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2018]

NAVIGATING THE LAWYERING MINEFIELD OF
INTERNAL INVESTIGATIONS

DOUGLAS R. RICHMOND*

I. INTRODUCTION

ORGANIZATIONS of all types conduct internal investigations into a wide range of alleged misconduct and as a result of information originating from a variety of sources. For example, corporations may conduct internal investigations in response to allegations of potential criminal conduct, financial wrongdoing, regulatory breaches, or improper or unlawful business practices raised by auditors, whistleblowers, plaintiffs in civil litigation, government agencies, vendors, clients or customers, competitors, or the media. Companies investigate alleged workplace discrimination or harassment as a result of employee complaints. Nonprofit organizations investigate alleged financial improprieties by their executives and volunteer leaders. Colleges and universities probe reports of misconduct by faculty, staff, and students which, if borne out, might violate Title IX of the Education Amendments of 1972.¹ The list of possible internal investigation actors, circumstances, and subjects goes on. Often, organizations publicly accused of wrongdoing swiftly announce internal investigations in efforts to blunt criticism and signal the seriousness with which they take the allegations.² Indeed, the announcement of an internal investigation is almost reflexive for organizations that are the subject of public allegations of misconduct. Regardless of the precise circum-

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1. “Title IX protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance.” U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX AND SEX DISCRIMINATION, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/C55W-WVUD>] (last visited Sep. 7, 2018).

2. See, e.g., Jack Stripling, *At Southern Cal, It Looked Like the End of a Presidency—and It Was*, CHRON. HIGHER EDUC., June 8, 2018, at A20, A21 (stating that USC was forming a special committee and hiring outside counsel to investigate the university’s failure to respond to repeated reports of sexual harassment and misconduct by a campus physician); David Gelles, *A Powerful Charity’s Toxic Culture*, N.Y. TIMES, May 13, 2018, Sunday Bus., at 1, 4 (reporting that a prominent Silicon Valley charity hired an outside law firm to investigate the charity’s workplace soon after the publication of an article reporting that a key executive regularly bullied and demeaned colleagues, made racially and sexually offensive comments, and threatened physical violence); Maya Salam, *Videos of Exercise at Cheer Camp Prompt Dismissal and Investigation*, N.Y. TIMES, Aug. 27, 2017, at 17 (responding to allegations that girls at a high school cheerleading camp had been forced to do painful “splits” by their coach and teammates, the Denver Public Schools superintendent swiftly announced that the coach had been fired “and that an outside law firm had been hired to investigate”).

stances, the stakes in these investigations are high for the individuals whose conduct is scrutinized, for the directors, executives, managers, or other leaders on whose watch the potential misconduct allegedly occurred, and for the organizations themselves.

Organizations that have identified the need for an internal investigation typically hire outside lawyers to conduct the investigation. They may do so because retaining outside counsel will provide a measure of independence that would be missing—or at least appear to be missing—from an investigation conducted by their own personnel; because the investigation will lead to an analysis of the organization's legal rights and obligations and potential liability, which outside counsel are well-suited to address; or because they lack the expertise or resources to conduct an investigation of the nature or scope contemplated. For law firms, internal investigations are a lucrative practice area and the publicity that such investigations sometimes attract has marketing value.³ Indeed, internal investigations are now “big business” for law firms.⁴ Large law firms constantly look to hire former federal and state prosecutors to augment their internal investigations practices on the theory that investigative skills developed in government service will translate readily to private practice.

As profitable or otherwise valuable or interesting as internal investigations may be from lawyers' or law firms' standpoints, however, they also give rise to professional liability and responsibility challenges and risks.⁵ Both clients and third parties may become potential adversaries if things allegedly go wrong.

Assume, for example, that the audit committee of a corporation's board of directors retained you to investigate a former employee's allegation that the CEO has engaged in fraud and self-dealing by contracting on behalf of the corporation with companies he secretly owns in whole or part. According to the former employee, the contracts are for needless or over-priced services; they are in fact vehicles for the CEO to divert corporate funds. You interview the former employee, seemingly key current employees, and the CEO. You also review documents. Based on your investigation, you recommend to the audit committee that the board fire

3. Miriam Rozen, *Avoiding the Quicksand*, AM. LAW., June 2017, at 14.

4. Marcus A. Asner & Alexander L. Miller, *A Measured Approach to Internal Investigations*, LAW360 (Nov. 5, 2015), <https://www.law360.com/articles/721396/a-measured-approach-to-internal-investigations> [<https://perma.cc/GVU5-6E75>]; see also Miriam Rozen, *Big Law Doubles Down on White-Collar, Investigations Practices*, AM. LAW. (Jan. 19, 2018), <https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/19/big-law-doubles-down-on-white-collar-investigations-practices> [<https://perma.cc/Z49B-QCNB>] (reporting that large U.S. law firms are significantly expanding their internal investigations practices because of the growth in demand by corporate clients fueled by increases in qui tam litigation, attorney general suits, and government regulation in general).

5. See William C. Wagner & Trent J. Sandifur, *Legal Malpractice Claims Resulting from Internal Investigations*, FOR THE DEF., Jan. 2013, at 39 (highlighting several professional liability risks arising out of lawyers' failures to confront common internal investigation pitfalls).

the CEO, which it does. The CEO promptly sues you and your law firm for defamation, negligence, negligent infliction of emotional distress, and tortious interference with business relationships. He alleges that your investigation was at best incomplete. Had you investigated more thoroughly, he says, you would have learned that he forced the former employee to resign for poor performance, and that she was an unstable witness who was seeking retribution; you would have discovered that the employees you interviewed were not sufficiently involved in the contracting process to be reliable informants; you would have interviewed other employees who could have explained the commercial reasonableness of the contracts; and, worst of all, had you inquired further, you would have learned that he had no interest in the subject companies. The CEO asserts that when you interviewed him you did not ask relevant questions, and you did not share enough information about the investigation or the accusations against him to have enabled him to correct your misimpressions. His claimed damages in the form of future lost income are significant.

On what is essentially the other side of the same coin, assume that a company's audit committee hired you to investigate an allegation anonymously made over the company's ethics hotline that three executives were conspiring to defraud the company by channeling payments to shell corporations they secretly controlled. You conducted an investigation and thereafter reported to the committee that the allegations were meritless. The company took no action as a result. A subsequent criminal investigation triggered by allegations made by the estranged spouse of one of the executives in their divorce proceedings determined that the allegations were actually true. As it turns out, the executives stole over \$30 million from the company through their scheme, and \$20 million of that loss came after you completed your investigation and cleared them of any wrongdoing. Now the company has sued you for negligence, alleging that your inadequate investigation allowed the executives' fraud to continue, and that it incurred damages of at least \$20 million as a consequence.

Alternatively, imagine that a public corporation's audit committee retains you to investigate press reports that the corporation had unlawfully backdated stock options granted to executives.⁶ With the investigation barely underway, the corporation and its senior officers, including the chief financial officer (CFO), are sued in a securities class action concerning the alleged backdating practices. The corporation hires you to represent all the defendants in that case. You interview the CFO regarding the corporation's stock option granting practices. Afterwards, you keep the CFO and other senior executives apprised of the status of your investigation. Ultimately, with the corporation's permission, you reveal the substance of your conversation with the CFO to FBI agents conducting a parallel government investigation into the backdating. When the CFO

6. These are the slightly modified facts of *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), discussed in detail in Part III.B.

learns that the government intends to use this information to charge him criminally, he asserts that he shared an attorney-client relationship with you as a result of the securities class action in which he is a defendant alongside the corporation. He says that his interview with you occurred in that context. Accordingly, the attorney-client privilege prevented you from sharing the content of that conversation with the FBI without his consent, and the government cannot use his privileged statements to build a criminal case against him. What result? Either way, are there any negative consequences for you or your law firm?

As hypothetical as these scenarios may seem, they accurately depict some of the very real risks that internal investigations pose for lawyers who practice in this dynamic area. Indeed, risks along these lines have come home to roost for top-flight law firms.

For example, after creditors forced beverage company Le-Nature's, Inc. into bankruptcy, the trustee of Le-Nature's liquidating trust sued Le-Nature's prominent former law firm for allegedly botching an internal investigation into massive fraud by Le-Nature's CEO, Greg Podlucky, that contributed to the bankruptcy.⁷ The trustee alleged that the law firm's deficient investigation failed to detect the fraud; Podlucky's fraud continued apace even during the investigation as a result of the firm's negligence; because of the firm's flawed investigation and misleading report of its results, the independent directors who initiated the investigation were misled into believing that the allegations of Podlucky's misconduct were baseless; and the law firm concealed Podlucky's fraud, thereby leading the independent directors to relax their vigilance.⁸ Had the law firm uncovered Podlucky's fraud as it should have, the trustee claimed, the directors could have halted it, avoided certain financings, and closed the company, thereby preserving significant asset value.⁹ The firm settled the trustee's lawsuit for \$23.75 million.¹⁰ The settlement paled in comparison to the \$500 million in damages the trustee had sought from the firm.¹¹ The firm denied all allegations of negligence.¹²

7. *Kirschner v. K & L Gates LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012).

8. *Id.* at 753.

9. *Id.* at 754 (quoting the trustee's complaint).

10. Dan Packel, *K&L Gates' \$24M Malpractice Deal OK'd In Le-Nature's Case*, LAW360 (Feb. 27, 2014), <https://www.law360.com/foodbeverage/articles/513816/k-l-gates-24m-malpractice-deal-ok-d-in-le-nature-s-case> [<https://perma.cc/RQZ5-BGW3>]; Richard Gazarik, *LeNature Legal Malpractice Lawsuit Settled for More than \$23.7 Million*, TRIB LIVE (Jan. 28, 2014), <http://triblive.com/news/adminpage/5493392-74/ferguson-lenature-podlucky> [<https://perma.cc/6P28-2QCK>].

11. Packel, *supra* note 10.

12. *See id.* (listing as one reason for preliminary approval of the settlement "K&L Gates' continued denial of negligent conduct"); Martha Neil, *K&L Gates Oks Settlement of \$23.7M in LeNature's Legal Malpractice Case*, ABA J. (Jan. 29, 2014), http://www.abajournal.com/news/article/kl_gates_oks_settlement_of_23.7m_in_lenature_legal_malpractice_case/ [<https://perma.cc/7NQN-Q38X>] (reporting that the settlement by the law firm and one of its partners "did not involve any admission of liability").

Another excellent law firm was accused of inadequately investigating alleged accounting improprieties at the now defunct telecommunications company Global Crossing Ltd.¹³ The law firm denied any negligence, asserting that its partner who was responsible for the internal investigation “was never charged with conducting a full-scale investigation, but rather a narrow inquiry” that it characterized as “a ‘look-see’ and a ‘rogue elephant hunt.’”¹⁴ Investors and former Global Crossing employees who lost their investments and pensions when the company failed filed a class action against various defendants whose alleged misconduct supposedly caused or contributed to the failure.¹⁵ The plaintiffs eventually settled with several defendants for a combined \$325 million.¹⁶ The law firm contributed \$19.5 million to the settlement even though it was not named as a defendant in the action.¹⁷

Pepper Hamilton LLP was sued by two former Baylor University employees in connection with the firm’s investigation into alleged sexual assaults of female students by Baylor football players.¹⁸ Former assistant athletic director Colin Shillinglaw asserted that he was defamed by reports that he failed to respond to the alleged assaults.¹⁹ Baylor fired him after Pepper Hamilton lawyers investigated the allegations against him and reported their findings to Baylor’s Board of Regents.²⁰ Similarly, long-time

13. Gretchen Morgenson, *Global Crossing Settles Suit on Losses*, BUS. DAY, N.Y. TIMES (Mar. 20, 2004), <https://www.nytimes.com/2004/03/20/business/global-crossing-settles-suit-on-losses.html?rref=collection%2Fbyline%2Fgretchen-morgenson> [<https://perma.cc/BT2X-2FB6>]; Steven Pearlstein, *Corporate Counsel Gone Astray*, WASH. POST (Mar. 19, 2003), https://www.washingtonpost.com/archive/business/2003/03/19/corporate-counsel-gone-astray/915010f5-bdf7-4cc1-b92c-c153fd8ab477/?utm_term=.80b5f6283dc6 [<https://perma.cc/4D59-EP8C>]; Dennis K. Berman, *Global Crossing Board Report Rebukes Ex-Outside Counsel*, WALL ST. J. (Mar. 11, 2003), <http://www.wsj.com/articles/SB104732497644513500> [<https://perma.cc/RDR6-K6WB>].

14. Berman, *supra* note 13.

15. Morgenson, *supra* note 13.

16. *Id.*

17. *Id.*

18. Lizzy McLellan & John Council, *When an Investigation Becomes a Scrimmage*, AM. LAW., Mar. 2017, at 13; John Council, *Ex-Football Official Sues Baylor, Pepper Hamilton for Libel Over Sexual Assault Scandal*, LEGAL INTELLIGENCER (Feb. 2, 2017), https://www.law.com/thelegalintelligencer/almID/1202778322232/ExFootball-Official-Sues-Baylor-Pepper-Hamilton-for-Libel-Over-Sexual-Assault-Scandal/?cmp=share_twitter [<https://perma.cc/DF6M-8YVJ>]; Paula Lavigne & Mark Schlabach, *Ex-Baylor Official Colin Shillinglaw Alleges Slander, Libel, Wrongful Firing*, ESPN.COM (Jan. 31, 2017), http://www.espn.com/college-football/story/_/id/18595095/colin-shillinglaw-ex-baylor-bears-assistant-athletics-director-files-civil-lawsuit-university-others [<https://perma.cc/VQ2W-Y5D4>]; Lizzy McLellan, *Pepper Hamilton Faces Lawsuit Over Baylor Report*, TEX. LAW. (Dec. 15, 2016), <https://www.law.com/texas-lawyer/almID/1202774849725/Pepper-Hamilton-Faces-Lawsuit-Over-Baylor-Report/?mcode=1202619333591&curindex=2&curpage=ALL> [<https://perma.cc/9CJW-FSXC>].

19. McLellan & Council, *supra* note 18, at 13.

20. *Id.* Shillinglaw later dismissed his lawsuit to pursue his claims in arbitration under the terms of his employment contract with Baylor. Lizzy McLellan, *Ex-*

Baylor employee, Tom Hill alleged that he was unfairly fired as a result of Pepper Hamilton's flawed investigation and subsequent report of the results to the Regents.²¹ He alleged that the firm's lawyers "failed to fulfill their entire charge" because they "did not interview several important witnesses, and did not give a full, accurate, unbiased report."²² Hill claimed that the circumstances surrounding his misguided termination had left him unemployable despite an impeccable performance history.²³

Certainly, many—perhaps most—allegations of defamation, legal malpractice, negligence, or other wrongdoing by lawyers conducting internal investigations are meritless.²⁴ Even then, the lawyers and law firms must endure the distraction, expense, practice disruption, stigma, and stress of litigation. Unfounded misconduct allegations may nonetheless impair client relationships and foreclose new business opportunities. In some instances, the lawyers may also face professional disciplinary proceedings, which will have negative effects like those in civil litigation. The need for lawyers to exercise care in conducting internal investigations should therefore be apparent.

This Article examines select professional liability, professional responsibility, attorney-client privilege, work product immunity, and other law of lawyering issues that potentially challenge lawyers who conduct internal investigations. We begin in Part II with the subject of client identity. In other words, who is the client for purposes of the investigation? The answer to this question is not always as clear as it might seem that it should be, although a correct answer is critically important. It is, after all, the client who determines the purpose and scope of the investigation, and to whom the lawyers report their progress, key developments, and the results of the investigation. It is the client to whom the lawyers owe ethical duties of competence, communication, confidentiality, diligence, and loyalty,²⁵ and who controls the attorney-client privilege with respect to the lawyers' communications. Finally for now, it is the existence of an attorney-client

Baylor Football Director Drops Claims Over Pepper's Report, LEGAL INTELLIGENCER (Apr. 10, 2017), <https://www.law.com/thelegalintelligencer/almID/1202783396429/> [<https://perma.cc/DBX5-SQBJ>].

21. McLellan, *supra* note 18.

22. *Id.*

23. *Id.*

24. *See, e.g.*, *Turner v. Wells*, 879 F.3d 1254, 1263–74 (11th Cir. 2018) (rejecting the plaintiff's defamation claims against the lead investigating lawyer and his law firm); *Salvatore v. Kumar*, 845 N.Y.S.2d 384, 389 (App. Div. 2007) (rejecting the plaintiff's legal malpractice claim against her former law firm and one of its partners).

25. *See* *Lawyer Disciplinary Bd. v. Blyler*, 787 S.E.2d 596, 612 (W. Va. 2016) ("A lawyer owes an ethical duty to clients including the duty of candor, loyalty, diligence, and competence."); MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2017) (governing lawyers' duty to communicate with clients); *id.* r. 1.6 (imposing a duty of confidentiality).

relationship that generally provides the foundation for professional liability claims against lawyers who allegedly mishandle representations.²⁶

Part III examines two related issues: (a) the concern that lawyers who conduct internal investigations on behalf of organizations will develop implied or de facto attorney-client relationships with the employees or other constituents with whom they interact; and (b) investigating lawyers' concurrent representation of organizations and their constituents. In doing so, it discusses lawyers' use of corporate *Miranda* or *Upjohn* warnings to prevent the formation of implied or de facto attorney-client relationships. Following that discussion, it reviews in detail a leading case that richly illustrates the problems posed by concurrent representations in this context.

Recognizing that organizational constituents and other witnesses with whom lawyers conducting internal investigations interact may or may not be represented by counsel, Part IV discusses lawyers' ethical duties in both circumstances. The discussion naturally centers on Model Rules of Professional Conduct 4.2 and 4.3; the former rule governs lawyers' ex parte communications with represented persons, while the latter rule addresses lawyers' dealings with people who are unrepresented.²⁷

26. Clients who sue lawyers for alleged misconduct in their representations typically focus on two theories of liability: (1) professional negligence, often described as legal malpractice; and (2) breach of fiduciary duty. Liability for legal malpractice requires a plaintiff to prove the lawyer owed her a duty of care, breach of that duty, proximate cause, and damages. *Sheretz v. Brownstein, Rask, Sweeney, Kerr, Grim, Desylvia & Hay, LLP*, 407 P.3d 914, 917 (Or. Ct. App. 2017); *Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017). Because a lawyer's duty of care flows from the attorney-client relationship, lawyers are usually liable for professional negligence only to clients. *McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008); *AG Capital Funding Partners, L.P. v. State Street Bank & Tr. Co.*, 842 N.E.2d 471, 478 (N.Y. 2005) (quoting *Estate of Spivey v. Pulley*, 526 N.Y.S.2d 145, 146 (App. Div. 1988)); *see also Hungate v. Law Office of David B. Rosen*, 391 P.3d 1, 12 (Haw. 2017) (stating that "absent special circumstances, attorneys owe no duty of care to non-clients"). This is the "strict privity" rule. *Baker v. Wood, Ris & Hames, PC*, 364 P.3d 872, 876–77 (Colo. 2016); *Blair v. Ing*, 21 P.3d 452, 458–59 (Haw. 2001); *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171 (Ohio 2008); *Friske v. Hogan*, 698 N.W.2d 526, 529 (S.D. 2005); *Johnson v. Hart*, 692 S.E.2d 239, 243 (Va. 2010). Although breach of fiduciary duty and legal malpractice generally are separate causes of action, the elements are similar. Liability for breach of fiduciary duty requires a plaintiff to prove "(1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." *Slovensky v. Friedman*, 49 Cal. Rptr. 3d 60, 72 (Ct. App. 2006) (quoting *Stanley v. Richmond*, 41 Cal. Rptr. 3d 768, 776 (Ct. App. 1995)); *see also Robert T. McLean Irrevocable Tr. v. Patrick Davis, P.C.*, 283 S.W.3d 786, 792–93 (Mo. Ct. App. 2009) (quoting *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000)). Similar to the strict privity rule for legal malpractice liability, "the predicate of the attorney's fiduciary obligations is the existence of an attorney-client relationship." RONALD E. MALLEN, *LEGAL MALPRACTICE* § 15:6, at 677 (2017 ed.) (footnote omitted).

27. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2017) (titled "Communication with Person Represented by Counsel"); *id.* r. 4.3 (titled "Dealing with Unrepresented Person").

Part V examines the attorney-client privilege and work product immunity in internal investigations. The application and waiver of the privilege and work product protection are critical concerns in this context. This Part discusses in detail two recent cases that highlight the attorney-client and work product immunity challenges that internal investigations pose for both clients and investigating lawyers.

Part VI discusses possible defamation claims against lawyers arising out of internal investigations. The seriousness of this risk should be apparent. After all, internal investigations often expose serious misconduct by employees and other close organizational constituents. Those accused of misconduct may lose their jobs, suffer reputational injury, and even face criminal prosecution or regulatory penalties. If they believe themselves to have been wrongly accused, they may view a lawsuit against the investigating lawyers as their best hope for restitution and vindication.

Finally, Part VII briefly asks whether an organization's regular outside counsel should conduct an internal investigation, or whether the organization should retain separate counsel for the task. There are arguments both for and against the use of an organization's regular outside counsel to conduct an internal investigation. Part VII succinctly concludes that the answer to the question depends on the facts of the case.

II. IDENTIFYING THE CLIENT

The first step for lawyers who are retained to conduct an internal investigation is identifying the client.²⁸ As noted earlier, client identification has a number of practical and professional ramifications for lawyers. A lawyer's retention to investigate potential misconduct within an organization does not necessarily mean that the organization is the lawyer's client. Depending on the circumstances, the client may be the CEO, the board of directors, the board chair, or a committee of the board, such as an audit committee, or a special litigation committee or other ad hoc committee.²⁹ Alternatively, the organization *may* be the client, and the individual or body who or which retains the lawyer is simply the constituent authorized to direct the lawyer's work, communicate with the lawyer, and invoke or waive the attorney-client privilege.³⁰ From the lawyer's perspec-

28. Jeffrey P. Doss, *Practical Considerations in Planning, Executing, Refining, and Concluding Investigations*, 39 AM. J. TRIAL ADVOC. 567, 567 (2016); Barry F. McNeil & Brad D. Brian, *Overview: Initiating an Internal Investigation and Assembling the Investigative Team*, in INTERNAL CORPORATE INVESTIGATIONS 1, 7 (Barry F. McNeil & Brad D. Brian eds., 3d ed. 2007).

29. McNeil & Brian, *supra* note 28, at 7.

30. See Michael Dockterman, *Protecting the Attorney-Client Privilege during an Internal Investigation*, in THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION 317, 319 (Vincent S. Walkowiak & Oscar R. Rodriguez eds., 6th ed. 2015) ("In an internal investigation, the client is the corporation itself."); R. Christopher Cook, *Representation Issues in Corporate Internal Investigations: Identifying and Assessing Risks*, in JONES DAY, CORPORATE INTERNAL INVESTIGATIONS 16, 17 (2013), <http://www.jonesday.com> [Permalink unavailable] (asserting that in an internal investigation the corpo-

tive, the practical and professional considerations will often be the same under either approach, provided that treating the organization as the client does not somehow create the impression that a particular constituent who should not be involved in the investigation is entitled to be. The fundamental question, of course, is how do the parties want to structure the attorney-client relationship, or, retrospectively, how did they do so? In any event, client identity is not driven by who pays the lawyer's fees, because the payment of fees does not alone create an attorney-client relationship.³¹

Controversies over client status typically surface where a corporate employee claims to have an attorney-client relationship with an investigating lawyer in addition to the lawyer's relationship with the corporation, as we will see later. But that is not the only context in which client identification may be an issue, as *Estate of Paterno v. National Collegiate Athletic Ass'n*³² illustrates.

Estate of Paterno arose out of the scandal that enveloped Pennsylvania State University (Penn State) after a former assistant football coach, Jerry Sandusky, was accused of using his university connection to sexually molest boys.³³ He was later convicted of related crimes and sentenced to prison.³⁴ Penn State created a Special Investigations Task Force (the Task Force) comprised of alumni, faculty, students, and trustees to investigate the university's response to early reports of Sandusky's crimes.³⁵ The investigation was conducted by Freeh Sporkin & Sullivan, LLP (FSS), a law firm founded by former FBI Director Louis Freeh.³⁶ FSS was retained in November 2011.³⁷

In July 2012, FSS delivered a report (the Freeh Report) that detailed its investigation of Penn State's handling of Sandusky's grotesque misconduct.³⁸ The Freeh Report concluded that the late Joe Paterno, Penn State's revered former head football coach, was told of Sandusky's crimes before Sandusky retired from Penn State, but failed to act on those reports.³⁹ The Freeh Report also concluded that Penn State officials con-

ration is the investigating lawyer's client regardless of whether the lawyer is "hired by the corporation itself or by the corporation's general counsel," but not explaining what it means to be "hired by the corporation itself").

31. *Palmer v. Super. Ct.*, 180 Cal. Rptr. 3d 620, 628 (Ct. App. 2014); *Rubin & Norris, L.L.C. v. Panzarella*, 51 N.E.3d 879, 891 (Ill. App. Ct. 2016); *State ex rel. Stovall v. Meneley*, 22 P.3d 124, 140 (Kan. 2001); *Att'y Grievance Comm'n of Md. v. Brooke*, 821 A.2d 414, 424 (Md. 2003); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 394 (Mo. Ct. App. 2011); *In re Disciplinary Action Against Giese*, 662 N.W.2d 250, 255 (N.D. 2003).

32. 168 A.3d 187 (Pa. Super. Ct. 2017).

33. *Id.* at 191.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* at 195 (providing the date of FSS's engagement letter).

38. *Id.* at 191–92.

39. *Id.*

spired to keep Sandusky's behavior secret.⁴⁰ The NCAA adopted the Freeh Report in imposing significant sanctions on Penn State through a consent decree.⁴¹

Paterno's estate, two of Paterno's sons, and a Penn State trustee sued the NCAA, Penn State, and others for breach of contract, commercial disparagement, defamation, and interference with contractual relations.⁴² The plaintiffs alleged that the defendants should have known that the Freeh Report represented "an unreliable rush to judgment" that produced baseless conclusions.⁴³ Soon after filing suit, the plaintiffs notified FSS of their intent to subpoena its files underlying the Freeh Report.⁴⁴ FSS and Penn State objected on attorney-client privilege and work product immunity grounds.⁴⁵ The trial court overruled the objections and later enforced the plaintiffs' subpoena.⁴⁶ The defendants took interlocutory appeals to the Superior Court of Pennsylvania.⁴⁷

With respect to the defendants' attorney-client privilege objections, the trial court had concluded that the Task Force—not Penn State—was FSS's client.⁴⁸ Consequently, Penn State lacked standing to assert the attorney-client privilege with respect to communications between FSS and the Task Force.⁴⁹

On appeal, the defendants argued that Penn State was FSS's client because Penn State created the Task Force; the Task Force had no independent legal identity and no budget of its own; the chair of Penn State's board of trustees, who was not a member of the Task Force, signed the November 2011 engagement letter with FSS on Penn State's behalf; and Penn State paid FSS's fees.⁵⁰ As further evidence of an attorney-client relationship between Penn State and FSS, the defendants pointed to (1) a December 2011 letter from Penn State's general counsel to FSS stating that Penn State's president, trustees, and Task Force members believed that FSS represented Penn State; and (2) a July 2012 letter from Penn State's outside counsel to Freeh stating that FSS represented Penn State and articulating Penn State's position on the attorney-client privilege regarding certain materials.⁵¹ The plaintiffs countered that (a) Freeh had testified in a deposition that the Task Force was FSS's sole client; and (b) in her December 2011 letter to FSS, Penn State's general counsel had de-

40. *Id.* at 192.

41. *Id.*

42. *See id.* (listing the plaintiffs' causes of action).

43. *Id.* (quoting the plaintiffs' complaint).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 193.

49. *Id.*

50. *Id.* at 194–95.

51. *Id.* at 195.

scribed the Task Force as “independent and distinct from Penn State and its board of trustees.”⁵²

Both sides focused on the terms of FSS’s engagement letter.⁵³ The *Estate of Paterno* court did likewise, starting with the opening paragraph, which stated:

We are pleased that the Board of Trustees of the Pennsylvania State University [. . .] on behalf of the [Task Force] established by the Trustees [. . .] has engaged us to represent the [Task Force]. [. . .] Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the [Task Force], including the anticipated scope of our services and billing policies and practices that will apply to the engagement.⁵⁴

The engagement letter also stated:

FSS has been engaged to serve as independent, external legal counsel to the [Task Force] to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of [Penn State] personnel to report such sexual abuse to appropriate police and governmental authorities. The results of FSS’s investigation will be provided in a written report to the [Task Force] and other parties as so directed by the [Task Force].⁵⁵

The letter included other provisions or statements indicating that the Task Force was FSS’s client, including a confidentiality provision which referred to FSS’s work and advice to the Task Force, and a paragraph that stated: “FSS will provide the above-described legal services for the [Task Force’s] benefit, for which the Trustees will be billed in the manner set forth above.”⁵⁶ With respect to possible termination of FSS’s representation, the engagement letter stated that either FSS or the Task Force could do so upon written notice.⁵⁷ In discussing client files, the engagement letter specifically referred to the Task Force’s representation.⁵⁸ Finally, the engagement letter stated that FSS was “delighted to be asked to provide legal services to the [Task Force],” and that FSS was “looking forward to working with the [Task Force] on this engagement.”⁵⁹

In short, the *Estate of Paterno* court reasoned, the engagement letter consistently (a) distinguished between Penn State’s board of trustees and

52. *Id.*

53. *Id.*

54. *Id.* (quoting the engagement letter) (alterations in the original text).

55. *Id.* (quoting the engagement letter) (emphasis omitted; alterations in the original text).

56. *Id.* at 196 (alteration in the original text).

57. *Id.* (quoting the engagement letter).

58. *Id.* (quoting the engagement letter).

59. *Id.* (quoting the engagement letter) (alterations in the original text).

the Task Force, and (b) identified the Task Force as the recipient of FSS's services.⁶⁰ The defendants could cite no legal authority that prevented Penn State from retaining and paying FSS to represent the Task Force, precluded the parties from limiting the attorney-client relationship to FSS and the Task Force, or compelled the conclusion that the Task Force had to be a "distinct legal entity" to be a client of FSS.⁶¹ As for the signature of the chair of Penn State's board of trustees on the engagement letter, that was required because Penn State was to pay FSS's fees; it was not "'fatally inconsistent' with a conclusion that the Task Force was [FSS's] client," as the defendants argued.⁶² In contrast, the additional signature of the Task Force chair, Kenneth Frazier, on the engagement letter undermined the defendants' argument that Penn State was FSS's client.⁶³ If Penn State was FSS's client and the Task Force had no separate identity, the court explained, Frazier's signature would have been superfluous.⁶⁴

The *Estate of Paterno* court concluded that the trial court did not err when it found that FSS had limited its representation to the Task Force.⁶⁵ It therefore upheld the trial court's determination that Penn State lacked standing to assert the attorney-client privilege with respect to the disputed materials because it was not FSS's client.⁶⁶

Estate of Paterno highlights several important issues or points for lawyers who conduct internal investigations. First, it is essential for the lawyer to identify the client in an engagement letter in this context just as it is in any other practice area.⁶⁷

Second, it is possible to designate a board of directors, a committee, or some other specially-formed group as the client even though that body is not a distinct legal entity.⁶⁸ In such a case, the lawyer must not reveal confidential communications with board, committee, or group members to others in the organization lest those disclosures potentially waive the attorney-client privilege.⁶⁹ The board, committee, or group members responsible for the investigation must be similarly cautious.⁷⁰

Third, a third party may fund an internal investigation. Again, the payment of a lawyer's fees does not by itself create an attorney-client rela-

60. *Id.*

61. *Id.* at 196–97.

62. *Id.* at 197.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See Doss, *supra* note 28, at 568 (recommending identifying the client in an engagement letter).

68. See *Estate of Paterno*, 168 A.3d at 196–97 (discussing the Task Force as FSS's client).

69. See EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 519 (6th ed. 2017) (discussing waiver by voluntary disclosure "to a party outside the zone of privilege").

70. *Id.*

tionship.⁷¹ The lawyer may not, however, allow the third party to direct or regulate her professional judgment in conducting the investigation.⁷² The third party's payment of the lawyer's fees does not alter the lawyer's obligations to her client.⁷³

III. CORPORATE *MIRANDA* OR *UPJOHN* WARNINGS AND CONCURRENT REPRESENTATION

The client identity debate in *Estate of Paterno* was resolved by examining the law firm's engagement letter. But the existence of an attorney-client relationship is not always so neatly identified or framed. This is because an attorney-client relationship need not be expressly contractual;⁷⁴ it may be inferred from the parties' conduct.⁷⁵ When considering whether a de facto or implied attorney-client relationship exists, courts do not consider the lawyer's reasonable expectations.⁷⁶ Instead, courts focus on the would-be client's expectations and particularly the reasonableness of his belief "that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."⁷⁷ Or, as a Wisconsin federal court explained, a party establishes a de facto or implied attorney-client relationship "if it shows (1) that it submitted confidential information to a lawyer, and (2) that it did so with a reasonable belief that the lawyer was acting as the party's attorney."⁷⁸ Either way, a putative client's unilateral belief that an attorney-client relationship exists is insufficient to establish such a relationship.⁷⁹ Rather, any subjective expectation must be accompanied by objective facts on which a reasonable person would rely as

71. See *supra* note 31 and accompanying text.

72. MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 2017).

73. *Id.* r. 5.4 cmt. 1.

74. Bank of Am., N.A. v. Super. Ct., 151 Cal. Rptr. 3d 526, 537 (Ct. App. 2013); Att'y Grievance Comm'n of Md. v. White, 136 A.3d 819, 830–31 (Md. 2016).

75. Fla. Bar v. King, 664 So. 2d 925, 927 (Fla. 1995); NuStar Farms, L.L.C. v. Zylstra, 880 N.W.2d 478, 483 (Iowa 2016); *In re Hodge*, 407 P.3d 613, 648 (Kan. 2017); Savell v. Duddy, 147 A.3d 1179, 1185 (Me. 2017) (quoting Bd. of Overseers of the Bar v. Dineen, 500 A.2d 262, 264–65 (Me. 1985)); C.K. Indus. Corp. v. C.M. Indus. Corp., 623 N.Y.S.2d 410, 411 (App. Div. 1995); *In re Disciplinary Action Against Ward*, 881 N.W.2d 226, 229–30 (N.D. 2016); Cuyahoga Cty. Bar Ass'n v. Hardiman, 798 N.E.2d 369, 373 (Ohio 2003); State *ex rel.* Okla. Bar Ass'n v. Helton, 394 P.3d 227, 236 n.14 (Okla. 2017); *In re Conduct of Wyllie*, 19 P.3d 338, 344 (Or. 2001); *In re Baytown Nissan Inc.*, 451 S.W.3d 140, 146 (Tex. App. 2015); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. c (2000).

76. Rubin & Norris, L.L.C. v. Panzarella, 51 N.E.3d 879, 891 (Ill. App. Ct. 2016); Carnegie Cos. v. Summit Props., 918 N.E.2d 1052, 1062 (Ohio Ct. App. 2009).

77. Diversified Grp., Inc. v. Daugerdas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001).

78. Nelson v. Green Builders, Inc., 823 F. Supp. 1439, 1445 (E.D. Wis. 1993).

79. Kubin v. Miller, 801 F. Supp. 1101, 1115 (S.D.N.Y. 1992); Guillebeau v. Jenkins, 355 S.E.2d 453, 458 (Ga. 1987); Border Demolition & Envtl., Inc. v. Pineda, 535 S.W.3d 140, 152 (Tex. App. 2017).

supporting the existence of an attorney-client relationship.⁸⁰ For example, a person's subjective belief may be held to be reasonable where the surrounding facts and circumstances placed the lawyer on notice that the person intended to form an attorney-client relationship, indicated that the lawyer shared the person's subjective intention to create the relationship, or demonstrated that the lawyer acted in a manner that would prompt a reasonable person in the putative client's position to rely on the lawyer's professional advice.⁸¹ In contrast, a would-be client's subjective belief is unreasonable where the lawyer has specifically informed the would-be client that she does not or will not represent him.⁸²

With respect to internal investigations, there is a concern that employees who are interviewed by, or otherwise communicate with, the organization's lawyer during the investigation may believe that the lawyer also represents them. If, in fact, the organization's lawyer does share an attorney-client relationship with an employee, a host of problems may follow. For instance, the lawyer may have a conflict of interest that requires her to withdraw from the matter altogether.⁸³ The employee may be able to invoke the attorney-client privilege in related proceedings and thus frustrate the organization's ability to resolve those disputes on favorable terms, such as where the organization wishes to waive the privilege to avoid possible criminal charges or deflect regulatory action.⁸⁴ Similarly, the employee may instruct the lawyer to keep their communications confidential, thereby preventing the lawyer from sharing information learned from the employee with the organization (there is no co-client exception to lawyers' ethical duty of confidentiality) and impairing the organization's ability to fulfill the purposes of the investigation.⁸⁵

80. See *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1281–83 (11th Cir. 2004) (applying Florida law); *DC Cogen Partners, L.L.C. v. Lane Powell PC*, 917 F. Supp. 2d 1123, 1137 (D. Or. 2013) (quoting *In re Conduct of Weidner*, 801 P.2d 828, 837 (Or. 1990)).

81. *DC Cogen Partners, L.L.C.*, 917 F. Supp. 2d at 1137 (quoting *In re Conduct of Weidner*, 801 P.2d at 837).

82. See, e.g., *Rusk v. Harstad*, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

83. See Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils of Corporate Internal Investigations*, LOSS PREVENTION J. (Attorneys' Liab. Assur. Soc'y, Inc., Chicago, IL), Summer 2005, at 2, 4 (citing *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969)).

84. *Id.*

85. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-450, at 1 (2008) (stating that "[w]hen a lawyer represents multiple clients, either in the same or related matters, Model Rule 1.6 requires that the lawyer protect the confidentiality of information relating to each of his clients"); Fla. Eth. Op. 95-4, 1997 WL 307142, at *5–7 (Fla. State Bar Ass'n, Comm. on Prof'l Ethics 1997) (explaining that there is no co-client exception to lawyers' duty of confidentiality in joint representations); N.Y. Eth. Op. 555, 1984 WL 50010, at *4 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1984) (concluding that the lawyer could not share with one joint client information shared with the lawyer by the other joint client in

A. *Corporate Miranda or Upjohn Warnings*

To avoid these problems, careful lawyers deliver “corporate *Miranda* warnings” or “*Upjohn* warnings” at the outset of employee interviews conducted as part of an internal investigation.⁸⁶ In these warnings, prudent lawyers clearly state that (1) they represent the organization and not the employee; (2) the interview is intended to enable the lawyer to provide legal advice to the organization, and that the interview is therefore covered by the organization’s attorney-client privilege; (3) it is important for the employee to keep the subject and content of the interview confidential to protect the organization’s attorney-client privilege; and (4) the decision to assert or to waive the privilege is the organization’s alone to make, and that it may do so without consulting the employee.⁸⁷ If the investigation possibly has criminal implications, the lawyer should inform the employee as part of the fourth point that the organization may disclose information learned in the investigation to law enforcement agencies.⁸⁸ A corporate *Miranda* or *Upjohn* warning goes beyond the disclosures an investigating lawyer must make under Model Rule of Professional Conduct 1.13(f), which states that a lawyer representing an organization “shall explain the identity of the client 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.”⁸⁹

confidence absent the confiding client’s consent); *see also* Wagner & Sandifur, *supra* note 5, at 42 (“One of the problems that a corporation can have if an attorney inadvertently establishes an attorney-client relationship with an interviewed employee is that the employee must specifically authorize the release of statements that the employee made to counsel during an investigation interview.”).

86. *See generally* Daniel C. Headrick & Ryan L. Harrison, *Understanding Corporate Miranda Warnings*, FOR THE DEF., Apr. 2013, at 39 (“[T]he so-called corporate *Miranda* warning was impliedly created in 1981 when the . . . Supreme Court expanded the attorney-client privilege to cover certain communications between attorneys representing a corporation and the corporation’s employees in *Upjohn Company v. United States*, 449 U.S. 383 (1981).”); William J. Powell & Emily M. Renzelli, *Not Just for Criminal Lawyers*, FOR THE DEF., Oct. 2010, at 65, 66 (“The warnings commonly given [to employees] during a corporate internal investigation are colloquially referred to as ‘corporate *Miranda*,’ and stem from the Supreme Court’s decision in *Upjohn v. United States*, 449 U.S. 383 (1981).”).

87. *See* ARNOLD & PORTER KAYE SCHOLER LLP, DESKBOOK ON INTERNAL INVESTIGATIONS, CORPORATE COMPLIANCE, AND WHITE COLLAR ISSUES § 1:3.3[B], at 1-11 to -12 (2d ed. 2016 & Supp. 2017) [hereinafter DESKBOOK ON INTERNAL INVESTIGATIONS] (outlining issues to be covered in an *Upjohn* warning); Randall J. Turk & Mark Miller, *The Witness Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 93, 103–04 (Barry F. McNeil & Brad D. Brian eds., 3d ed. 2007) (listing the subjects to be addressed in warnings to witnesses who are interviewed in an internal investigation).

88. *See* DESKBOOK ON INTERNAL INVESTIGATIONS, *supra* note 87, § 1:3.3[B], at 1-12 (instructing that when warning a witness that the organization may waive the attorney-client privilege, a lawyer should identify law enforcement authorities as being among the third parties to whom disclosure may be made).

89. MODEL RULES OF PROF’L CONDUCT r. 1.13(f) (AM. BAR ASS’N 2017).

*In re Grand Jury Subpoena: Under Seal*⁹⁰ highlights the importance of these warnings. *In re Grand Jury Subpoena: Under Seal* involved a March 2001 internal investigation by AOL Time Warner (AOL) into its relationship with PurchasePro, Inc.⁹¹ AOL hired Wilmer Cutler & Pickering (Wilmer) to assist with the investigation.⁹² AOL in-house lawyers and Wilmer lawyers repeatedly interviewed AOL employees Kent Wakeford, John Doe 1, and John Doe 2.⁹³ They told the employees that they represented AOL; although their conversations were privileged, the privilege belonged to AOL and was AOL's to assert or waive; and if there was a conflict between the employee and AOL, the attorney-client privilege belonged to AOL.⁹⁴ They told Wakeford that they "could" represent him as well as AOL, so long as no conflicts of interest surfaced.⁹⁵ Similarly, they told John Doe 1 that "[we] can represent [you] until such time as there appears to be a conflict of interest," and told John Doe 2 that "[w]e represent AOL, and can represent [you] too if there is not a conflict."⁹⁶

In contrast to their statements to the employees about the possibility of representing them as well as AOL, they informed Wakeford that he was free to retain personal counsel at AOL's expense.⁹⁷ When John Doe 1 asked if he needed personal counsel, a Wilmer lawyer answered that he did not recommend it, but said that he would tell AOL not to be concerned if John Doe 1 hired a lawyer.⁹⁸

In November 2001, the SEC launched an investigation into AOL's dealings with PurchasePro, and as part of that investigation interviewed Wakeford and John Doe 1.⁹⁹ The employees invoked the attorney-client privilege with respect to their interviews in the internal investigation.¹⁰⁰ When a federal grand jury subpoenaed the lawyers' interview notes, AOL agreed to waive the attorney-client privilege and produce the notes, but the employees resisted.¹⁰¹ They moved to quash the subpoenas, asserting that they had individual attorney-client relationships with the investigating

90. 415 F.3d 333 (4th Cir. 2005).

91. *Id.* at 335.

92. *Id.*

93. *Id.* at 336.

94. *Id.*

95. *Id.*

96. *Id.* (internal quotation marks omitted).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 337.

101. *Id.*

lawyers that they did not wish to waive.¹⁰² The district court denied the motions to quash and the employees appealed.¹⁰³

The Fourth Circuit affirmed the district court,¹⁰⁴ stating that the “essential touchstones” of an attorney-client relationship between the lawyers and the employees “were missing at the time of the interviews.”¹⁰⁵ There was no sign “of an objectively reasonable, mutual understanding that the [employees] were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal advice.”¹⁰⁶ The *In re Grand Jury Subpoena: Under Seal* court concluded that the employees could not have reasonably believed that the lawyers represented them, and thus they could not invoke the attorney–client privilege.¹⁰⁷ As the court explained:

First, there [was] no evidence that the investigating attorneys told the [employees] that they represented them, nor is there evidence that the [employees] asked the investigating attorneys to represent them. To the contrary, there is evidence that the investigating attorneys relayed to Wakeford the company’s offer to retain personal counsel for him at the company’s expense, and that they told John Doe 1 that he was free to retain personal counsel. Second, there [was] no evidence that the [employees] ever sought personal legal advice from the investigating attorneys, nor is there any evidence that the investigating attorneys rendered personal legal advice. Third, when the [employees] spoke with the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company’s discretion. Under these circumstances, [the employees] could not have reasonably believed that the investigating attorneys represented them personally.¹⁰⁸

The *In re Grand Jury Subpoena: Under Seal* court reasoned that the lawyers’ statements that they could represent the employees absent a conflict of interest did not reflect an agreement to do so.¹⁰⁹ After all, “‘we *can* represent you’ is distinct from ‘we *do* represent you.’”¹¹⁰ Furthermore, the lawyers’ statements had to be interpreted in the context of the entire

102. *Id.* Wakeford, who had retained personal counsel, had entered into a common interest agreement with AOL, and also invoked the attorney-client privilege under the common interest agreement between his lawyer and AOL’s lawyers. He lost that argument because the common interest agreement post-dated his interviews in the internal investigation. *Id.*

103. *Id.*

104. *Id.* at 341.

105. *Id.* at 338.

106. *Id.*

107. *Id.* at 339–40.

108. *Id.* (footnote omitted).

109. *Id.* at 338, 340.

110. *Id.* at 340.

warning they delivered, which demonstrated that their loyalty was solely to AOL.¹¹¹ By telling the employees at the outset of their interviews that they represented AOL, and warning them that the content of their interviews belonged to AOL, the lawyers notified the employees that, while their communications were confidential, AOL could at any time reveal the content of the communications without their consent.¹¹² The court nonetheless sounded a cautionary note:

[O]ur opinion should not be read as an implicit acceptance of the watered-down “*Upjohn* warnings” the investigating attorneys gave the [employees]. *It is a potential legal and ethical minefield.* Had the investigating attorneys, in fact, entered into an attorney-client relationship with [the employees], as their statements to the [employees] professed they could, they would not have been free to waive the [employees’] privilege when a conflict arose. It should have seemed obvious that they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences.¹¹³

Lawyers should be sure to deliver corporate *Miranda* or *Upjohn* warnings before beginning any interview and should strive to make those warnings as clear as possible. Absent a clear warning, an employee or other organizational constituent may (among other consequences) be positioned to assert a personal attorney–client privilege with an investigating lawyer in related proceedings.¹¹⁴ Even imperfect warnings may be effective in light of other facts, however, as *United States v. Merida*¹¹⁵ demonstrates.

Jason Merida was the Choctaw Nation of Oklahoma’s executive director of construction.¹¹⁶ In 2009 and 2010, he was involved in three

111. *Id.*

112. *Id.*

113. *Id.* (latter emphasis added).

114. *See, e.g., In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998) (“[W]e conclude that a limited attorney-client privilege exists between [a hospital CEO] and [two lawyers]. Our holding is an extremely limited one and does not extend to communications made while third parties were present nor does it extend to communications in which both corporate and individual liability were discussed. It includes only . . . communications in which [the CEO] sought legal advice as to his personal liability without regard to any corporate considerations.”); *United States v. Hart*, Crim. A. No. 92-219, 1992 WL 348425, at *2 (E.D. La. Nov. 16, 1992) (“[I]n the absence of any advice by [the investigating lawyers] to the contrary, [the] defendants were justified in believing that [the lawyers] were there to protect their individual interests as well as those of the corporation. . . . [The] defendants reasonably believed that, during their conversations with [the lawyers], they were clients of [the lawyers], that they were communicating with them in their capacities as lawyers, and that they were providing legal services to them in their individual capacities, jointly with the corporation.”).

115. 828 F.3d 1203 (10th Cir. 2016).

116. *Id.* at 1204.

schemes to defraud the Nation.¹¹⁷ One of them was known as the “Steel Fraud.”¹¹⁸ In December 2009, the Nation’s Business Committee approved Merida’s proposal to purchase at a twenty percent discount \$10.5 million in steel supposedly left over from a failed Las Vegas casino project for use in future Nation construction projects.¹¹⁹ A Tulsa company, Builders Steel (which participated in the fraud), was the purported seller of the steel.¹²⁰

In October 2010, after the Nation had paid approximately \$9.25 million to Builders Steel, tribal auditors visited the company’s lot and discovered that at least half of the expected steel was missing.¹²¹ The Nation then retained lawyer Michael Burrage to investigate the Steel Fraud and to sue Builders Steel.¹²²

In November 2010, as part of Burrage’s investigation, tribal executives ordered Merida to appear in his capacity as a Nation employee at Burrage’s office.¹²³ Burrage and another lawyer for the Nation told Merida upon his arrival that a court reporter would be transcribing his sworn statement.¹²⁴ The interview began this way:

Q. Jason, we’ve met. I’m Mike Burrage.

A. Uh-huh.

Q. And Bob is—Rabon is here with me. And there has been a lawsuit filed by the Choctaw Nation of Oklahoma against Builders Steel in the District Court of Bryan County, Oklahoma. And we want to take your statement today—

A. Uh-huh.

Q. —in connection with that lawsuit. Okay.

A. Okay.

Q. Now, what we do here, today—for the purposes of the record, it’s covered by the attorney/client privilege because you do work for the Choctaw Nation.

A. Uh-huh.

Q. And the Nation asserts any privilege—attorney/client privilege in connection with this statement.

And the other thing that we need in the record that—this—the taking of this statement is work product of the lawyers. In other words, what you say may not be the work product, but my questions to you are work product setting forth my mental processes and so forth.

117. *Id.* at 1205.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1206.

122. *Id.*

123. *Id.*

124. *Id.*

A. Uh-huh.

Q. So it's the position of the Nation that this whole statement is privilege[d] and confidential.

A. Yeah.

Q. Is that okay with you?

A. Sure.¹²⁵

The Nation's Chief and Assistant Chief subsequently asked Burrage to report the preliminary findings from his investigation to the local U.S. Attorney.¹²⁶ A following federal criminal investigation revealed the Steel Fraud and the other two frauds in which Merida was involved.¹²⁷ The government indicted Merida and his henchmen; everyone except Merida pleaded guilty before trial.¹²⁸

At trial, Merida testified on his own behalf, and the prosecutor quoted portions of his sworn statement when cross-examining him.¹²⁹ Merida's lawyer interrupted and moved for a mistrial, arguing that the transcript was protected by the attorney-client privilege because Burrage was representing Merida when he took his statement.¹³⁰ The district court denied Merida's motion, concluding that if Merida's statements were privileged, the privilege belonged to the Nation.¹³¹ The jury convicted Merida, and the district court sentenced him to twelve years in prison, plus restitution.¹³² Merida appealed the district court's denial of his motion for a mistrial to the Tenth Circuit.¹³³

On appeal, Merida argued that he reasonably believed when he gave his sworn statement that Burrage was his lawyer and that his remarks would be protected by the attorney-client privilege.¹³⁴ This argument failed for four reasons. First, Merida spoke with Burrage on the Nation's orders; he did not meet with Burrage "on his own initiative to seek legal advice."¹³⁵ Second, when he met with Burrage, he did not tell him that he was "seeking legal advice in [his] individual rather than in [his] representative capacit[y]."¹³⁶ Third, Merida could not show that Burrage agreed to speak with him in his individual capacity despite the possibility of a

125. *Id.* (quoting transcript of the interview).

126. *Id.* at 1207.

127. *Id.*

128. *Id.*

129. *Id.* at 1207–08.

130. *Id.* at 1208.

131. *Id.*

132. *Id.* at 1208–09.

133. *Id.* at 1209.

134. *Id.*

135. *Id.* at 1210 (citing *Wylie v. Marley Co.*, 891 F.2d 1463, 1471 (10th Cir. 1989)).

136. *Id.* (quoting *In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998)).

conflict of interest with the Nation.¹³⁷ Fourth, Merida's sworn statement concerned the Nation's affairs and matters.¹³⁸ Under these circumstances, the Nation held the attorney-client privilege—not Merida.¹³⁹ After further concluding that any alleged error in the use of Merida's sworn statement on cross-examination was harmless, the Tenth Circuit affirmed the district court's denial of his motion for a mistrial.¹⁴⁰

A concurring judge observed that if Burrage's comments to begin Merida's statement were considered "in isolation," it would be understandable if "a layperson might have missed the nuance" that the privilege belonged to the Nation rather than to Merida.¹⁴¹ Burrage should have more precisely admonished Merida at the start of his interview.¹⁴² Nonetheless, given the circumstances of the interview, Merida's belief that his communications with Burrage were privileged was unreasonable.¹⁴³

B. Concurrent Representation Challenges

Again, corporate *Miranda* or *Upjohn* warnings are intended to prevent the inadvertent formation of attorney-client relationships between investigating lawyers and organizational constituents.¹⁴⁴ The chance that employees or other constituents will believe the lawyer represents them in connection with the investigation is increased where the lawyer has previously represented them in litigation in which they were co-defendants with the organization,¹⁴⁵ or currently represents them in other matters involving the organization. The best example of these scenarios is the internal investigation and subsequent litigation involving William Ruehle, the former Chief Financial Officer of Broadcom Corporation (Broadcom), which attracted wide attention among the corporate and white-collar bars when a California federal district court issued a stinging opinion in *United States v. Nicholas*.¹⁴⁶ The Ninth Circuit's reversal of *Nicholas* in *United States v. Ruehle*¹⁴⁷ a few months later did nothing to lessen the case's educational value for lawyers.

137. *Id.* at 1210–11.

138. *Id.* at 1211 (quoting *In re Grand Jury Subpoenas*, 144 F.3d at 659, and referring to the corporate employee-corporate counsel privilege test established in *In re Bevell, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120 (3d Cir. 1986)).

139. *Id.*

140. *Id.* at 1213.

141. *Id.* (Lucero, C.J., concurring).

142. *Id.* (Lucero, C.J., concurring).

143. *Id.* (Lucero, C.J., concurring).

144. See DESKBOOK ON INTERNAL INVESTIGATIONS, *supra* note 87, § 1:3.3[B], at 1-11 (explaining that *Upjohn* warnings are intended "[t]o reinforce explicitly with the employee that an attorney-client relationship is not being created").

145. Wagner & Sandifur, *supra* note 5, at 42–43.

146. 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd sub nom.* *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

147. 583 F.3d 600 (9th Cir. 2009).

1. *The Nicholas and Ruehle Background*

In May 2006, an investor group identified Broadcom as one of many public companies that were backdating employees' stock options.¹⁴⁸ As a result of related media attention and the prospect of an SEC inquiry, Broadcom's board of directors and management decided to investigate the company's stock option granting practices.¹⁴⁹ Broadcom's audit committee engaged the company's regular outside counsel, Irell & Manella LLP (Irell), to conduct the investigation, which was known as the "Equity Review."¹⁵⁰ Ruehle, as Broadcom's CFO, participated in these plans.¹⁵¹ The audit committee and other Broadcom representatives reportedly made clear that Broadcom intended to disclose information obtained in the Equity Review to its outside auditors at Ernst & Young LLP, and "to fully cooperate with government regulators."¹⁵²

Later in May 2006, two lawsuits were filed against Broadcom regarding its stock option granting practices: the "Derivative Action" or the "Murphy Action," and the "Jin Action."¹⁵³ Ruehle was also sued individually in both cases.¹⁵⁴ Irell represented Broadcom and Ruehle in both cases, although it did not obtain Ruehle's informed consent to its dual representations as California ethics rules required.¹⁵⁵ Irell had previously represented Ruehle and Broadcom jointly in securities litigation with proper consent; that representation concluded in 2005.¹⁵⁶

On June 1, 2006, Irell lawyers Kenneth Heitz and Dan Lefler met with Ruehle to discuss Broadcom's stock option granting practices and his role in them as CFO.¹⁵⁷ Ruehle would later claim that Heitz and Lefler neglected to tell him that they were not his lawyers, nor did they suggest that he could consult with his own lawyer before talking to them.¹⁵⁸ He would further claim that neither in this meeting nor in following conversations in June 2006 did they ever advise him that his statements to them would be disclosed to others.¹⁵⁹ Heitz and Lefler would later say that they gave Ruehle *Upjohn* warnings, and that their representation of him in the Jin Action and Murphy Action did not begin until after the June 1 interview.¹⁶⁰

148. *Id.* at 602.

149. *Id.*

150. *Id.* at 602–03.

151. *Id.* at 602.

152. *Id.* at 603.

153. *Id.*; *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1112–13 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

154. *Ruehle*, 583 F.3d at 603.

155. *Nicholas*, 606 F. Supp. 2d at 1113.

156. *Id.* at 1112.

157. *Id.* at 1113. The Irell lawyers had been keeping Ruehle informed about the progress of the Equity Review. Indeed, he had received two e-mail status reports from them the day before. *Id.*

158. *Id.*

159. *Id.*

160. *United States v. Ruehle*, 583 F.3d 600, 605 (9th Cir. 2009).

There were also conflicting accounts of the later conversations; the district court indicated that they included discussion of the Jin Action and that Ruehle sought legal advice from the Irell lawyers about the long-expected SEC investigation, which had begun on June 13.¹⁶¹ The Ninth Circuit, however, wrote that “[a]t no point [in the June conversations] did the topic of the civil securities lawsuits arise as it might relate to Ruehle personally. Nor did Ruehle ever indicate . . . that he was seeking legal advice in his individual capacity.”¹⁶²

In late June 2006, Broadcom advised Ruehle to obtain independent counsel in connection with the SEC investigation and the two lawsuits, which he did.¹⁶³ Ruehle thereafter remained involved in the Equity Review from a managerial standpoint.¹⁶⁴

In August 2006, on Broadcom’s orders, the Irell lawyers shared what they learned in the Equity Review with Ernst & Young in a series of meetings—some of which Ruehle attended.¹⁶⁵ Those disclosures included the substance of Ruehle’s June 1 interview.¹⁶⁶ Later—again at Broadcom’s direction—Irell shared the same information with the SEC and the local U.S. Attorney’s office in their investigations of Broadcom.¹⁶⁷ In fact, FBI agents interviewed Heitz and Lefler regarding their conversations with Ruehle, and summarized those interviews in Form FD-302 memoranda.¹⁶⁸ Although Ruehle knew that Broadcom and Irell would be sharing the results of the Equity Review with Ernst & Young,¹⁶⁹ he did not consent to the disclosure of his conversations with Heitz and Lefler to either Ernst & Young or to the government.¹⁷⁰

In June 2008, a grand jury indicted Ruehle over Broadcom’s backdating practices.¹⁷¹ In December 2008, Ruehle learned that his statements to Heitz and Lefler might be used against him when the Form FD-302 memoranda summarizing their interviews were produced to him in the criminal case.¹⁷² He objected to the planned use of his statements against him on attorney–client privilege grounds.¹⁷³ The district court conducted an extended evidentiary hearing to determine whether the privilege applied to Ruehle’s statements to Heitz and Lefler.¹⁷⁴

161. *Nicholas*, 606 F. Supp. 2d at 1114.

162. *Ruehle*, 583 F.3d at 604.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1114 (C.D. Cal. 2009), *rev’d sub nom. United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

168. *Id.*

169. *Ruehle*, 583 F.3d at 610–11.

170. *Nicholas*, 606 F. Supp. 2d at 1114.

171. *Ruehle*, 583 F.3d at 605.

172. *Nicholas*, 606 F. Supp. 2d at 1114.

173. *Id.*

174. *Id.*

2. *The District Court Opinion in Nicholas*

The district court firmly sided with Ruehle. According to the district court, there was “no serious question” that when Ruehle met with Heitz and Lefler on June 1, 2006, he “reasonably believed that an attorney-client relationship existed,” that he was speaking with the Irell lawyers for the purpose of obtaining legal advice, and that any information he shared with them would be kept confidential.¹⁷⁵ Pushing back, the government argued that because the Irell lawyers gave Ruehle an *Upjohn* warning, his statements to them were not privileged.¹⁷⁶ The district court shredded that argument:

[T]he Court has serious doubts whether any *Upjohn* warning was given to Mr. Ruehle. Mr. Ruehle did not remember being given any warning, no warning is referenced in Mr. Lefler’s notes from the meeting, and no written record of the warning even exists. . . . But even if an *Upjohn* warning were provided to Mr. Ruehle, the substance of the warning Mr. Heitz testified he gave [was] woefully inadequate. . . . Mr. Heitz testified that he advised Mr. Ruehle . . . that he and Mr. Lefler were interviewing him on behalf of Broadcom in connection with their investigation of Broadcom’s stock option granting practices. . . . Mr. Heitz further testified that he never told Mr. Ruehle that he and Mr. Lefler were not Mr. Ruehle’s lawyers or that Mr. Ruehle should consult with another lawyer. . . . Most importantly, neither Mr. Heitz nor Mr. Lefler ever told Mr. Ruehle that any statements he made to them could be shared with third parties, including the Government in a criminal investigation of him. . . .

Perhaps most critically, however, whether an *Upjohn* warning was or was not given is irrelevant in light of the undisputed attorney-client relationship between Irell and Mr. Ruehle. An *Upjohn* warning is given to a non-client to advise the employee that he is not communicating with his personal lawyer, no attorney-client relationship exists, and any communication may be revealed to third parties. . . . Here, Mr. Ruehle was represented by Irell in litigations related to the identical subject matter as Irell’s internal investigation on behalf of Broadcom. An oral warning, as opposed to a written waiver of the clear conflict presented by Irell’s representation of both Broadcom and Mr. Ruehle, is simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege. . . . An oral warning to a current client that no attorney-client relationship exists is nonsensical at best—and unethical at worst.¹⁷⁷

175. *Id.* at 1115.

176. *Id.* at 1116.

177. *Id.* at 1116–17 (citations to the record and footnote omitted).

Moving on, the district court concluded that Irell breached its duty of loyalty to Ruehle in three ways.¹⁷⁸ First, Irell did not obtain Ruehle's informed written consent to its concurrent representation of him in the Jin and Murphy Actions on the one hand, and of Broadcom in the Equity Review on the other hand.¹⁷⁹ Second, the Irell lawyers interrogated Ruehle, a current client, for the benefit of another current client, Broadcom.¹⁸⁰ Third, Irell disclosed Ruehle's privileged communications to Ernst & Young and the government without his consent.¹⁸¹ Ruehle spoke with Heitz and Lefler expecting confidentiality; he never would have talked to them had he suspected that they would disclose his statements to the government for use in a criminal case.¹⁸² Anyway, he "never gave Irell permission to jettison his rights for those of Broadcom" and reveal the confidential information he shared with Irell to third parties.¹⁸³ For the Irell lawyers to have done so without his consent "was wrong and a clear breach of [their] duty of loyalty to him."¹⁸⁴ Their disclosure of his confidences to the government for use in building a criminal case against him was especially galling.¹⁸⁵

The district court viewed Irell's "ethical breaches of the duty of loyalty" as "very troubling."¹⁸⁶ As a result, it suppressed all evidence reflecting Ruehle's statements to the Irell lawyers regarding Broadcom's stock option granting practices.¹⁸⁷ The court also referred Irell to the California State Bar for possible professional discipline.¹⁸⁸

3. *The Ninth Circuit Opinion in Ruehle*

The government took an interlocutory appeal of the trial court's suppression order and the Ninth Circuit considered the matter on an expedited basis.¹⁸⁹ In *United States v. Ruehle*, the Ninth Circuit explained that because the district court's conclusion that "Ruehle reasonably believed that Irell represented him individually with respect to the ongoing civil lawsuits when the June 1, 2006 meeting took place" was not clearly erroneous, it would approach the case "from the perspective that Irell had attorney-client relationships with both Broadcom and Ruehle individually."¹⁹⁰

178. *Id.* at 1117–21.

179. *Id.* at 1117–18.

180. *Id.* at 1119.

181. *Id.* at 1120–21.

182. *Id.* at 1121.

183. *Id.*

184. *Id.*

185. *See id.* ("Even worse [than disclosure to Ernst & Young], Irell later disclosed the same information to the Government as part of its criminal prosecution of [Ruehle].").

186. *Id.*

187. *Id.*

188. *Id.*

189. *United States v. Ruehle*, 583 F.3d 600, 606 (9th Cir. 2009).

190. *Id.* at 607.

That approach did not help Ruehle, however, because the district court had erred by applying California privilege law rather than federal common law.¹⁹¹ California law presumes that the attorney-client privilege attaches to communications between a lawyer and a client, while under federal common law, the party asserting the privilege must establish the privileged nature of any communications.¹⁹² Thus, by applying California law, the district court had improperly burdened the government with proving what information was *not* privileged, rather than making Ruehle prove which information *was* privileged.¹⁹³

With the burden of proof properly allocated to Ruehle, it was quickly apparent that his privilege claim would fail because his statements to the Irell lawyers “were not ‘made in confidence’ but rather for the purpose of disclosure to the outside auditors.”¹⁹⁴ The record contained ample evidence that Ruehle knew that any factual information the Irell lawyers collected in the Equity Review would be shared with Ernst & Young.¹⁹⁵ He had further testified in the district court that the information he provided to Heitz and Lefler was predominantly factual and was thus the kind of information that they would reveal to third parties.¹⁹⁶

In an effort “to minimize the damning evidence confirming his awareness that his interactions with Irell would not be held in confidence,” Ruehle argued that he would not have cooperated in the Equity Review had he known that the information he shared with Heitz and Lefler would be used against him in a criminal prosecution or an SEC enforcement action.¹⁹⁷ This argument had resonated with the district court, but it fell flat in the Ninth Circuit.¹⁹⁸ The relevant point from an attorney-client privilege perspective was Ruehle’s knowledge that any factual information he shared with the Irell lawyers would in turn be communicated to Ernst & Young, which erased the expectation of confidentiality required to invoke the privilege.¹⁹⁹ Ruehle’s subjective surprise that the information he knew would be shared with Ernst & Young would also be disclosed to the SEC and federal prosecutors was immaterial.²⁰⁰

Retreating further, Ruehle pointed out that Heitz had testified below that he could not distinguish between facts relevant to the Equity Review and facts relevant to Ruehle’s defense in the Jin and Murphy Actions.²⁰¹

191. *Id.* at 608–09.

192. *Id.* at 609.

193. *Id.* (citing *Gordon v. Super. Ct. of L.A. Cty.*, 65 Cal.Rptr.2d 53 (Ct. App. 1997)).

194. *Id.*

195. *Id.* at 610.

196. *Id.* at 610–11.

197. *Id.* at 611.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Thus, his right to invoke the privilege in the Jin and Murphy Actions transferred to his communications with the Irell lawyers in connection with the Equity Review. But Ruehle's effective concession that the information underlying the Equity Review and the civil securities cases was inseparable hurt his cause rather than helping it.²⁰² His knowledge that anything related to the former would be shared at least with Ernst & Young "destroy[ed] the confidentiality essential to establishing the privilege as to both."²⁰³

Ruehle tried to argue that while he expected that the Irell lawyers would reveal factual information learned in the Equity Review to third parties, they would reveal only factual information that was not otherwise privileged.²⁰⁴ This argument was doomed by his inability to identify which statements of his should be considered privileged.²⁰⁵ At bottom, Ruehle's position was "that some nebulous portion of his communications with Heitz and Lefler was intended to be confidential as to him personally and therefore everything said or not said to the attorneys should be protected by his individual attorney-client privilege."²⁰⁶ That clearly was not the law.²⁰⁷ Additionally, Ruehle's argument ignored "the settled rule that *any* voluntary disclosure of information to a third party waives the attorney-client privilege, regardless of whether such disclosure later turns out to be harmful."²⁰⁸

In summary, it was clear to the Ninth Circuit that Ruehle's statements to the Irell lawyers were not meant to be confidential but were instead intended for outside disclosure.²⁰⁹ Ruehle could not prove the existence of an individual attorney-client privilege that barred the disclosure of his June 2006 communications with Heitz and Lefler to the government.²¹⁰ After rejecting Ruehle's additional argument that the Irell lawyers' alleged ethics violations mandated the suppression of his statements to them, the *Ruehle* court reversed the district court and remanded the case for trial.²¹¹

C. *Summary and Recommendations for Lawyers*

Although they were ultimately vindicated by the Ninth Circuit in *Ruehle*, the Irell lawyers surely regretted the position in which they found themselves. Their experience illustrates the need for lawyers conducting internal investigations to clearly define their role when interviewing orga-

202. *Id.* at 611–12.

203. *Id.* at 612.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 613–14.

nizational constituents.²¹² To accomplish that goal, lawyers should start employee interviews by issuing corporate *Miranda* or *Upjohn* warnings that make several key points. First, lawyers should tell employees in definite terms that they represent the organization and not the employees individually. Second, they should inform the employees that the interviews are being conducted for the purpose of providing legal advice to the organization. Conjunctively, they should tell employees that they cannot keep secrets from the organization; if an employee shares information with them, they will share that information with the organization.²¹³ Third, they should tell employees that while their communications are shielded from discovery by the attorney-client privilege, the organization alone owns the privilege and may waive it regardless of the employees' wishes and without consulting or notifying them. Fourth, they should instruct employees to keep their communications confidential. Fifth, where applicable, they should tell employees that their failure to cooperate in the investigation violates the organization's employment policies and is grounds for discipline, including termination of employment.

As the district court opinion in *Nicholas* teaches, lawyers should memorialize their warnings to employees.²¹⁴ This is easily done where interviews are recorded or a stenographer is present.²¹⁵ In some cases it may be preferable to provide employees with a written warning that they must sign and date before being interviewed.

If offered a second chance, the Irell lawyers would also likely decline to represent Ruehle individually in the Jin Action and Murphy Action at the same time that they were representing Broadcom in the Equity Review. Indeed, concurrent representations often spawn thorny conflicts of interest.

212. Lawyers should not assume that particular employees do not need corporate *Miranda* or *Upjohn* warnings based on their education, experience, or sophistication. Even employees with law degrees or legal backgrounds should receive such warnings.

213. Lawyers should never tell employees that particular matters are "off the record," or promise not to share certain information with the organization. Employees may reveal embarrassing (or worse) facts that are irrelevant to the investigation and thus need not be documented or reported, but those decisions can be made after the employee discloses the information and its relevance or importance to the investigation can be judged.

214. See *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1114 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) ("As an initial matter, the Court has serious doubts whether any *Upjohn* warning was given. . . . Mr. Ruehle did not remember being given any warning, no warning is referenced in Mr. Lefler's notes from the meeting, and no written record of the warning even exists.").

215. It is rare to record or transcribe employee interviews because verbatim records of interviews may not qualify for work product protection and they may otherwise be discoverable by the government in criminal cases. Turk & Miller, *supra* note 87, at 110.

Model Rule of Professional Conduct 1.7(a) governs concurrent conflicts of interest.²¹⁶ Model Rule 1.7(a) applies when the representation of a client will be directly adverse to another client, when there is a significant risk that a client's representation will be materially limited by the lawyer's responsibilities to another client or to a third person, and when there is a significant risk that a client's representation may be materially limited by the lawyer's own interests.²¹⁷ Rule 1.7(a) prohibits concurrent adverse representations even in wholly unrelated matters.²¹⁸ For a lawyer to undertake a representation notwithstanding a concurrent conflict of interest, she must reasonably believe that she can competently and diligently represent the clients notwithstanding any competing obligations; the representation cannot be prohibited by law; and she must obtain the clients' informed consent, confirmed in writing.²¹⁹

When considering whether to seek consent, lawyers too often gloss over the Model Rule 1.7(b)(1) requirement that they "reasonably believe[]" that they "will be able to provide competent and diligent representation to each affected client."²²⁰ They do so not because they are unethical, but because subjectively they cannot imagine any other possibility. The standard against which their belief will be measured, however, is an objective one.²²¹ A lawyer's subjective, good faith belief that she can fulfill her professional obligations to the affected clients notwithstanding any competing interests or obligations is therefore immaterial.²²²

216. MODEL RULES OF PROF'L CONDUCT r. 1.7(a) (AM. BAR ASS'N 2017)

217. *Id.* r. 1.7(a)(1)–(2).

218. *Id.* r. 1.7 cmt. 6.

219. *Id.* r. 1.7(b).

220. *Id.* r. 1.7(b)(1); *see also* State *ex rel.* Horn v. Ray, 325 S.W.3d 500, 507 (Mo. Ct. App. 2010) (emphasizing that the ability to consent must be resolved as to each client).

221. *Federico v. Lincoln Military Hous., L.L.C.*, Civ. No. 2:12CV80, 2014 WL 12613388, at *2 (E.D. Va. May 23, 2014); *People v. Mason*, 938 P.2d 133, 136 (Colo. 1997); *see Ferolito v. Vultaggio*, 949 N.Y.S.2d 356, 363 (App. Div. 2012) (requiring that a "disinterested lawyer" believe that the conflicted lawyer can competently represent each client's interests); Ill. Adv. Op. 09-02, 2009 WL 8559340, at *3 (Ill. State Bar Ass'n 2009) (explaining that a "reasonable belief is an objective standard predicated on what a disinterested lawyer would conclude as to whether the adverse clients would agree to the dual representation"); N.Y.C. Eth. Op. 2004-02, 2004 WL 2155079, at *3–4 (N.Y.C. Ass'n Bar Comm. Prof'l Judicial Ethics 2004) (defining the hypothetical, disinterested lawyer in the multiple representation context as someone who "would believe that a single lawyer could competently represent the interests of each client").

222. *In re Stein*, 177 P.3d 513, 519 (N.M. 2008); *see* *So v. Suchanek*, 670 F.3d 1304, 1310–11 (D.C. Cir. 2012) (rejecting as irrelevant the attorney's subjective belief that his joint representation of the Ponzi scheme victim and the person who involved the victim in scheme posed no conflict; rather, the analysis depended on whether an objective observer having attorney's knowledge of the situation would have reasonably doubted his ability to undertake the joint representation); *Robertson v. Wittenmyer*, 763 N.E.2d 804, 807–08 (Ind. Ct. App. 2000) (concluding that the lawyer could not have reasonably believed that representing one client against another was permissible and upholding the lawyer's disqualification).

Returning to *Ruehle*, it is difficult to understand how the Irell lawyers could have believed that they could both represent Ruehle in the securities cases and interview him in the Equity Review in which they represented Broadcom.²²³ They either knew or reasonably should have known that Broadcom was adverse to him in the Equity Review, because if Broadcom's stock option grants were unlawful, Broadcom might contend that he was a rogue employee who bore principal responsibility for the scheme.²²⁴ Furthermore, because Broadcom launched the Equity Review in large part because it anticipated an SEC investigation,²²⁵ they knew or reasonably should have known that Broadcom might turn over to the SEC and prosecutors the information they collected in their investigation, and that the government might use information learned from Ruehle as a basis for criminal charges against him.

Although Ruehle could have consented to the Irell lawyers' representation of him while they were concurrently representing Broadcom,²²⁶ the facts were such that Heitz and Lefler would have had to strain to believe that it was appropriate to even seek his consent. In short, Irell should have confined its representation to Broadcom.

In conclusion, lawyers should carefully consider whether to concurrently represent a corporate constituent even in a wholly unrelated matter. In many instances, the potential risks will outweigh any possible rewards. Furthermore, while lawyers must honestly assess the facts and make a reasonable judgment that competent and diligent representation of both clients is achievable, best practices dictate that they not make that determination in isolation. In other words, they should involve disinterested lawyers in the Rule 1.7(b)(1) analysis. Additionally, lawyers should always beware of hindsight applied by courts and clients alike—the failure to satisfy the competency and diligence standard will trigger a Rule 1.7 violation despite the fact that all affected clients gave informed consent.²²⁷

IV. ETHICALLY COMMUNICATING WITH UNREPRESENTED AND REPRESENTED CONSTITUENTS

As cases involving corporate *Miranda* or *Upjohn* warnings reflect, employees and other organizational constituents with whom investigating law-

223. See CAL. RULES OF PROF'L CONDUCT r. 3-310(C)(3) (STATE BAR OF CAL. 1988) ("A member shall not, without the informed written consent of each client . . . Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.").

224. *United States v. Nicholas*, 606 F. Supp. 2d 1109, 1118 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

225. *Id.* at 1112.

226. See *id.* (requiring informed written consent).

227. See, e.g., *Sanford v. Virginia*, 687 F. Supp. 2d 591, 604 (E.D. Va. 2009) (finding that the parties' consent to multiple representation was irrelevant because no reasonable lawyer could believe that she would be able to provide competent and diligent representation to each of the affected clients).

yers communicate are often unrepresented.²²⁸ At the same time, they may have very significant interests at stake. If employees decline to cooperate in the investigation they may be fired.²²⁹ If they are guilty of misconduct, they may lose their jobs, be exposed to criminal liability, or face possible civil liability. These considerations invite the question of what lawyers may ethically say to unrepresented employees or constituents. More narrowly, what may a lawyer ethically say to them if they ask whether they need lawyers?

On the other side of the coin, employees and other witnesses may have retained counsel in connection with the investigation. This poses a different communication problem for the organization's lawyers.

A. *Communicating with Unrepresented Constituents*

Where a person with whom a lawyer wishes to communicate is not represented by counsel, Model Rule of Professional Conduct 4.3 governs the lawyer's conduct. Model Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.²³⁰

In a nutshell, Model Rule 4.3 recognizes that when a person is unrepresented, there is a significant risk that a lawyer will overreach in their dealings, and it accordingly restricts the lawyer's ability to unfairly exploit the situation.²³¹

Model Rule 4.3 distinguishes between situations involving unrepresented persons whose interests may be adverse to the lawyer's client and those in which there is no conflict.²³² In the former instance, the rule

228. See Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 929 (stating that "[m]ost corporate constituents will not have their own counsel at the time they are asked to participate in an investigative interview").

229. See, e.g., *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69, 75 (2d Cir. 2016) (explaining that a company's demand that two officers explain their alleged involvement in criminal activity while on the job in an interview under the penalty of termination was reasonable, and stating that the company had cause to fire them for refusing to comply).

230. MODEL RULES OF PROF'L CONDUCT R. 4.3 (AM. BAR ASS'N 2017).

231. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 42.02, at 42-3 (4th ed. 2014 & Supp. 2017).

232. MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (AM. BAR ASS'N 2017).

assumes that the potential for a lawyer to compromise the unrepresented person's interests is so great that the lawyer must be barred from giving any legal advice other than the advice to obtain counsel.²³³ Any questions as to whether a lawyer's remarks constitute legal advice should be decided by focusing on what the unrepresented person may reasonably have understood, rather than on the lawyer's intent.²³⁴ This determination may be influenced by the person's experience or sophistication, and by the context or setting in which the communication occurs.²³⁵

Model Rule 4.3 *permits* a lawyer to advise an unrepresented person whose interests may conflict with the interests of the lawyer's client to retain a lawyer, but it does not *require* a lawyer who thinks such a person would benefit from counsel to give that advice.²³⁶ It is up to the lawyer to decide whether to advise an unrepresented person to secure counsel.

Employees who are being interviewed in an internal investigation may ask the investigating lawyers whether they need their own lawyers. An investigating lawyer cannot answer "no" if she knows or reasonably should know that there is a reasonable possibility that the employee's interests may conflict with the organization's interests because that answer would qualify as legal advice and therefore violate Model Rule 4.3.²³⁷ A negative answer in that situation might also expose a lawyer to discipline for dishonesty.²³⁸ As a result, the lawyer has three reasonable options. First, she may respond by telling the employee that he is not her client and she therefore cannot give him legal advice. Second, she may tell the employee that he should secure counsel. As a practical matter, however, a lawyer may be reluctant to give this advice out of the concern that it will cut off communication with the employee and thereby deprive the organization of information it might have learned had the interview continued with the employee being unrepresented. Third, she may tell the employee that she does not represent him and that if he wants to consult with a lawyer, she will adjourn or postpone the interview to allow him to do so. If the employee decides to consult with a lawyer, so be it.²³⁹ The other lawyer's advice to the employee obviously will influence subsequent dealings be-

233. *Id.*

234. *See, e.g.*, Att'y Q v. Miss. State Bar, 587 So. 2d 228, 233 (Miss. 1991) (holding that the lawyer's statement, "don't worry about it," constituted legal advice under the circumstances).

235. MODEL RULES OF PROF'L CONDUCT r. 4.3 cmt. 2 (AM. BAR ASS'N 2017).

236. *Id.* r. 4.3.

237. *Id.*

238. *Id.* r. 4.1(a) (providing that a lawyer "shall not knowingly . . . make a false statement of material fact or law to a third person"); *id.* r. 8.4(c) (prohibiting lawyers from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation").

239. *See generally* Paul E. Starkman, *When Employees "Lawyer Up,"* THE BRIEF, Spring 2007, at 26 (discussing the pros and cons for an organization when an employee-witness opts to retain counsel in connection with an internal investigation, and highlighting the advantageous aspects of that choice).

tween the employee and the organization. If, on the other hand, the employee opts to proceed with the interview unrepresented, that is his choice.

If a lawyer advises an unrepresented person to secure counsel, there may be a question as to whether that advice presents a conflict of interest.²⁴⁰ After all, advising an employee or other constituent to consult a lawyer may be adverse to the organization's interests because it may discourage or prevent the witness from providing important information to the organization.²⁴¹ Fortunately, Model Rule 4.3 answers that question for lawyers: the answer is no. Again, Model Rule 4.3 provides that:

In dealing on behalf of a client with a person who is not represented by counsel . . . [a] lawyer shall not give legal advice to [the] unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of [the unrepresented] person are or have a reasonable possibility of being in conflict with the interests of the client.²⁴²

Model Rule 4.3 would not be written as it is if by advising an unrepresented person to secure counsel in the face of a possible conflict of interest a lawyer was simultaneously acting under or creating a conflict of interest. That would be an absurd result. Of course, courts interpret ethics rules according to the same principles that govern statutory interpretation,²⁴³ and courts interpret statutes to avoid absurd results.²⁴⁴ Courts therefore must interpret ethics rules to avoid absurd results.²⁴⁵ As a result, courts must interpret Model Rule 4.3 to hold that lawyers who advise unrepresented individuals to seek counsel do not thereby create conflicts of interest.

B. *Communicating with Represented Constituents and Witnesses*

Although organizational constituents who are involved in internal investigations are frequently unrepresented, some may have personal counsel, as may other witnesses who an investigating lawyer wants to

240. See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2017) (governing material limitation conflicts involving current clients).

241. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1089 (2007).

242. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2017).

243. Ferris, *Thompson & Zweig, Ltd. v. Esposito*, 90 N.E.3d 400, 405 (Ill. 2017); *Comm'n for Lawyer Discipline v. Hanna*, 513 S.W.3d 175, 178 (Tex. App. 2016).

244. *Cen v. Att'y Gen.*, 825 F.3d 177, 194 (3d Cir. 2016); *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010); *State v. Villamil*, 898 N.W.2d 482, 487 (Wis. 2017); *Brown v. State*, 393 P.3d 1265, 1278 (Wyo. 2017).

245. See *Chism v. Tri-State Constr., Inc.*, 374 P.3d 193, 207 (Wash. Ct. App. 2016) (explaining that it is fundamental for a court to avoid absurd results when interpreting any rule of professional conduct (quoting *In re Marriage of McDermott*, 307 P.3d 717, 727 (Wash. Ct. App. 2013))).

interview.²⁴⁶ When witnesses are represented by counsel, investigating lawyers run squarely into Model Rule 4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.²⁴⁷

By its terms, Model Rule 4.2 applies only where the lawyer knows that a person with whom she wishes to communicate is represented in the matter. Sometimes the fact of representation is obvious, such as where the other lawyer has entered her appearance in litigation or otherwise announced her representation, or the person has stated that he has a lawyer. Such clarity is not required to violate the rule, however, because a lawyer's knowledge can be inferred from circumstances.²⁴⁸ Lawyers cannot avoid acquiring knowledge by turning a blind eye to facts or circumstances that indicate a person is represented by counsel.²⁴⁹ Even so, the Rule 4.2 knowledge requirement is plainly one of actual knowledge.²⁵⁰ The fact that a lawyer *should have known* that a person was represented in a matter will not support a Rule 4.2 violation.²⁵¹

Questions sometimes surface about the existence or scope of a “matter” within the meaning of Rule 4.2.²⁵² The determination of the existence or scope of a matter can be crucial because Model Rule 4.2 does not

246. See, e.g., Katie J.M. Baker, *Meet the Sexual Assault Adviser Top U.S. Colleges Have On Speed Dial*, BUZZFEED (July 28, 2014), https://www.buzzfeed.com/katiejmbaker/meet-the-sexual-assault-adviser-top-us-colleges-have-on-speed?utm_term=.hfZEPx0qP#.nrVoBVWmB [<https://perma.cc/L2UX-XX7N>] (discussing a case in which a lawyer conducting an investigation into a sexual assault at Hobart and William Smith Colleges on behalf of the institution e-mailed the victim, who he knew to be represented by a lawyer).

247. MODEL RULES OF PROF'L CONDUCT r. 4.2. (AM. BAR ASS'N 2017).

248. *Id.* r. 1.0(f).

249. *People v. Underhill*, 353 P.3d 936, 950 (Colo. 2015); *Scanlan v. Eisenberg*, 893 F. Supp. 2d 945, 950 (N.D. Ill. 2012).

250. See, e.g., *McClellan v. Ready Mixed Concrete Co. of Erie, Civ. No 13-87 Erie*, 2014 WL 4060254, at *1–2 (W.D. Pa. Aug. 14, 2014) (noting and applying the actual knowledge requirement); *Mori v. Saito*, 785 F. Supp. 2d 427, 433 (S.D.N.Y. 2011) (rejecting the argument that a lawyer violated Rule 4.2 because she “must have known” that an unidentified caller was a represented party); *State ex rel. Oklahoma Bar Ass'n v. Harper*, 995 P.2d 1143, 1147 (Okla. 2000) (requiring actual knowledge and rejecting a “should have known” standard for an alleged Rule 4.2 violation).

251. *Harper*, 995 P.2d at 1147.

252. See, e.g., *Mims v. Chichester*, 722 N.Y.S.2d 30, 31 (App. Div. 2001) (noting that while multiple matters may involve the same subjects, they remain different matters for purposes of the rule); *Damron v. CSX Transp., Inc.*, 920 N.E.2d 169, 177–78 (Ohio Ct. App. 2009) (reasoning that extrinsic evidence for use in impeachment was outside the scope of the matter).

prohibit communications with a represented person outside the scope of the representation.²⁵³

Courts tend to define a matter from a case or representation perspective rather than from a factual perspective, as demonstrated in *People v. Santiago*.²⁵⁴ In *Santiago*, the question was whether ex parte communications by prosecutors investigating potential criminal child endangerment charges against Evelyn Santiago were prohibited by Rule 4.2 because Santiago was represented by appointed counsel in parallel juvenile court proceedings seeking to have her children made wards of the state.²⁵⁵ Because it was undisputed that the lawyer representing Santiago in the juvenile court matter had not been engaged to represent her in the criminal investigation, the Illinois Supreme Court concluded that Rule 4.2 was not violated despite the overlapping case facts.²⁵⁶ The only “matter” in which Santiago was represented by counsel was the juvenile court case.²⁵⁷

Consider, then, a situation in which a corporate officer is represented by a lawyer in commercial litigation in which the corporation has also been named as a defendant. If the corporation launches an internal investigation into related practices about which the officer perhaps knows out of the concern that those practices may expose it to criminal prosecution or regulatory action, may the lawyers conducting the investigation interview the officer outside the presence of his defense counsel in the commercial litigation? Indeed they may, because under *Santiago* and similar cases the litigation and the internal investigation are separate matters even though they share common facts.²⁵⁸ The only matter in which the officer is represented is the commercial litigation.

253. MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt. 4 (AM. BAR ASS'N 2017).

254. 925 N.E.2d 1122 (Ill. 2010); *see also* *United States v. Ford*, 176 F.3d 376, 382 (6th Cir. 1999) (concluding that because a government informant communicated with the defendant concerning an offense other than the one for which the defendant was indicted, there was no Rule 4.2 violation); *Griffin-El v. Beard*, No. 06-2719, 2009 WL 2929802, at *7 (E.D. Pa. Sept. 8, 2009) (finding no Rule 4.2 violation where defense lawyers communicated with a corrections officer in his role as records custodian when the officer was represented by counsel only in another lawsuit filed by their client, and not in the matter in which his status as a records custodian made him a potential witness); *Miller v. Material Sci. Corp.*, 986 F. Supp. 1104, 1106–07 (N.D. Ill. 1997) (permitting a communication by the plaintiff's attorney in a federal securities class action with a party that was represented in a related SEC investigation but not in the federal class action); *Miano v. AC&R Adver., Inc.*, 148 F.R.D. 68, 80 (S.D.N.Y. 1993) (finding that corporate employees were not off-limits when the corporate entity had not retained any counsel in the matter that was the focus of the communications); *Harper*, 995 P.2d at 1147 (Okla. 2000) (reasoning that a defense lawyer's interview of a driver did not violate Rule 4.2 because it involved a passenger's separate claim, not other claims arising out of the same accident in connection with which the driver had counsel).

255. *Santiago*, 925 N.E.2d at 1123–25.

256. *Id.* at 1128–31.

257. *Id.* at 1129–30.

258. *See id.* at 1130 (stating that “because the drafters of Rule 4.2 did not include the words ‘subject matter’ or ‘same or a substantially related’ matter in the rule, we presume that the omission was deliberate”). *But see* RONALD D. ROTUNDA

On the other hand, the corporate officer may have retained counsel to represent him in connection with the internal investigation. In that case, the investigating lawyers will need that lawyer's permission to interview the officer.²⁵⁹

Four remaining points about Model Rule 4.2 are noteworthy. First, the rule does not protect a person's right to counsel; it protects counsel's right to participate in any communication between her client and another lawyer.²⁶⁰ Thus, only the lawyer can invoke Rule 4.2 or consent to ex parte communications—the client cannot agree to ex parte contact.²⁶¹

Second, Model Rule 4.2 applies even when the represented person initiates the communication.²⁶² In that situation, the lawyer must either avoid the communication or terminate it as soon as practicable after learning that it is improper.²⁶³

Third, a lawyer's inability to communicate with counsel for a represented person, such as where the other lawyer is unavailable or unresponsive, does not permit the lawyer to shortcut Rule 4.2 and communicate with the represented person directly.²⁶⁴

Finally, Rule 4.2 protects against “contacts that are well meaning but misguided as well as those that are intentionally improper.”²⁶⁵ In *In re*

& JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-4, at 997 (2017–2018) (asserting that Rule 4.2 applies where two matters are related).

259. MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR ASS'N 2017).

260. *State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999).

261. *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (discussing a Rule 4.2 analog); *Nieves v. OPA, Inc.*, 947 F. Supp. 2d 887, 895 (N.D. Ill. 2013); *Scanlan v. Eisenberg*, 893 F. Supp. 2d 945, 950 (N.D. Ill. 2012); *Faison v. Thornton*, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (discussing the Nevada version of Rule 4.2); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Box*, 715 N.W.2d 758, 764–65 (Iowa 2006) (construing an analogous rule); *Miller*, 600 N.W.2d at 464.

262. *Scanlan*, 893 F. Supp. 2d at 950; *United States v. Smallwood*, 365 F. Supp. 2d 689, 696 (E.D. Va. 2005); *Pleasant Mgmt., L.L.C. v. Carrasco*, 870 A.2d 443, 446 (R.I. 2005); *Engstrom v. Goodman*, 271 P.3d 959, 964 (Wash. Ct. App. 2012); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396, at 16 (1995). *But cf.* *United States v. Guivas-Soto*, 124 F. Supp. 3d 72, 74 (D.P.R. 2015) (concluding that a prosecutor did not violate Rule 4.2 by reading two letters sent to him by a represented defendant because Model Rule 4.2 “prohibits only *communication* by the lawyer, and reading a letter does not communicate anything”).

263. *See, e.g., Zaug v. Va. State Bar*, 737 S.E.2d 914, 917–19 (Va. 2013) (concluding that the lawyer did not violate Rule 4.2 when the opposing party called and then launched into an emotional outburst, and the lawyer could not reasonably terminate the conversation immediately; the requirement to disengage from an unrepresented person's communication does not require a lawyer to be discourteous or impolite).

264. *In re Garcia*, 147 P.3d 132, 134–35 (Kan. 2006); *see, e.g., In re Eddings*, 782 S.E.2d 445, 445 (Ga. 2017) (violating Rule 4.2 by communicating with represented individuals on the eve of trial when a critical deadline was imminent, and the lawyer had unsuccessfully attempted to contact their lawyers).

265. *Att'y Grievance Comm'n of Md. v. Kent*, 653 A.2d 909, 918 (Md. 1995).

Capper,²⁶⁶ for example, a lawyer who represented a husband in a child custody matter prepared a custody agreement for his client to deliver to his ex-wife for execution based on his client's mistaken representation that his ex-wife was not using a lawyer in the matter to save money.²⁶⁷ The lawyer knew that the ex-wife had previously been represented in post-dissolution matters.²⁶⁸ And, in fact, the ex-wife was represented in this matter, such that the lawyer violated Rule 4.2 through his client.²⁶⁹ Because no one was harmed and the lawyer's violation derived from his client's erroneous assertion, the lawyer received only a public reprimand for his misconduct.²⁷⁰ The *In re Capper* court noted, however, that this case was "a vivid reminder that lawyers should independently verify that opposing parties wishing to communicate directly with them are in fact not represented by counsel, especially where the lawyer knows that the party had previously been represented in the matter."²⁷¹

C. Summary

For investigating lawyers who do not know whether an employee or witness is represented by counsel in connection with the investigation, the best course of action is to ask whether this is the case at the start of the interview or before. If the person is represented, the interview cannot go forward without the other lawyer's permission or presence.²⁷² The organization's perceived right to compel an employee's cooperation in the investigation does not alter the lawyers' ethical obligations.²⁷³ If the employee or witness is not represented by counsel with respect to the investigation, then the investigating lawyers will know that their conduct is governed by Rule 4.3 and can proceed accordingly.

V. THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT IMMUNITY

Internal investigations involve sensitive matters. The results of an investigation may be relevant to the organization's potential civil or criminal liability. The organization's board of directors and executives may rely on the investigative record to analyze and respond to legal threats to the organization. At the same time, potential adversaries—including, in some cases, the government—are acutely interested in obtaining investigative

266. 757 N.E.2d 138 (Ind. 2001).

267. *Id.* at 139.

268. *Id.*

269. *Id.* at 140.

270. *Id.*

271. *Id.*

272. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2017).

273. *See generally id.* r. 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

materials for use against the organization.²⁷⁴ In short, there are many reasons for an organization to want to keep the results of an internal investigation and information learned during the inquiry confidential. The two primary bases for doing so are the attorney-client privilege and the work product doctrine. Responsibility for asserting the privilege and work product immunity, and for ensuring that they are not waived or otherwise lost, principally rests with the organization's lawyers. It is therefore essential for lawyers to understand key contours of the attorney-client privilege and work product immunity.

A. *The Attorney-Client Privilege*

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications,²⁷⁵ and it is now widely codified.²⁷⁶ The best-known privilege test was announced nearly seventy years ago in *United States v. United Shoe Machinery Corp.*²⁷⁷ The *United Shoe* test famously provides that the privilege applies if:

- (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.²⁷⁸

274. See, e.g., *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 390–97 (S.D.N.Y. 2015) (rejecting the defendant's claims that information gathered during its internal investigation was privileged or constituted work product, and granting the plaintiffs' motion to compel discovery).

275. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1278 (Del. 2014); *Worley v. Cent. Fla. YMCA, Inc.*, 228 So. 3d 18, 24 (Fla. 2017); *Ctr. Partners, Ltd. v. Growth Head GP, L.L.C.*, 981 N.E.2d 345, 355 (Ill. 2012); *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999); *State v. Gonzalez*, 234 P.3d 1, 12 (Kan. 2010); *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 870 N.E.2d 33, 38 (Mass. 2007) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34 (N.Y. 2016); *In re Miller*, 584 S.E.2d 772, 782 (N.C. 2003); *Frease v. Glazer*, 4 P.3d 56, 60 (Or. 2000); *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263 (Pa. Super. Ct. 2007); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (quoting *United States v. Zolin*, 491 U.S. 554, 562 (1989)); *Doe v. Maret*, 984 P.2d 980, 982 (Utah 1999).

276. See, e.g., CAL. EVID. CODE §§ 950–62 (2016); FLA. STAT. § 90.502 (2015); KAN. STAT. ANN. § 60-426 (2015); 42 PA. CONS. STAT. § 5928 (2016).

277. 89 F. Supp. 357 (D. Mass. 1950).

278. *Id.* at 358–59.

Although the *United Shoe* test implies that the privilege covers only communications from the client to the attorney, confidential communications from an attorney to a client are also privileged.²⁷⁹ The attorney-client privilege is a two-way street.

The Restatement (Third) of the Law Governing Lawyers articulates the elements of the attorney-client privilege more succinctly.²⁸⁰ Section 68 provides that the privilege attaches “to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”²⁸¹ “Privileged persons” include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client’s representation.²⁸²

The attorney-client privilege belongs to the client.²⁸³ When a lawyer invokes the privilege, she does so as the client’s agent—not as a holder of the privilege.²⁸⁴

Because the privilege attaches to communications, an otherwise privileged exchange between a client and a lawyer containing information that could be discovered by other means remains shielded from discovery.²⁸⁵ There is, however, no blanket privilege covering all attorney-client com-

279. *United States v. Christensen*, 801 F.3d 970, 1007 (9th Cir. 2015) (applying federal privilege law); *Byrd v. State*, 929 S.W.2d 151, 154 (Ark. 1996); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 60 (Conn. 1999); *Clausen v. Nat’l Grange Mut. Ins. Co.*, 730 A.2d 133, 137–38 (Del. Super. Ct. 1997); *People v. Radojicic*, 998 N.E.2d 1212, 1221 (Ill. 2013); *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 684 (Iowa 1995); *Rent Control Bd. v. Praught*, 619 N.E.2d 346, 350 (Mass. App. Ct. 1993); *Shorter v. State*, 33 So. 3d 512, 516 (Miss. Ct. App. 2009) (quoting *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003)); *Palmer v. Farmers Ins. Exch.*, 861 P.2d 895, 906 (Mont. 1993); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011); *Giammarco v. Giammarco*, 959 A.2d 531, 533 (R.I. 2008) (quoting *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 158–59 (R.I. 2000)); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002); *Zink v. City of Mesa*, 256 P.3d 384, 403 (Wash. Ct. App. 2011); *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 994 (W. Va. 2014) (quoting FRANKLIN D. CLECKLEY ET AL., *LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE* § 26(b)(1), at 693 (4th ed. 2012)).

280. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000).

281. *Id.*

282. *Id.* § 70.

283. *Holt v. McCastlain*, 182 S.W.3d 112, 117 (Ark. 2004); *OXY Res. Cal. L.L.C. v. Super. Ct.*, 9 Cal. Rptr. 3d 621, 644–45 (Ct. App. 2004); *Ctr. Partners, Ltd. v. Growth Head GP, L.L.C.*, 981 N.E.2d 345, 356 (Ill. 2012); *Att’y Grievance Comm’n of Md. v. Powers*, 164 A.3d 138, 151 (Md. 2017); *Arnoldy v. Mahoney*, 791 N.W.2d 645, 657 (S.D. 2010); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012).

284. EPSTEIN, *supra* note 69, at 26.

285. *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736, 741 (Cal. 2009).

munications.²⁸⁶ The client must assert the privilege with respect to each communication in question, and the court hearing the matter must scrutinize each one independently.²⁸⁷ The party asserting the privilege bears the burden of establishing its application to particular communications.²⁸⁸ This is a fact-specific inquiry.²⁸⁹

A party seeking to protect written or electronic communications from discovery does not have to identify them as “privileged” or “confidential” for the attorney-client privilege to attach.²⁹⁰ On the other hand, a party cannot shield a communication from discovery simply by branding it “confidential” or “privileged.”²⁹¹ Similarly, a client cannot cloak a communication in the attorney-client privilege simply by routing it through a lawyer.²⁹² Rather, a communication must bear all of the hallmarks of the privilege for it to be protected.²⁹³

286. DCP Midstream, LP v. Anadarko Petroleum Corp., 303 P.3d 1187, 1199 (Colo. 2013); *see also* Scott v. Peterson, 126 P.3d 1232, 1234 (Okla. 2005) (“[T]he mere status of an attorney-client relationship does not make every communication between attorney and client protected by the privilege.”).

287. Wesp v. Everson, 33 P.3d 191, 197 (Colo. 2001); Brown v. Katz, 868 N.E.2d 1159, 1167 (Ind. Ct. App. 2007).

288. Cencast Servs., L.P. v. United States, 91 Fed. Cl. 496, 502 (Fed. Cl. 2010); *Wesp*, 33 P.3d at 198; *In re* Appraisal of Dole Food Co., 114 A.3d 541, 561 (Del. Ch. 2014) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)); *Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1059 (Fla. Dist. Ct. App. 2015); *Kirk v. Ford Motor Co.*, 116 P.3d 27, 34 (Idaho 2005); *Collins v. Braden*, 384 S.W.3d 154, 161, 163 (Ky. 2012); *Maldonado v. Kiewit La. Co.*, 152 So. 3d 909, 927 (La. Ct. App. 2014); *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 16 (Me. 2016); *Clair v. Clair*, 982 N.E.2d 32, 40–41 (Mass. 2013); *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 116 (Mo. Ct. App. 2012); *State ex rel. AMISUB, Inc. v. Buckley*, 618 N.W.2d 684, 694 (Neb. 2000); *Bhandari v. Artesia Gen. Hosp.*, 317 P.3d 856, 860 (N.M. Ct. App. 2013); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34 (N.Y. 2016); *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004); *State ex rel. HCR Manorcare, L.L.C. v. Stucky*, 776 S.E.2d 271, 282 (W. Va. 2015); *Dishman v. First Interstate Bank*, 362 P.3d 360, 367 (Wyo. 2015).

289. *State ex rel. Koster*, 383 S.W.3d at 118.

290. *See, e.g.*, *Baptiste v. Cushman & Wakefield, Inc.*, No. 03Civ2102(RCC) (THK), 2004 WL 330235, at *1–2 (S.D.N.Y. Feb. 20, 2004) (rejecting the argument that failing to label an e-mail message as privileged deprived it of privileged status); *Blumenthal v. Kimber Mfg. Co.*, 826 A.2d 1088, 1098 (Conn. 2003) (discussing e-mail and stating that “[w]hether a document expressly is marked as ‘confidential’ is not dispositive, but is merely one factor a court may consider in determining confidentiality”); *Chrysler Corp. v. Sheridan*, No. 227511, 2001 WL 773099, at *3 (Mich. Ct. App. July 10, 2001) (involving the inadvertent disclosure of an e-mail message that was not identified as “privileged” or “confidential”).

291. *Blumenthal*, 826 A.2d at 1098.

292. *Stopka v. Am. Family Mut. Ins. Co.*, 816 F. Supp. 2d 516, 528 (N.D. Ill. 2011) (quoting *Equity Residential v. Kendall Risk Mgmt., Inc.*, 246 F.R.D. 557, 563 (N.D. Ill. 2007)); *Opus Corp. v. IBM Corp.*, 956 F. Supp. 1503, 1510 (D. Minn. 1996); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994); *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 526 S.E.2d 750, 755 (Va. 2000).

293. *Stopka*, 816 F. Supp. 2d at 528.

The attorney-client privilege benefits organizations as well as individuals.²⁹⁴ In the organizational context, a common problem is determining who among the entity's employees speaks on its behalf. Courts have traditionally applied two tests to analyze organizational privilege claims: the "control group" test and the "subject matter" test. A few courts have adopted a third test that closely tracks the subject matter test, and which is sometimes called the "modified subject matter test."²⁹⁵

Applying the control group test, communications must be made by an employee who is positioned "to control or take a substantial part in the determination of corporate action in response to legal advice" for the privilege to attach.²⁹⁶ Only these employees qualify as the "client" for attorney-client privilege purposes.²⁹⁷

In comparison, under the subject matter test, a lawyer's communication with any employee may be privileged if it is intended to secure legal advice for the corporation, the employee is communicating with the lawyer at a superior's request or direction, and the employee's responsibilities include the subject of the communication.²⁹⁸ Applying this test, the employee's position or rank is irrelevant to the privilege analysis.²⁹⁹ The Supreme Court embraced the subject matter approach in *Upjohn Co. v. United States*,³⁰⁰ although it declined to formulate a specific test.³⁰¹ Regardless, it is clear following *Upjohn* that under the subject matter test, a lawyer's confidential communications with any employee are privileged when they concern matters within the scope of the employee's responsibilities and the employee knows the communications are intended to enable or facilitate the lawyer's representation of the corporation.³⁰²

294. See, e.g., *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 15 (Me. 2016) (stating that the attorney-client privilege is "available to individuals, corporations, and other entities").

295. See, e.g., *Baisley v. Missiquoi Cemetary Ass'n*, 708 A.2d 924, 931 (Vt. 1998) (following *Upjohn*, the subject-matter test and the modified subject-matter test define the client in the corporate context).

296. EPSTEIN, *supra* note 69, at 189.

297. *Id.*

298. *Id.*

299. *Id.*

300. 449 U.S. 383 (1981).

301. *Id.* at 396.

302. See, e.g., *Grand Canyon Skywalk Dev. L.L.C. v. Cieslak*, Nos. 2:15-cv-01189-JAD-GWF, 2:13-cv-00596-JAD-GWF, 2015 WL 4773585, at *8 (D. Nev. Aug. 13, 2015) ("*Upjohn* holds that the privilege applies to communications with corporate employees, regardless of their position, when the communications concern matters within the scope of the employee's corporate duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation."); *MGA Entm't, Inc. v. Nat'l Prods. Ltd.*, No. CV 10-07083 JAK (SSx), 2012 WL 3150532, at *2 (C.D. Cal. Aug. 2, 2012) ("According to the Supreme Court, the privilege applies to communications by any corporate employee regardless of position when the communications concern matters within the scope of the employee's duties and the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corpora-

The third test is often referred to as the “modified *Harper & Row* test,” or the “*Diversified Industries* test,” after the federal cases from which it derives: *Harper & Row Publishers, Inc. v. Decker*,³⁰³ and *Diversified Industries, Inc. v. Meredith*.³⁰⁴ Again, as noted earlier, some courts describe it as the modified subject matter test.³⁰⁵ Under this test:

The attorney-client privilege [applies] to an employee’s communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.³⁰⁶

The modified *Harper & Row* test or *Diversified Industries* test is basically the subject matter test with the “need to know” factor added, hence the modified subject matter test label.

Courts narrowly or strictly construe the attorney-client privilege because it limits full disclosure of the truth.³⁰⁷ For example, the privilege does not shield from discovery the mere fact that an attorney-client relationship exists, when that relationship began, the general nature of the services for which the client retained the attorney, or the terms and conditions of the attorney’s engagement.³⁰⁸ While the privilege protects the

tion.”); *United States v. Ghavami*, 882 F. Supp. 2d 532, 538–39 (S.D.N.Y. 2012) (explaining that “the attorney-client privilege protects communications by corporate employees to counsel for the corporation who is acting as a lawyer, as long as the communications are made at the direction of corporate superiors in order to secure legal advice and the employees are aware that they are being questioned in connection with the provision of such advice”).

303. 423 F.2d 487 (7th Cir. 1970).

304. 572 F.2d 596 (8th Cir. 1977).

305. See *supra* note 295 and accompanying text.

306. *In re Bieter Co.*, 16 F.3d 929, 936 (8th Cir. 1994) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)).

307. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012); *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135, 167 (Conn. 2004); *Ctr. Partners, Ltd. v. Growth Head GP, L.L.C.*, 981 N.E.2d 345, 356 (Ill. 2012); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003); *Clair v. Clair*, 982 N.E.2d 32, 40 (Mass. 2013); *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34 (N.Y. 2016); *Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010) (quoting *Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va. 1988)); *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 798 (Wis. 2002) (quoting cases).

308. See, e.g., *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) (rejecting the attorney-client privilege with respect to a law firm memorandum); *State ex rel. Koster v. Cain*, 383 S.W.3d 105, 119 (Mo. Ct. App. 2012) (“[T]he great weight of authority on the subject recognizes that with rare exception, the mere fact of the existence of a relationship between an attorney and a client, and

content of attorney-client communications from disclosure, it does not prevent disclosure of the facts communicated.³⁰⁹ Those facts remain discoverable by other means.³¹⁰ Nor does the attorney-client privilege shield from discovery or communications in which an attorney is giving business advice rather than legal advice.³¹¹ These essential principles are as true in internal investigation cases as they are elsewhere.³¹²

Finally, the attorney-client privilege may be waived either voluntarily or by implication.³¹³ The most obvious example of a waiver is a client's intentional revelation of otherwise privileged information to a third party who is not necessary to the client's representation.³¹⁴ The party seeking to overcome the privilege generally bears the burden of establishing a waiver,³¹⁵ although some courts hold that that the party asserting the privilege bears the burden of establishing that it has not been waived.³¹⁶

the nature of the fee arrangements between the attorney and a client are not attorney-client privileged communications.”); *Commonwealth v. Chmiel*, 889 A.2d 501, 531–32 (Pa. 2005) (determining that a fee arrangement with a lawyer was not privileged). *But see* *L.A. Cty. Bd. of Supervisors v. Super. Ct.*, 386 P.3d 773, 783 (Cal. 2016) (concluding that a lawyer's invoice for work “in active and ongoing litigation” is privileged); *State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist.*, 959 N.E.2d 524, 529–30 (Ohio 2011) (explaining that to the extent narrative portions of attorney fee statements describe legal services performed for a client, they are privileged because they represent communications from the attorney to the client about matters for which the attorney was retained).

309. *N.J. v. Sprint Corp.*, 258 F.R.D. 421, 426 (D. Kan. 2009) (quoting *Williams v. Sprint/United Mgmt. Co.*, No. 03–2200, 2006 WL 1867478, at *10 (D. Kan. July 1, 2006)); *Hagans v. Gatorland Kubota, L.L.C./Sentry Ins.*, 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010); *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 341 (Nev. 2017); *W. Horizons Living Ctrs. v. Feland*, 853 N.W.2d 36, 41 (N.D. 2014); *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413, 424 (R.I. 2017); *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1070 (Utah 2013); *Newman v. Highland Sch. Dist.* No. 203, 381 P.3d 1188, 1191 (Wash. 2016).

310. *Collins*, 384 S.W.3d at 159.

311. *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 380 (W.D. Va. 2012) (applying Virginia law); *Costco Wholesale Corp. v. Super. Ct.*, 219 P.3d 736, 743 (Cal. 2009); *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 78 n.8 (Pa. 2011).

312. *See, e.g.*, *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. 28, 45 (E.D.N.Y. 2013) (finding that an investigating lawyer's communications with human resources staff were not privileged because “their predominant purpose was to provide human resources and thus business advice, not legal advice”).

313. *Cormack v. United States*, 118 Fed. Cl. 39, 43 n.3 (Fed. Cl. 2014); *People v. Curren*, 348 P.3d 467, 480 (Colo. App. 2014).

314. *See Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012) (noting that disclosure to third parties waives the privilege unless it is necessary for the client to obtain informed legal advice).

315. *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001); *Yocabet v. UPMC Presbyterian*, 113 A.3d 1012, 1019 (Pa. Super. Ct. 2015); *Andrews v. Ridco, Inc.*, 863 N.W.2d 540, 547 (S.D. 2015); *McAfee v. State*, 467 S.W.3d 622, 643 (Tex. App. 2015); *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 89 (W. Va. 2003).

316. *See, e.g.*, *United States v. Bolander*, 722 F.3d 199, 222 (4th Cir. 2013); *In re Grand Jury Investig.*, 902 N.E.2d 929, 932 (Mass. 2009); *Ambac Assur. Corp. v.*

B. *Work Product Immunity*

In addition to the attorney-client privilege, key information may be protected as confidential under the work product doctrine. The attorney-client privilege and the work product doctrine are separate and distinct.³¹⁷ Although courts and lawyers alike often describe the work product doctrine as the “work product privilege,” it is actually a form of qualified immunity.³¹⁸

Unlike the attorney-client privilege, which is the client’s to assert, it is commonly said that the lawyer holds work product immunity.³¹⁹ It is unquestionably true that a lawyer may assert work product immunity on her own behalf.³²⁰ But in fact, both the lawyer and the client hold work product immunity, and either may assert it to avoid discovery.³²¹ Similarly, either the client or the lawyer may waive work product immunity, although only with respect to herself.³²²

A party claiming work product protection bears the burden of establishing that it applies to the information at issue.³²³ “As with the attorney-client privilege, an assertion that a document [or other information] is protected by the work product doctrine must be established by specific facts and not conclusory statements.”³²⁴ A party “cannot create work

Countrywide Home Loans, Inc., 57 N.E.3d 30, 35 (N.Y. 2016); *Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010).

317. *Doe v. Twp. High Sch. Dist. 211*, 34 N.E.3d 652, 670 (Ill. App. Ct. 2015) (quoting *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 326 (Ill. 1991)); *Elkton Care Ctr. Assocs. Ltd. P’ship v. Quality Care Mgmt., Inc.*, 805 A.2d 1177, 1183 (Md. Ct. Spec. App. 2002).

318. *Anderson v. Marsh*, 312 F.R.D. 584, 592 (E.D. Cal. 2015); *Wachovia Bank, N.A. v. Clean River Corp.*, 631 S.E.2d 879, 884 (N.C. Ct. App. 2006) (quoting *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 551 S.E.2d 873, 876 (N.C. Ct. App. 2001)).

319. *OXY Res. Cal. L.L.C. v. Super. Ct.*, 9 Cal. Rptr. 3d 621, 645 (Ct. App. 2004); *Clausen v. Nat’l Grange Mut. Ins. Co.*, 730 A.2d 133, 138 (Del. Super. Ct. 1997).

320. *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2010).

321. *In re Naranjo*, 768 F.3d 332, 344 & n.17 (4th Cir. 2014); *In re Grand Jury Subpoenas*, 561 F.3d 408, 411 (5th Cir. 2009); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 n.15 (8th Cir. 1997); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 347 (Nev. 2017).

322. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994); *see also Holey v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (suggesting, however, that a lawyer might be forced to surrender work product following a client’s waiver if the lawyer’s insistence on confidentiality harmed the client).

323. *Vicor Corp. v. Vigilant Ins. Co.*, 674 F.3d 1, 17 (1st Cir. 2012); *Solis v. Food Emp’rs Labor Relations Ass’n*, 644 F.3d 221, 232 (4th Cir. 2011).

324. *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 382 (W.D. Va. 2012).

product solely by the nomenclature used to entitle documents.”³²⁵ Simply branding a document as “work product” does not make it so.³²⁶

Work product protection is broader than that conferred by the attorney-client privilege in terms of the range of information it shields from discovery.³²⁷ Work product immunity is not limited, as is the attorney-client privilege, to confidential communications between an attorney and a client.³²⁸ The work product doctrine protects lawyers’ effective trial preparation by immunizing certain information from discovery, including materials prepared by attorneys’ agents and consultants.³²⁹

In addition, and consistent with the purposes and contours of the work product doctrine generally, work product immunity is not necessarily waived by disclosure to a third-party.³³⁰ Rather, for disclosure to a third party to waive work product protection, the third party must be an adversary or a conduit to an adversary.³³¹

There are two categories of attorney work product: “fact” or “ordinary” work product, but better described as “tangible” work product; and “opinion” or “core” work product, also termed “intangible” work product. To qualify as tangible work product, the material sought to be protected must be a document or tangible thing prepared in anticipation of litiga-

325. *Henderson v. Newport Cty. Reg'l YMCA*, 966 A.2d 1242, 1249 (R.I. 2009).

326. *See, e.g., In re Google Inc.*, 462 F. App'x 975, 979 (Fed. Cir. 2012) (disregarding the description of an e-mail message as containing work product in light of the content of the message); *Ledgin v. Blue Cross & Blue Shield of Kan. City*, 166 F.R.D. 496, 499 (D. Kan. 1996) (describing a party's document stamp of “attorney work product” as a “self-serving embellishment” that did not preclude discovery).

327. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986)); *100 Harborview Dr. Condo. Council of Unit Owners v. Clark*, 119 A.3d 87, 113 (Md. Ct. Spec. App. 2015); *Draggin' Y Cattle Co. v. Addink*, 312 P.3d 451, 460 (Mont. 2013); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 347 (Nev. 2017); *State v. Lead Indus. Ass'n, Inc.*, 64 A.3d 1183, 1192 (R.I. 2013).

328. *Reg'l Airport Auth. of Louisville v. LFG, L.L.C.*, 460 F.3d 697, 713 (6th Cir. 2006).

329. *See, e.g., In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (protecting communications with a party's trial strategy and deposition preparation consultant).

330. *See, e.g., In re Grand Jury Proceedings #3*, 847 F.3d 157, 165 (3d Cir. 2017) (stating that although the target of a grand jury investigation, Doe, “waived the attorney-client privilege by forwarding the email to his accountant, the document still retained its work-product status because it was used to prepare for Doe's case against those suing him”); *United States v. Stewart*, 287 F. Supp. 2d 461, 468–69 (S.D.N.Y. 2003) (finding no waiver of work product immunity where the defendant forwarded an e-mail message from her lawyer to her adult daughter, who was her closest confidante); *In re Lake Lotawana Cmty. Improvement Dist.*, 563 B.R. 909, 922 (Bankr. W.D. Mo. 2016) (stating that “[m]ere disclosure to a third party” does not waive work product immunity and concluding that disclosure to a mediator is not a waiver).

331. *O'Boyle v. Borough of Longport*, 94 A.3d 299, 313–18 (N.J. 2014); *Lead Indus. Ass'n, Inc.*, 64 A.3d at 1196.

tion by or for a party, or by or for the party's representative.³³² "Opinion" work product refers to an attorney's conclusions, legal theories, mental impressions, or opinions.³³³

The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3) and its state counterparts.³³⁴ Rule 26(b)(3) provides in pertinent part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.³³⁵

As with the attorney-client privilege, work product protection is not absolute and may be waived,³³⁶ although conduct that waives the privilege may not waive work product immunity.³³⁷ Consequently, any alleged waiver of the two doctrines must be analyzed separately.³³⁸

As for the principle that work product immunity is not absolute, consider, for example, that it does not shield from discovery facts known by or

332. FED. R. CIV. P. 26(b)(3).

333. *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. 1995).

334. Because the work product doctrine has been codified in Rule 26, in federal courts, work product immunity is governed by the uniform federal standard even in diversity cases. *Pemberton v. Republic Servs., Inc.*, 308 F.R.D. 195, 200 (E.D. Mo. 2015); *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 247 (D.D.C. 2013) (quoting *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988)).

335. FED. R. CIV. P. 26(b)(3).

336. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010); *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301-02 (Fed. Cir. 2006); *Ardon v. City of Los Angeles*, 366 P.3d 996, 1001 (Cal. 2016).

337. *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Ct.*, 280 P.3d 240, 248 (Mont. 2012).

338. *In re Kellogg, Brown & Root, Inc.*, 796 F.3d 137, 145 (D.C. Cir. 2015) (quoting EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 1027 (5th ed. 2007)); *Doe v. Twp. High Sch. Dist. 211*, 34 N.E.3d 652, 670 (Ill. App. Ct. 2015) (quoting *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 326 (Ill. 1991)).

shared with a lawyer.³³⁹ Moreover, as Rule 26(b)(3) makes clear, a party may discover its adversary's tangible work product if it demonstrates substantial need of the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.³⁴⁰

In comparison to tangible work product, opinion work product receives almost absolute protection against discovery.³⁴¹ To discover an adversary's opinion work product, a party must demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product.³⁴² Opinion work product is discoverable only if the attorneys' conclusions, mental impressions, or opinions are at issue in

339. *Meltzer Contracting Co. L.L.C. v. Stephens*, 642 F. Supp. 2d 1192, 1204 (D. Haw. 2009); *Whitlow v. Martin*, 259 F.R.D. 349, 354 (C.D. Ill. 2009).

340. FED. R. CIV. P. 26(b)(3). In contrast, communications protected by the attorney-client privilege do not become discoverable by virtue of the inquiring party's inability to obtain the information from other sources. *St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 776–77 (Ky. 2005). Nor are privileged materials discoverable based on the requesting party's "substantial need." See *United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012) (quoting *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494–95 (9th Cir. 1989)); *United States v. Wells Fargo Bank*, 132 F. Supp. 3d 558, 563 (S.D.N.Y. 2015) (explaining that the attorney-client privilege cannot be overcome by a showing of sufficient need); *Hagans v. Gatorland Kubota, L.L.C./Sentry Ins.*, 45 So. 3d 73, 76 (Fla. Dist. Ct. App. 2010) (referring to "need"); *Collins v. Braden*, 384 S.W.3d 154, 159 (Ky. 2012) (referring to "great need and hardship"). Likewise, "undue hardship" cannot be invoked to overcome the attorney-client privilege. *Hagans*, 45 So. 3d at 76.

341. *Drummond Co. v. Conrad & Sherer, L.L.P.*, 885 F.3d 1324, 1335 (11th Cir. 2018) (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994)); *Smith v. Scottsdale Ins. Co.*, 621 F. App'x 743, 746 (4th Cir. 2015) (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999)); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 n.3 (9th Cir. 2014) (quoting *United States v. Deloitte L.L.P.*, 610 F.3d 129, 135 (D.C. Cir. 2010)); *Deloitte L.L.P.*, 610 F.3d at 135 (noting the characterization of opinion work product as "virtually undiscoverable" (quoting *Director, Office of Thrift Supervision v. Vinson & Elkins, L.L.P.*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (quoting *In re Ford Motor Co.*, 110 F.3d 954, 962 n.7 (3d Cir. 1997)); *In re Veiga*, 746 F. Supp. 2d 27, 35 (D.D.C. 2010) (characterizing opinion work product as "virtually undiscoverable" (quoting *Director*, 124 F.3d at 1307); see also *Scott v. Peterson*, 126 P.3d 1232, 1235 (Okla. 2005) (stating that opinion work product "is not discoverable except in extraordinary circumstances"). *But cf.* *Chua v. Johnson*, 784 S.E.2d 449, 454 (Ga. Ct. App. 2016) ("Unlike the qualified privilege afforded other work product, opinion work product is entitled to an absolute privilege and is therefore absolutely protected from disclosure."); *TP Orthodontics, Inc. v. Kesling*, 15 N.E.3d 985, 995 (Ind. 2014) (noting that opinion work product is not discoverable); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 347 (Nev. 2017) (quoting an earlier Nevada case in explaining that opinion work product is undiscoverable); *Henderson v. Newport Cty. Reg'l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009) (stating that opinion work product is absolutely immune from discovery).

342. *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 333 (S.D.N.Y. 2003).

the case and there is a compelling need for their discovery.³⁴³ The circumstances in which this test is met are exceptional and rare.³⁴⁴

In contrast to the attorney-client privilege, which is not limited to litigation-related communications,³⁴⁵ materials must be generated or prepared “in anticipation of litigation” to qualify as work product.³⁴⁶ Materials prepared in anticipation of litigation retain their work product immunity even if litigation never ensues.³⁴⁷ Documents prepared in the ordinary course of business, or that would have been prepared regardless of anticipated litigation, however, do not constitute work product.³⁴⁸

As the anticipation of litigation requirement signals, work product immunity attaches before litigation is initiated.³⁴⁹ In fact, it is “not necessary that litigation be threatened or imminent, as long as the prospect of litigation is identifiable because of claims that have already arisen.”³⁵⁰ Some courts state the “anticipation of litigation” requirement a bit differently, holding that work product immunity attaches if there is “a substantial probability that litigation will ensue.”³⁵¹ Regardless of the test employed, the remote prospect of litigation will not bring the work product doctrine into play.³⁵²

343. *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992).

344. *In re Cendant Corp.*, 343 F.3d at 663; *Henderson v. Holiday CVS, L.L.C.*, 269 F.R.D. 682, 688 (S.D. Fla. 2010) (quoting *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994)).

345. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App. 1999).

346. *Save Sunset Beach Coal. v. City of Honolulu*, 78 P.3d 1, 20 (Haw. 2003); *Brown v. Katz*, 868 N.E.2d 1159, 1166 (Ind. Ct. App. 2007); *Wichita Eagle & Beacon Pub. Co. v. Simmons*, 50 P.3d 66, 85 (Kan. 2002); *Miller v. J.B. Hunt Transp., Inc.*, 770 A.2d 1288, 1291–93 (N.J. Super. Ct. App. Div. 2001); *State ex rel. Brandenburg v. Blackmer*, 110 P.3d 66, 69 (N.M. 2005); *Scott v. Peterson*, 126 P.3d 1232, 1235 (Okla. 2005); *Henderson v. Newport Cty. Reg’l YMCA*, 966 A.2d 1242, 1247 (R.I. 2009); *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 799–800 (W. Va. 2014) (quoting *State ex rel. Erie Prop. & Cas. Co. v. Mazzone*, 684 S.E.2d 31, 40 (W. Va. 2007)). *But see Laguna Beach Cty. Water Dist. v. Super. Ct.*, 22 Cal. Rptr. 3d 387, 393 (Ct. App. 2004) (explaining that California law has no “anticipation of litigation” requirement); *Estate of Paterno v. Nat’l Collegiate Athletic Ass’n*, 168 A.3d 187, 201 (Pa. Super. Ct. 2017) (rejecting the assertion that under Pennsylvania law the work product doctrine is limited to materials prepared in anticipation of litigation).

347. EPSTEIN, *supra* note 69, at 1167.

348. *Solis v. Food Emp’rs Labor Relations Ass’n*, 644 F.3d 221, 232 (4th Cir. 2011) (quoting *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992)); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001).

349. *State v. Lead Indus. Ass’n, Inc.*, 64 A.3d 1183, 1193 (R.I. 2013).

350. *Nat’l Tank Co. v. 30th Judicial Dist. Ct.*, 851 S.W.2d 193, 205 (Tex. 1993).

351. *Wichita Eagle & Beacon*, 50 P.3d at 85.

352. *Lamar Advert. of S.D., Inc. v. Kay*, 267 F.R.D. 568, 577–78 (D.S.D. 2010); *Sajda v. Brewton*, 265 F.R.D. 334, 339 (N.D. Ind. 2009) (quoting *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983)).

Finally, materials said to be work product may have been prepared for multiple purposes. For example, a lawyer may create documents for a business purpose and in anticipation of litigation. Because courts approach this problem in one of two ways, the result in such a case depends on the jurisdiction. In some jurisdictions, a court must discern the primary motivating purpose behind the documents' creation.³⁵³ "If the primary motivating purpose is other than to assist in pending or impending litigation," then the materials are not protected as work product.³⁵⁴ Other courts have abandoned the primary motivating purpose test for a "because of" test.³⁵⁵ Using this test, the "work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose."³⁵⁶ Regardless of the test applied, this is a case- and fact-specific inquiry.³⁵⁷

C. *The Waiver Threat*

As already noted, a party may waive the attorney-client privilege and work product immunity. In the internal investigations context, "[t]here are many reasons, ranging from leniency under the Sentencing Guidelines to restoration of the corporate image, that a client may decide to waive the attorney-client privilege."³⁵⁸ A waiver may be necessary where the internal investigation relates to the organization's relationship or involvement with various federal agencies or programs.³⁵⁹ But while "waiver" is generally understood to refer to the intentional or voluntary relinquishment of a known right or privilege, waiver in the attorney-client privilege and work

353. Laney *ex rel.* Laney v. Schneider Nat'l Carriers, Inc., 259 F.R.D. 562, 566 (N.D. Okla. 2009); *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ.1260 (SS), 1993 WL 561125, at *3 (S.D.N.Y. Dec. 23, 1993) (quoting cases); *Ex parte Cryer*, 814 So. 2d 239, 247 (Ala. 2001) (quoting cases); *Heffron v. Dist. Ct. of Okla. Cty.*, 77 P.3d 1069, 1079 (Okla. 2003); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 784 (Tenn. Ct. App. 1999); *State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 757 S.E.2d 788, 800–02 (W. Va. 2014).

354. *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, at *3.

355. See, e.g., *Waymo L.L.C. v. Uber Techs., Inc.*, 870 F.3d 1350, 1362 (Fed. Cir. 2017) (quoting *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011)); *F.T.C. v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015); *Richey*, 632 F.3d at 568; *In re Prof'l Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976–77 (7th Cir. 1996); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (Iowa 2004); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 347 (Nev. 2017).

356. *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002).

357. See, e.g., *In re Prof'l Direct Ins. Co.*, 578 F.3d at 439 (determining whether documents were prepared in anticipation of litigation required examination of the documents and the context in which they were prepared).

358. DOCKTERMAN, *supra* note 30, at 325.

359. *Id.*

product contexts does not require intentional or knowing conduct by a party.³⁶⁰ A party may waive the privilege or work product immunity impliedly or inadvertently. The implied or inadvertent waiver of the attorney-client privilege with respect to a document or communication does not necessarily waive work product immunity with respect to the same information, however, because the two doctrines “are independent and grounded on different policies.”³⁶¹

If a party waives its attorney-client privilege or tangible work product immunity, the question then becomes the scope of the waiver. The concern for the waiving party is whether it triggered a subject matter waiver, i.e., whether it has waived the privilege or tangible work product protection for all communications or materials relating to the same subject matter.³⁶² The subject matter waiver doctrine does not apply to opinion work product.³⁶³

There is “no bright line test” for determining whether communications or materials concern the same subject matter.³⁶⁴ Courts tend to “construe the scope of subject matter as narrowly as possible but so as to effect ‘fundamental fairness’ to both the party seeking to preserve [confidentiality] and the party seeking to inquire as to a matter that has been

360. *See, e.g.*, *Curto v. Med. World Commc'ns, Inc.*, 783 F. Supp. 2d 373, 379–81 (E.D.N.Y. 2011) (reasoning that the plaintiff could not avoid waiving her attorney-client privilege or work product immunity by declaring that she did not intend to waive them when she delivered protected documents to the defendants, observing that a party may waive work product immunity when it uses information in a manner inconsistent with such immunity, and explaining why that was the situation in this case); *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 3705902, at *5 (C.D. Cal. Sept. 22, 2010) (explaining that although MGA did not intend to waive the attorney-client privilege by producing a document, a party's subjective intent does not control whether a waiver occurred); *see also* EPSTEIN, *supra* note 69, at 508 (“Waiver can and does occur by operation of the law, despite the fact that the waiver may have been unknowing, involuntary, and unintentional.”); THOMAS E. SPAHN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE: A PRACTITIONER'S GUIDE* 554 (3d ed. 2013) (“In the waiver context, courts agree that a client can waive the privilege without intending to do so.”).

361. EPSTEIN, *supra* note 69, at 1280; *see also* *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 326 (Ill. 1991) (stating that the attorney-client privilege and work product doctrine “are separate and distinct protections and waiver of one does not serve as waiver of the other”).

362. *See, e.g.*, *Morris v. Scenera Research, L.L.C.*, No. 09 CVS 19678, 2011 WL 3808544, at *11 (N.C. Super. Ct. Aug. 26, 2011) (“A waiver of certain communications can waive the attorney-client privilege not only as to the particular communication but to other communications relating to that same subject matter.”).

363. *DeMartini v. Town of Gulf Stream*, Case No. 16-81371-CIV-MID-DLEBROOKS, 2017 WL 1376383, at *3 (S.D. Fla. Apr. 11, 2017) (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir. 1994)); *Puckett v. Ocwen Loan Servicing, Inc.*, 5:16-CV-05909, 2016 WL 6828609, at *3 (S.D. W. Va. Nov. 17, 2016) (citing *In re Martin Marietta Corp.*, 856 F.2d 619, 623, 625–26 (4th Cir. 1988)).

364. *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005).

partially disclosed.”³⁶⁵ Indeed, the subject matter waiver doctrine is intended to prevent a party from selectively disclosing otherwise confidential material or communications that advance its case while sequestering unfavorable information.³⁶⁶ Thus, where the disclosure is inadvertent, waiver should generally be limited to the documents or communications disclosed rather than being extended to other materials concerning the same subject.³⁶⁷ Where a subject matter waiver is fairly in play, however, the following factors may be relevant in deciding whether disclosed and undisclosed communications relate to the same subject matter:

- 1) the general nature of the lawyer’s assignment; 2) the extent to which the lawyer’s activities in fulfilling that assignment are undifferentiated and unitary or are distinct and severable; 3) the extent to which the disclosed and undisclosed communications share, or do not share, a common nexus with a distinct activity; 4) the circumstances in and purposes for which disclosure originally was made; 5) the circumstances in and purposes for which further disclosure is sought; 6) the risks to the interests protected by the privilege if further disclosure were to occur; and 7) the prejudice which might result if disclosure were not to occur.³⁶⁸

In federal courts, subject matter waiver is controlled by Federal Rule of Evidence 502(a), which provides that a waiver of the attorney-client privilege or work product immunity reaches undisclosed communications or information “only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.”³⁶⁹ As the advisory committee’s notes to Rule 502(a) explain, the rule “is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.”³⁷⁰ Rule 502(a)(1) clarifies that the inadvertent disclosure of privileged communications or work product material will not produce a subject matter waiver.³⁷¹

365. EPSTEIN, *supra* note 69, at 791.

366. *Ctr. Partners, Ltd. v. Growth Head GP, L.L.C.*, 981 N.E.2d 345, 357 (Ill. 2012).

367. EPSTEIN, *supra* note 69, at 791.

368. *United States v. Skeddle*, 989 F. Supp. 917, 919 (N.D. Ohio 1997) (quoting a prior order in the case).

369. FED. R. EVID. 502(a).

370. FED. R. EVID. 502 Judicial Conference Advisory Committee Explanatory Note (Revised 11/28/2007) (citing *In re United Mine Workers of Am. Emp. Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)).

371. *See id.* (“Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.”).

Two recent federal cases, *Banneker Ventures, L.L.C v. Graham*³⁷² and *Doe 1 v. Baylor University*,³⁷³ illustrate the risk of waiver and the potentially uncertain application of the attorney-client privilege and work product immunity in internal investigations.³⁷⁴

1. *Banneker Ventures*

Banneker Ventures arose out of Banneker Ventures, L.L.C.'s (Banneker) failed attempt to develop property above a Washington, DC commuter rail station.³⁷⁵ The proposed development was known as the Florida Avenue Project.³⁷⁶ Banneker won the bid to develop the property from the Washington Metropolitan Area Transit Authority (WMATA), but after a year of related negotiations, WMATA terminated its relationship with Banneker in late March 2010.³⁷⁷ One month later, Banneker's lawyer, A. Scott Bolden, wrote to WMATA and outlined what Banneker believed to be misconduct by the organization and its board of directors.³⁷⁸ Pointedly, Banneker believed that WMATA board member Jim Graham had secretly schemed to steer the Florida Avenue Project to a different developer that supported him politically.³⁷⁹ Bolden's letter asked WMATA to restart negotiations so that Banneker could launch the Florida Avenue Project.³⁸⁰ Bolden's letter also warned WMATA that Banneker would seek legal and equitable remedies if negotiations over the Florida Avenue Project did not resume.³⁸¹ WMATA did not reopen negotiations.³⁸²

Over two years later, WMATA retained Cadwalader, Wickersham & Taft LLP to "provide investigative and legal services regarding the actions of WMATA's Board in connection with the Florida Avenue Project."³⁸³

372. 253 F. Supp. 3d 64 (D.D.C. 2017).

373. 320 F.R.D. 430 (W.D. Tex. 2017).

374. *See, e.g., Doe v. Hamilton Cty. Bd. of Educ.*, Case No. 1:16-cv-373, 2018 WL 542971, at *4 (E.D. Tenn. Jan. 24, 2018) (concluding that the defendant waived the attorney-client privilege, tangible work product immunity, and opinion work product immunity by publicly releasing the report of an internal investigation and thereafter stating that it intended to rely on the investigation and report to defend lawsuits against it); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 346–47, 349 (Nev. 2017) (affirming the trial court's decision that Wynn Resorts waived its attorney-client privilege by disclosing the report of an internal investigation conducted by the Freeh Group, but issuing a writ of prohibition directing the trial court to determine the applicability of the work product doctrine).

375. *Banneker Ventures, L.L.C. v. Graham*, 798 F.3d 1119, 1125 (D.C. 2015).

376. *Banneker Ventures*, 253 F. Supp. 3d at 68.

377. *Id.*

378. *Id.*

379. *Banneker Ventures*, 798 F.3d at 1125.

380. *Banneker Ventures*, 253 F. Supp. 3d at 68.

381. *Id.*

382. *Id.*

383. *Id.* at 69 (citing and quoting WMATA's memorandum in support of its motion for a protective order) (internal quotations omitted).

Cadwalader lawyers interviewed thirty-four witnesses, nineteen of whom were current or former WMATA employees or board members, and prepared fifty-one interview memoranda.³⁸⁴ The Cadwalader lawyers who created the memoranda labeled them “attorney work product.”³⁸⁵

At the conclusion of the investigation, Bradley Bondi of Cadwalader delivered the firm’s report (the Bondi Report) to WMATA.³⁸⁶ The WMATA board recommended public release of the Bondi Report.³⁸⁷ The Bondi Report included references to, and citations from, the Cadwalader lawyers’ witness interview memos.³⁸⁸

Banneker sued WMATA, Graham, and others for cutting it out of the Florida Avenue Project.³⁸⁹ In discovery, Banneker requested the fifty-one interview memoranda.³⁹⁰ WMATA moved for a protective order on the basis that the memos were protected against discovery by the work product doctrine and attorney-client privilege.³⁹¹

Beginning its analysis with the work product doctrine, the court observed that to be undiscoverable materials must have been created in anticipation of litigation, and that this requirement incorporates both temporal and objective elements.³⁹² WMATA argued that it anticipated litigation because the Bondi Report and the underlying interviews were sparked by Bolden’s letter threatening possible legal action.³⁹³ WMATA also filed a declaration from former Cadwalader lawyer Emily Rockwood, which stated that she knew Banneker might sue WMATA over the Florida Avenue Project; that the interview memoranda were “intended to be internal work product for use by the Cadwalader legal team”; and that the citations to the memos in the Bondi Report “were ‘intended for reference by the Cadwalader team.’”³⁹⁴ Banneker countered that WMATA did not reasonably anticipate litigation because it waited more than two years after receiving Bolden’s letter to hire Cadwalader and did nothing litigation-related in the interim.³⁹⁵ Banneker also argued that other evidence showed that the investigation was conducted for business reasons.³⁹⁶ According to Banneker, the true purpose of the investigation was to ascertain whether WMATA directors were performing their duties as public servants

384. *Id.*

385. *Id.* (internal quotations omitted).

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 68.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* (quoting Rockwood’s declaration) (internal quotations omitted).

395. *Id.*

396. *Id.*

or whether new rules and procedures were required, and to respond to public demands for accountability.³⁹⁷

While acknowledging that “there is no standard or rule regarding how close in time potential litigation must be,” the *Banneker Ventures* court concluded that the interviews were not timed to anticipated litigation.³⁹⁸ Although Bolden’s letter prompted WMATA to anticipate litigation, the court was bothered by the gap between WMATA’s receipt of the letter and its retention of Cadwalader, as well as by the lack of any action indicating anticipated litigation during those two years.³⁹⁹ Absent evidence of any intervening action by WMATA regarding Bolden’s letter, Cadwalader’s investigation could not be tied to anticipated litigation.⁴⁰⁰ “The fact that litigation resulted shortly after the public disclosure of the Bondi Report [did] not show that WMATA retained Cadwalader in reasonable anticipation of that litigation.”⁴⁰¹ The court thus found that the temporal element of work product protection was missing.⁴⁰²

The court further found that WMATA failed the work product doctrine’s motivational test because it could not show that the Cadwalader lawyers created the interview memos in preparation for litigation.⁴⁰³ “Documents that would have been created in the ordinary course of business irrespective of litigation” are not work product,⁴⁰⁴ nor are documents that would have been created in substantially similar form regardless of litigation.⁴⁰⁵ Here, it was apparent that “absent any anticipated litigation, WMATA would have conducted the same investigation to evaluate its business practices and revise the Standards of Conduct for the Board of Directors.”⁴⁰⁶

Because the interview memoranda were not protected as work product, the court ordered WMATA to produce the memos describing interviews with non-WMATA personnel.⁴⁰⁷ The court then turned to the interview memoranda for WMATA personnel, which were potentially protected by WMATA’s attorney-client privilege.⁴⁰⁸

397. *See id.* (reciting *Banneker*’s argument).

398. *Id.* at 72.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* (quoting *In re Veiga*, 746 F. Supp. 2d 27, 34 (D.D.C. 2010)).

404. *Id.* (quoting *Duran v. Andrew*, No. 09-730, 2010 WL 1418344, at *4–5 (D.D.C. Apr. 5, 2010)).

405. *Id.* (quoting *FTC v. Boehringer Ingelheim Pharms.*, 778 F.3d 142, 149 (D.C. Cir. 2015)).

406. *Id.* at 72–73.

407. *Id.* at 73.

408. *See id.* (noting that WMATA could not invoke the attorney-client privilege with respect to the memos regarding interviews of non-WMATA personnel).

Banneker argued that WMATA waived the privilege by including parts of the interview memos in the Bondi Report, which it released to the public.⁴⁰⁹ The court accepted Banneker's argument, first explaining:

[T]he Bondi Report was intended to be an internal document . . . and not slated for public disclosure. Upon receipt of the Bondi Report, the WMATA Board decided to release it to the public. . . . By disclosing the Bondi Report, WMATA chose to disclose the legal and factual conclusions . . . contained in the report and, therefore, waived any claim of attorney-client privilege that existed with respect to the Bondi Report itself.⁴¹⁰

The court next evaluated whether WMATA's public disclosure of the Bondi Report operated as a subject matter waiver of the privilege vis-à-vis the underlying interview memoranda.⁴¹¹ In deciding this issue, the court looked to Federal Rule of Evidence 502(a),⁴¹² which provides that a disclosure that waives the attorney-client privilege or work product doctrine reaches undisclosed communications or information "only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together."⁴¹³ The court concluded that the Rule 502(a) test was met:

The . . . waiver of privilege as to the Bondi Report was intentional . . . and the disclosed and undisclosed communications and information concern the same subject matter. The Bondi Report disclosed counsel's legal and factual conclusions about the events during negotiations with Banneker for the Florida Avenue Project and the WMATA Board of Directors' Standards of Conduct—the exact subject of the . . . interview memoranda. In fact, the Bondi Report cites extensively to the interview memoranda. . . . Additionally, WMATA has not argued that the interview memoranda contain information outside the scope of the investigation or [the] Bondi Report.

Finally, . . . fairness dictates the Bondi Report and interview memoranda should be considered together. . . . WMATA has permitted direct citation and reference to confidential communications to be disclosed publically in the Bondi Report. WMATA has also used the Bondi Report to its advantage in this litigation. Fairness dictates that if WMATA is able to use the Bondi Report

409. *Id.*

410. *Id.*

411. *Id.* at 73–74.

412. *Id.* at 74 (quoting *U.S. Airline Pilots v. Pension Benefit Guar. Corp.*, 274 F.R.D. 28, 31 (D.D.C. 2011) (quoting *FED. R. EVID.* 502)).

413. *FED. R. EVID.* 502(a).

and facts disclosed in that report to support its claims and defenses, then Banneker is entitled to the remaining facts and information contained in the interview memoranda that were not included in the Bondi Report. The intent of subject matter waiver is to prevent a party from selectively disclosing information and documents that would otherwise be privileged to gain a tactical advantage. WMATA cannot both benefit from the disclosure of the Bondi Report and prevent further disclosure of the remaining information in the interview memoranda.⁴¹⁴

The court did hold that WMATA could redact information from the interview memoranda before production that was unrelated to the subjects covered by the Bondi Report, and announced that it would issue a protective order along those lines.⁴¹⁵ In the end, the *Banneker Ventures* court granted in part and denied in part WMATA's motion for a protective order.⁴¹⁶ Banneker, however, was the clear winner.

2. Doe 1 v. Baylor University

*Doe 1 v. Baylor University*⁴¹⁷ arose out of a sexual assault scandal that decimated the Baylor football program and ultimately engulfed the university.⁴¹⁸ Multiple young women alleged that they were raped by Baylor football players beginning in 2011 or so.⁴¹⁹

In September 2015, in the midst of the scandal, Baylor's Board of Regents hired Pepper Hamilton, LLP to "conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lens of specific cases."⁴²⁰ In February 2016, Baylor and Pepper Hamilton amended their engagement agreement to include the following language:

Specifically, Pepper [Hamilton] has been engaged . . . to provide legal advice and guidance to the University in connection with the independent and external review [previously identified] and other matters related to the institutional response to ongoing

414. *Banneker Ventures*, 253 F. Supp. 3d at 74.

415. *Id.* at 74–75.

416. *Id.* at 75.

417. 320 F.R.D. 430 (W.D. Tex. 2017).

418. See generally Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html?_r=0 [<https://perma.cc/6AB5-9W66>] (reporting that since a young woman reported being raped by a Baylor football player in 2012, allegations of sexual assault by Baylor football players multiplied, "causing incalculable damage to the university's reputation and leading to resignations and firings, including those of the president, the football coach and the athletic director").

419. *Id.*

420. *Doe I*, 320 F.R.D. at 434 (quoting the 2015 engagement agreement) (internal quotations omitted).

matters under Title IX . . . and related authority. It is the shared understanding of Baylor University and Pepper [Hamilton] that all material prepared and communications made by Baylor University, Pepper [Hamilton], and their representatives in the course of the review are in anticipation of litigation and are privileged work product.⁴²¹

The remainder of the engagement letter remained unchanged.⁴²²

A few months later, Baylor released two documents sketching the results of Pepper Hamilton's investigation: a summary of the investigation and its conclusions headed "Findings of Fact," and a list of recommendations titled "Report of External and Independent Review, Recommendations" (Recommendations).⁴²³ Ten women—Jane Does 1–10—filed *Doe I* and sought to discover the materials "provided to and produced by Pepper Hamilton in connection with the investigation."⁴²⁴ Baylor resisted on attorney-client privilege and work product grounds.⁴²⁵ In response, the *Doe I* plaintiffs argued that the materials were discoverable because Pepper Hamilton had not provided legal services to Baylor in anticipation of litigation, but had instead conducted the investigation to mitigate "a public relations scandal."⁴²⁶ They further argued that Baylor's numerous public disclosures concerning the investigation had waived any otherwise applicable confidentiality protections.⁴²⁷

The *Doe I* court easily concluded that the attorney-client privilege applied to the materials sought.⁴²⁸ The 2015 engagement letter recited that Baylor hired Pepper Hamilton "to conduct an independent and external review of Baylor University's institutional responses to Title IX and related compliance issues through the lens of specific cases."⁴²⁹ Although the letter did not refer to "legal advice," "legal assistance," or the like, there is no magic phrase that must be included in an engagement letter to invoke the attorney-client privilege.⁴³⁰ The 2015 engagement letter clearly reflected that Baylor hired Pepper Hamilton to "review its compliance with federal law—in other words, to obtain legal advice."⁴³¹ The 2016 amendment to the engagement letter was immaterial because it merely clarified that Baylor was seeking legal advice when it first retained Pepper Hamilton—it did

421. *Id.* (quoting the 2016 engagement agreement).

422. *Id.*

423. *Id.*

424. *Id.* (footnote omitted).

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 437.

429. *Id.* at 436 (quoting the 2015 engagement letter) (internal quotations omitted).

430. *Id.*

431. *Id.*

not alter the scope of the firm's engagement or change its mandate.⁴³² Baylor also submitted affidavits establishing that it engaged Pepper Hamilton to provide legal advice and services, and that the firm did so.⁴³³

The plaintiffs argued that the privilege did not apply because Pepper Hamilton "conducted an 'independent investigation' for Baylor," rather than providing legal representation.⁴³⁴ This argument was doomed from the start considering that perhaps the leading Supreme Court attorney-client privilege case, *Upjohn Co. v. United States*,⁴³⁵ recognized the privilege in connection with an internal investigation.⁴³⁶ Try as they might, the plaintiffs could not distinguish this case from *Upjohn* or other internal investigation cases where courts upheld the privilege.⁴³⁷

Fighting on, the plaintiffs argued that even if the communications at issue were privileged, Baylor had waived the privilege through three disclosures.⁴³⁸ First, Baylor publicly released the Findings of Fact and Recommendations in May 2016.⁴³⁹ Second, in defending a lawsuit by a former athletic department employee, Baylor filed a court document in which it quoted text messages and paraphrased conversations by Baylor staff discussing alleged rapes by football players that were reported to athletic department personnel.⁴⁴⁰ The filing stated that "all facts and evidence discussed were revealed by Pepper Hamilton's investigation."⁴⁴¹ Third, Pepper Hamilton briefed former Baylor regents about confidential aspects of the investigation.⁴⁴²

The court agreed with the plaintiffs that Baylor had waived the attorney-client privilege.⁴⁴³ Consequently, the court had to analyze the scope of the waiver.⁴⁴⁴ Because Baylor had repeatedly represented that the Findings of Fact and Recommendations "summarize[d] and represent[ed] the full course of Pepper Hamilton's investigation," and given "the level of detail publicly released about the investigation as a whole," the court concluded that Baylor had waived the privilege with respect to all communications with, and information and materials provided to, Pepper Hamilton.⁴⁴⁵

432. *Id.*

433. *Id.*

434. *Id.*

435. 449 U.S. 383 (1981).

436. *Doe I*, 320 F.R.D. at 436.

437. *Id.* at 436–37.

438. *Id.* at 437.

439. *Id.*

440. *Id.*

441. *Id.* (internal citations omitted).

442. *Id.*

443. *Id.*

444. *Id.* at 440.

445. *Id.*

Having resolved the privilege issue, the court turned to Baylor's work product claim.⁴⁴⁶ The plaintiffs contended that the work product doctrine did not apply because Baylor did not retain Pepper Hamilton in anticipation of litigation, and even if it did, Baylor had waived any protection.⁴⁴⁷ Baylor, however, demonstrated that its decision to hire Pepper Hamilton was "primarily motivated by its anticipation of litigation."⁴⁴⁸ For example, by August 2015, a Baylor football player had been convicted of raping a former Baylor soccer player, and the local newspaper had reported that the young woman had hired a lawyer.⁴⁴⁹ Other media reports suggested imminent litigation and possible government action against the university.⁴⁵⁰

The plaintiffs contended that because Baylor's public statements concerning the Pepper Hamilton investigation never mentioned potential litigation, Baylor must not have retained the firm primarily for that reason.⁴⁵¹ This argument did not impress the *Doe I* court. As the court explained, "no magic words" are required to invoke the work product doctrine.⁴⁵² Furthermore, an organization might not want to signal that it had hired a law firm in anticipation of litigation lest it actually encourage that litigation.⁴⁵³

Continuing, the court observed that waiver is narrower in the work product context than it is in the attorney-client privilege context.⁴⁵⁴ The court reasoned that subject matter waiver of work product immunity is generally confined to cases where the party claiming immunity "directly placed at issue" the "quality and substance" of a lawyer's work product.⁴⁵⁵ That was not the situation here, where Baylor had not relied on Pepper Hamilton's work product in formulating its defense.⁴⁵⁶ For example, Baylor never mentioned Pepper Hamilton's investigation in its answer in the case.⁴⁵⁷

Finally, because the plaintiffs were seeking Pepper Hamilton's tangible work product, they could obtain it even in the absence of waiver if they could show substantial need for the materials to prepare their case and their inability, without undue hardship, to obtain the substantial

446. *Id.*

447. *Id.* at 440–41.

448. *Id.* at 441.

449. *Id.*

450. *See id.* (describing the influence of media reports on Baylor's general counsel and one of its regents).

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 442.

455. *Id.* (citing *Feld v. Fireman's Fund Ins. Co.*, 991 F. Supp. 2d 242, 255 (D.D.C. 2013)).

456. *Id.*

457. *Id.*

equivalent by other means.⁴⁵⁸ The plaintiffs, however, had made no such showing.⁴⁵⁹ The court left open the possibility that they might be able to clear this substantial hurdle in the future.⁴⁶⁰

Although Baylor largely prevailed on the work product issue, it did not achieve a clean sweep.⁴⁶¹ The court rejected Baylor's attempt to withhold the names of the people that Pepper Hamilton interviewed and the data and documents it produced to Pepper Hamilton.⁴⁶² Baylor had not demonstrated that this information qualified as work product.⁴⁶³ In any event, Baylor had made a limited waiver of work product immunity when it released the interviewees' names and revealed specific sources of data that Pepper Hamilton reviewed.⁴⁶⁴ "Just as Baylor could not release half of a memo written by Pepper Hamilton and withhold the other half as protected, Baylor [could not] release the names of certain individuals who were interviewed and certain data sources and withhold the rest as protected attorney work product."⁴⁶⁵

In summary, the *Doe I* court held that Baylor did not have to produce "interview memoranda, notes, emails, presentations, and other 'documents and tangible things that [were] prepared' as part of Pepper Hamilton's investigation" which had not been released.⁴⁶⁶ The plaintiffs could not ask questions of witnesses that sought the mental impressions of Baylor's lawyers.⁴⁶⁷ In addition, Baylor did not have to produce documents Pepper Hamilton selected for use in interviews, recordings of interviews conducted by Pepper Hamilton, or Pepper Hamilton's interview notes.⁴⁶⁸

D. Conclusion

Internal investigations present frequent opportunities for attorney-client privilege and work product controversies. Lawyers should consider several measures to increase the likelihood that these important confidentiality protections are preserved.

First, assuming it to be true, a lawyer should state in her engagement letter that the investigation is intended to provide the client with legal advice or to assist her in delivering legal services to the client.⁴⁶⁹ In other

458. *Id.* (quoting FED. R. CIV. P. 26(b)(3)).

459. *Id.*

460. *Id.*

461. *See id.* at 443 (stating that although "work-product protection is quite broad, it is not as broad as Baylor asserts in its briefing").

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *See, e.g.,* Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 620 (7th Cir. 2010) (focusing on the engagement letter between the defendant school board and the law firm hired to investigate a teacher's alleged sexual abuse of

words, the lawyer is functioning in a legal capacity and not simply as an investigator. Similarly, and again where applicable, the engagement letter should state that the investigation is being conducted in anticipation of litigation. The fact that another law firm will be retained to represent the organization in any actual or threatened litigation does not prevent work product immunity from attaching to the investigating lawyer's efforts.⁴⁷⁰

Second, the lawyer should explain to the client the essential contours of the attorney-client privilege and work product doctrine and how these protections may be waived, so the client can reasonably act to preserve confidentiality.⁴⁷¹ If the report of the investigation will be publicly released or will be shared with government agencies, the lawyer should also discuss with the client the likely effect of those decisions on the privilege and work product immunity.

Third, the investigating lawyers should conduct the investigation in a fashion consistent with the application and preservation of the attorney-client privilege and work product immunity.⁴⁷² Such measures or procedures include the administration of *Upjohn* or corporate *Miranda* warnings to employees and witnesses, maintaining confidentiality throughout the course of the investigation and the delivery of any report, and appropriately labeling documents created in the investigation as privileged or work product.⁴⁷³ Lawyers should also differentiate between legal advice and business advice to the client and when reasonably practicable, may wish to provide non-legal advice in separate communications.⁴⁷⁴

Fourth, to best ensure application of the attorney-client privilege, any report of the investigation should be written in a way that reflects the lawyer's legal advice.⁴⁷⁵ To be sure, it will also be necessary for the lawyer to recite facts and include non-privileged information in the report as a foundation for her legal advice or conclusions, but the inclusion of such mate-

students, which spelled out that the board retained the law firm to provide legal services in responding to the abuse allegations, and thus supported recognition of the attorney-client privilege).

470. *See id.* at 622 (stating that the fact that the investigating law firm was not the defendant's litigation counsel "was not dispositive" when evaluating possible work product immunity, and concluding that the investigating lawyers' witness interview notes and memoranda qualified for work product protection).

471. *See S.E.C. v. Lavin*, 111 F.3d 921, 929 (D.C. 1997) (explaining that "the holder must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure").

472. *See, e.g., Sandra T.E.*, 600 F.3d at 620 (discussing the lawyers' conduct during the investigation).

473. *Id.*

474. *See, e.g., Spectrum Sys. Int'l Corp. v. Chem. Bank*, 581 N.E.2d 1055, 1061 (N.Y. 1991) (observing that the law firm's report contained no business or other non-legal advice and was therefore privileged).

475. *See, e.g., id.* at 1060 ("The report . . . sets forth the firm's assessment regarding a possible legal claim, its approximate size and weaknesses. As a confidential report from lawyer to client transmitted in the course of professional employment and conveying the lawyer's assessment of the client's legal position, the document has the earmarks of a privileged communication.").

rial does not alone vitiate the attorney-client privilege.⁴⁷⁶ With an eye toward enforcing work product protection, the report should be written in a fashion that delivers as much of the content as possible in the form of the lawyer's evaluation, observations, and opinions, and minimizes verbatim statements by witnesses.⁴⁷⁷ The obvious disadvantage to this approach is that disclosure of the report to third parties—whether inadvertent or intentional—may be especially damaging to the client.⁴⁷⁸

Finally, when preparing an investigative report that the client will likely release to the public, the lawyer should carefully consider whether statements in the report might waive the attorney-client privilege or jeopardize work product immunity. If so, those portions of the report may need to be edited to avoid waiver. Protecting against possible subject matter waiver is a particular goal here. The lawyer should also advise or remind the client of the possible effect of the report's release on the privilege and work product immunity.⁴⁷⁹

VI. THE RISK OF LIABILITY FOR DEFAMATION

Internal investigations often expose misconduct by employees and other close organizational constituents, and more than occasionally uncover evidence of possible crimes by the same categories of people. When such findings are incorporated in a written report of the investigation or are otherwise revealed at the conclusion of the investigation, the accused individuals may be seriously harmed. Even if there are no criminal consequences, they may lose their jobs and have their reputations permanently stained.⁴⁸⁰ Those with professional licenses may lose their careers. Accordingly, internal investigations almost invite defamation claims against the inquiring lawyers.⁴⁸¹

476. *Id.* at 1060–61.

477. Edwin G. Schallert & Natalie R. Williams, *Report of the Investigation*, in INTERNAL CORPORATE INVESTIGATIONS, 301, 310 (Barty F. McNeil & Brad D. Brian eds., 3d ed. 2007).

478. *See id.* at 310 (warning that “the greater the reliance on [the investigating lawyer’s] subjective opinion and mental impressions, the greater the harm should the report be discovered”).

479. MODEL RULES OF PROF’L CONDUCT r. 1.4(a)(2), (b) (AM. BAR ASS’N 2017).

480. *See, e.g.*, Melissa Daniels, *Uber Fires 20 Amid Perkins Coie Workplace Culture Probe*, LAW360 (June 6, 2017), <https://www.law360.com/articles/931941/print?section=automotive> [Permalink unavailable] (reporting that Uber Technologies, Inc. fired 20 employees following an investigation by an outside law firm into allegations of sexual harassment and other workplace misconduct). *See generally* RODNEY A. SMOLLA, LAW OF DEFAMATION § 8:53, at 8-33 to -34 (1999 & Supp. 2006) (“Very few defamatory statements carry more potential for devastating harm . . . than false and defamatory evaluations of an employee’s work performance. Careers may turn on such evaluations. . .”).

481. *See, e.g.*, Kat Greene, *Sidley-Authored Report on 9/11-Era Torture Defamatory: Suit*, LAW360 (Feb. 21, 2017), <https://www.law360.com/articles/894317/print?section=legalethics> [Permalink unavailable] (reporting on a lawsuit by a group of psychologists against a respected former federal prosecutor arising out of the report

A. *Defamation Essentials*

Defamation may take the form of libel or slander.⁴⁸² “Defamation by writing and by contemporary means analogous to writing is libel. Defamation communicated orally is slander.”⁴⁸³ Under section 558 of the Restatement (Second) of Torts, a plaintiff who alleges defamation must prove the following elements:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁴⁸⁴

If even one of these elements is missing, the plaintiff’s cause of action will fail.⁴⁸⁵

A statement must be both false and defamatory to be actionable.⁴⁸⁶ A statement is false for defamation purposes if it “is not substantially correct.”⁴⁸⁷ Or, phrased slightly differently, a substantially true statement is not false, and consequently is not actionable.⁴⁸⁸ In other words, a defendant need not establish “the literal truth of the precise statement made” to avoid liability.⁴⁸⁹ “Slight inaccuracies of expression are immaterial provided that the [allegedly] defamatory charge is true in substance.”⁴⁹⁰

A statement is defamatory if it tends to harm the plaintiff’s reputation “either by lowering the esteem in which he is held or by discouraging others from associating with him.”⁴⁹¹ The threshold question of whether

of an investigation for the American Psychological Association concerning the psychologists’ roles in crafting or defending harsh interrogation techniques; the investigation followed allegations by a journalist that the APA had colluded with the CIA and the military to support torture).

482. *Swanson Towing & Recovery, L.L.C. v. Wrecker 1, Inc.*, 802 S.E.2d 300, 305 (Ga. Ct. App. 2017); *W.J.A. v. D.A.*, 43 A.3d 1148, 1153 (N.J. 2012).

483. DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 519, at 173 (2d ed. 2011).

484. *RESTATEMENT (SECOND) OF TORTS* § 558 (1977).

485. *Dietz v. Dietz*, 165 So. 3d 342, 360 (La. Ct. App. 2015).

486. *Miller v. Cent. Ind. Cmty. Found., Inc.*, 11 N.E.3d 944, 956 (Ind. Ct. App. 2014); *Schaecher v. Bouffault*, 772 S.E.2d 589, 594 (Va. 2015).

487. *Batson v. Shiflett*, 602 A.2d 1191, 1212 (Md. 1992).

488. *See Armstrong v. Thompson*, 80 A.3d 177, 183–84 (D.C. 2013) (discounting “minor inaccuracies” in factual statements “so long as the substance, the gist, the sting, of the libelous charge be justified” (quoting *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 318 (D.C. Cir. 1994)); *Thomas v. Sumner*, 341 P.3d 390, 402 (Wyo. 2015) (citing *Tschirgi v. Lander Wyo. State Journal*, 706 P.2d 1116, 1120 (Wyo. 1985)).

489. *RESTATEMENT (SECOND) OF TORTS* § 581A cmt. f (1977).

490. *Id.*

491. *Pan Am Sys., Inc. v. Atl. Ne. Rails & Ports, Inc.*, 804 F.3d 59, 64 (1st Cir. 2015) (applying Maine law); *see also Tuite v. Corbitt*, 866 N.E.2d 114, 121 (Ill.

a communication is capable of defamatory meaning is a question of law for the court.⁴⁹²

True statements are not actionable as defamation no matter how badly they supposedly blemished the plaintiff's reputation.⁴⁹³ But while courts often say that truth is an absolute or complete defense to alleged defamation,⁴⁹⁴ it is the plaintiff's burden to prove the offending statement's falsity.⁴⁹⁵ If the statement is true, the plaintiff cannot prove her *prima facie* case and she will lose.⁴⁹⁶ Thus, truth is not actually *a defense* to alleged defamation,⁴⁹⁷ although for obvious reasons defendants always raise truth in response to a defamation claim.

To be actionable, the allegedly defamatory statement also must be one of fact rather than opinion.⁴⁹⁸ Statements of opinion generally are protected under the First Amendment.⁴⁹⁹ Whether a statement is one of

2006) ("A statement is defamatory if it tends to harm a person's reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person.").

492. Dietz v. Dietz, 165 So. 3d 342, 360 (La. Ct. App. 2015); Sarkar v. Doe, 897 N.W.2d 207, 220 (Mich. Ct. App. 2016) (quoting Ghanam v. Does, 845 N.W.2d 128, 143 (Mich. Ct. App. 2014)); Chapman v. Maxwell, 322 P.3d 1029, 1032 (Mont. 2014); Schaecher v. Bouffault, 772 S.E.2d 589, 595 (Va. 2015).

493. Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc., 829 F.3d 576, 580 (8th Cir. 2016) (applying Missouri law); Pan Am Sys., Inc., 804 F.3d at 64.

494. See, e.g., Cottrell v. Smith, 788 S.E.2d 772, 781 (Ga. 2016) ("Truth is a complete defense to alleged libel or slander."); Greenberg v. Spitzer, 62 N.Y.S.3d 372, 386 (App. Div. 2017) (asserting that "truth is an absolute defense to an action based on defamation").

495. See, e.g., Kerr v. Marshall Univ. Bd. of Governors, 824 F.3d 62, 74 (4th Cir. 2016) (quoting Belcher v. Wal-Mart Stores, Inc., 568 S.E.2d 19, 22 (W. Va. 2002)); Fureigh v. Horn, 434 S.W.3d 390, 393–94 (Ark. Ct. App. 2014) (listing a statement's falsity as an element the plaintiff must prove); Hadley v. Doe, 34 N.E.3d 549, 557 (Ill. 2015) (explaining that to "state a cause of action for defamation, a plaintiff must present facts showing the defendant made a false statement about the plaintiff"); Lindenmuth v. McCreer, 165 A.3d 544, 555 (Md. Ct. Spec. App. 2017) (observing the plaintiff failed to demonstrate the defendant's statements were false, "an element of a plaintiff's *prima facie* case of defamation"); Armistead v. Minor, 815 So. 2d 1189, 1193 (Miss. 2002) (listing falsity as an element the plaintiff must prove); Terry v. Journal Broad. Corp., 840 N.W.2d 255, 264–65 (Wis. Ct. App. 2013) (quoting Freer v. M & I Marshall & Ilsley Corp., 688 N.W.2d 756, 760 (Wis. Ct. App. 2004)).

496. See Emeson v. Dep't of Corrs., 376 P.3d 430, 443 (Wash. Ct. App. 2016) (stating that without a false and defamatory statement, libel and slander claims will fail).

497. Batson v. Shiflett, 602 A.2d 1191, 1212 (Md. 1992); DOBBS ET AL., *supra* note 483, § 537, at 237. *But see* Johnson v. Phillips, 526 S.W.3d 529, 535 (Tex. App. 2017) (stating that regardless of whether "a particular plaintiff is required to prove the falsity of the challenged statement, a defendant may assert truth as an affirmative defense to a libel action").

498. Scholz v. Delp, 41 N.E.3d 38, 45 (Mass. 2015).

499. Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc., 829 F.3d 576, 580 (8th Cir. 2016) (applying Missouri law); Agar v. Judy, 151 A.3d 456, 481 (Del. Ch. 2017); Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1241 (D.C.

fact or opinion is a question of law.⁵⁰⁰ In distinguishing between statements of fact and opinion, courts examine the totality of the circumstances.⁵⁰¹ With slight variation between jurisdictions, relevant factors in this examination “include (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false.”⁵⁰² Of course, a statement of pure opinion cannot be proven true or false.⁵⁰³

A statement of opinion may be actionable, however, if it implies the existence of facts that are false and defamatory.⁵⁰⁴ In that case, “the provably false implications are actionable in the same way as other statements or implications of fact.”⁵⁰⁵ But liability for defamation will not lie if the defendant discloses the true facts undergirding the opinion.⁵⁰⁶ As the Ninth Circuit explained in *Partington v. Bugliosi*,⁵⁰⁷ “when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.”⁵⁰⁸ Thus, for a lawyer potentially exposed to liability for an opinion that implies a factual basis, the lesson is

2016); *Elliott v. Murdock*, 385 P.3d 459, 465 (Idaho 2016); *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013).

500. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (applying Florida law); *Doe 2 v. Super. Ct.*, 206 Cal. Rptr. 3d 60, 68–69 (Ct. App. 2016); *Smith v. Humane Soc’y of U.S.*, 519 S.W.3d 789, 798 (Mo. 2017) (quoting *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993)); *Mehta v. Ohio Univ.*, 958 N.E.2d 598, 608 (Ohio Ct. App. 2011); *Johnson*, 526 S.W.3d at 535.

501. *Dickinson v. Cosby*, 225 Cal. Rptr. 3d 430, 457 (Ct. App. 2017); *Steinhausen v. Home Servs. of Neb., Inc.*, 857 N.W.2d 816, 828 (Neb. 2015); *Gilson v. Am. Inst. of Alt. Med.*, 62 N.E.3d 754, 774 (Ohio Ct. App. 2016).

502. *Steinhausen*, 857 N.W.2d at 828; *see also* *Obsidian Fin. Grp., L.L.C. v. Cox*, 740 F.3d 1284, 1293 (9th Cir. 2014) (quoting an earlier case, *Parkington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995), in phrasing the test in nearly identical terms); *Greenberg v. Horizon Ark. Publ’ns, Inc.*, 522 S.W.3d 183, 190 (Ark. Ct. App. 2017) (offering nearly identical language); *Neumann v. Liles*, 369 P.3d 1117, 1125 (Or. 2016) (using very similar language in phrasing the test).

503. *See, e.g., McKee*, 825 N.W.2d at 733 (describing someone as “a real tool” reflects pure opinion “because the term ‘real tool’ cannot be reasonably interpreted as stating a fact and it *cannot be proven true or false*”) (emphasis added).

504. *Piccone v. Bartels*, 785 F.3d 766, 771 (1st Cir. 2015); *Alaskaland.com, L.L.C. v. Cross*, 357 P.3d 805, 819 (Alaska 2015) (quoting *State v. Carpenter*, 171 P.3d 41, 51 (Alaska 2007)); *Dickinson*, 225 Cal. Rptr. 3d at 457; *Jacobs v. The Oath for La., Inc.*, 221 So. 3d 241, 246 (La. Ct. App. 2017).

505. *DOBBS ET AL.*, *supra* note 483, § 569, at 318.

506. *Piccone*, 785 F.3d at 771; *Sarkar v. Doe*, 897 N.W.2d 207, 226–27 (Mich. Ct. App. 2016); *Young v. Wilham*, 406 P.3d 988, 997 (N.M. Ct. App. 2017).

507. 56 F.3d 1147 (9th Cir. 1995).

508. *Id.* at 1156–57.

obvious: reveal the non-defamatory facts on which the opinion is predicated.⁵⁰⁹

A defendant also may avoid liability if the defamatory statement was privileged. A privilege is either qualified or absolute.⁵¹⁰ A qualified privilege may be lost through unreasonable actions that abuse the privilege.⁵¹¹ To use a common example, a person whose statements are animated by actual malice abuses a qualified privilege and consequently loses its protection.⁵¹² A qualified privilege may further be lost through abuse if the defendant knew the defamatory information was false, had no reason to believe it was true, or excessively published it.⁵¹³

In contrast, an absolute privilege is a complete bar to liability regardless of the defendant's motive or the reasonableness of her conduct.⁵¹⁴ The best example of an absolute privilege enjoyed by lawyers is the litigation privilege set forth in section 586 of the Restatement (Second) of Torts:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.⁵¹⁵

It is easy to imagine an organization conducting an internal investigation "preliminary to a proposed judicial proceeding,"⁵¹⁶ such that defamatory statements by the investigating lawyers relating to the proceeding would be absolutely privileged. In *Shell Oil Co. v. Witt*,⁵¹⁷ the Texas Su-

509. See *Piccone*, 785 F.3d at 771 ("Thus, the speaker can immunize his statement from defamation liability by fully disclosing the non-defamatory facts on which his opinion is based.").

510. *Lindenmuth v. McCreer*, 165 A.3d 544, 553 (Md. Ct. Spec. App. 2017).

511. *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 283 (Ky. Ct. App. 2017).

512. See, e.g., *Jackson v. City of Columbus*, 883 N.E.2d 1060, 1064–65 (Ohio 2008) (involving an internal investigation).

513. See *Patrick v. Tyson Foods, Inc.*, 489 S.W.3d 683, 695 (Ark. Ct. App. 2016) (stating that qualified privilege may be lost if it is abused by excessive publication, if the offending statement is made with actual malice, or if the statement is made with "a lack of grounds for belief in [its] truth"); *McCullough v. Noblesville Schs.*, 63 N.E.3d 334, 348 (Ind. Ct. App. 2016) (stating that the common interest privilege, which is a qualified privilege, can be lost through abuse, i.e., the defendant was primarily motivated by ill will, the statement was published excessively, or the statement was made without belief or grounds for belief in its truth); *Downey v. Chutehall Constr. Co., Ltd.*, 19 N.E.3d 470, 477 (Mass. App. Ct. 2014) (explaining that a qualified privilege may be abused and therefore lost if the defendant acted out of malice, knew the information was false, had no reason to believe the information was true, acted in reckless disregard of the truth, or published the information excessively, unnecessarily, or unreasonably).

514. *Hosmane v. Seley-Radtke*, 132 A.3d 348, 356 (Md. Ct. Spec. App. 2016).

515. RESTATEMENT (SECOND) OF TORTS § 586 (1977).

516. *Id.*

517. 464 S.W.3d 650 (Tex. 2015).

preme Court concluded that the litigation privilege attached to defamatory statements in the report of an internal investigation by outside lawyers and investigators.⁵¹⁸ Shell initiated the investigation after the Department of Justice notified the company that it was the target of a Foreign Corrupt Practices Act investigation.⁵¹⁹ Because Shell “acted with serious contemplation of the possibility that it might be prosecuted,”⁵²⁰ the investigation was preliminary to a proposed judicial proceeding, and the statements in the report were absolutely privileged.⁵²¹ Although the plaintiff in *Writt* sued Shell rather than the investigating lawyers, the result would have been the same had the lawyers been the targets of the litigation.⁵²²

B. A Representative Case

*Pearce v. E.F. Hutton Group, Inc.*⁵²³ nicely illustrates lawyers’ potential exposure to defamation liability arising out of internal investigations. *Pearce* arose out of a 1985 investigation of E.F. Hutton & Co., Inc.’s (Hutton) allegedly illegal corporate practices by the legendary Griffin Bell and his law firm, King & Spalding.⁵²⁴ The Hutton Group, which owned Hutton, hired Bell in response to a Department of Justice inquiry, other government probes, and the associated public relations circus.⁵²⁵ Bell’s investigation yielded the “Hutton Report,” which named numerous Hutton employees who were allegedly responsible for the fraudulent cash management practices in question and recommended sanctions against them.⁵²⁶ Bell made the Hutton Report available to the public at a Washington, DC press conference.⁵²⁷

Among the employees Bell identified as a wrongdoer was John Pearce, who managed Hutton’s St. Louis office.⁵²⁸ After the Hutton Report came out, Hutton removed Pearce from his position and transferred him to Florida; he later left the company.⁵²⁹ In addition, state securities regulators took punitive actions against him.⁵³⁰

518. *Id.* at 656–59.

519. *Id.* at 651, 655–56, 659.

520. *Id.* at 659.

521. *Id.* at 656–59.

522. See DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 130–34 (2d ed. 2016) (discussing the application of the litigation privilege to allegedly defamatory statements by lawyers preliminary to proposed judicial proceedings).

523. 664 F. Supp. 1490 (D.D.C. 1987).

524. *Id.* at 1493–94.

525. *Id.* at 1493.

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.* at 1494.

Pearce sued the Hutton Group and Bell on several theories, including libel.⁵³¹ He alleged in relevant part that the Hutton Report falsely asserted that he should have known his conduct was unlawful, and violated Hutton guidelines and policies.⁵³²

Bell moved for summary judgment on Pearce's libel count on the theory that the offending statements in the Hutton Report were either opinions or privileged.⁵³³ The district court disagreed.⁵³⁴

In evaluating whether the offending statements were opinions, the *Pearce* court applied the four-factor totality of the circumstances test announced by the D.C. Circuit in *Ollman v. Evans*.⁵³⁵ This first required the *Pearce* court to analyze "the common usage or meaning of the specific language" at issue.⁵³⁶ Here, Bell had written that Pearce's "actions were such that 'no reasonable person could have believed that this conduct was proper' . . . and were 'so aggressive and egregious as to warrant sanctions.'" ⁵³⁷ He had also reported that Pearce "was 'actually engaged in wrongdoing' . . . and was a 'moving force in improprieties.'" ⁵³⁸ These statements were not opinions.⁵³⁹ An average reader would understand them to mean that Pearce knew his conduct was wrong as a matter of fact.⁵⁴⁰ Indeed, Bell's statements were tantamount to criminal accusations.⁵⁴¹

The second *Ollman* factor for the court to consider was whether the statements could be verified.⁵⁴² After observing that "verifiability is not a simple, black or white determination," and that the "degree to which a statement is verifiable ranges over a spectrum rather than fitting into neat categories," the court reasoned that the statements could be objectively proven or disproven.⁵⁴³ Although determining whether Pearce knew his conduct was wrongful would require the jury to assess his intent, jurors routinely make such determinations in criminal cases.⁵⁴⁴ In sum, Bell's statements were "verifiable under an objective, 'reasonable person' standard."⁵⁴⁵

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.* at 1500–09, 1519.

535. 750 F.2d 970 (D.C. 1984).

536. *Pearce*, 664 F. Supp. at 1501.

537. *Id.* (quoting Pearce's complaint) (citation to the record omitted).

538. *Id.* (quoting Pearce's complaint) (citation to the record omitted).

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* (citing *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. 1984)).

543. *Id.* at 1501–02.

544. *Id.* at 1502.

545. *Id.*

Third, the *Pearce* court had to examine the context in which the statements were made.⁵⁴⁶ This factor weighed heavily in *Pearce*'s favor:

[T]he Hutton Report as a whole undercuts [Bell's] position that his statements were opinion. The average reader . . . would naturally assume that he or she was being presented with a compilation of facts. Another consideration in this respect is the inclusion of cautionary language in the text where the challenged statements are found A reader encountering such language tends to discount what follows

Arguably, the inclusion of Bell's statements in the "Conclusions and Remedies" section of the Hutton Report, and the use of the words "We conclude" and "We think" in connection with those statements, amounts to cautionary language. In the context of this . . . report, however, the language is more akin to a summary of facts than a subjective analysis of them. Furthermore, because the challenged statements set forth [Pearce's] culpability, they imply the existence of damaging, undisclosed facts beyond the mere descriptions of the [wrongful] activities given in the [report's] more detailed sections Therefore, the average reader would not have been put on notice that Bell's statements were opinions.

Even if [Bell] had put readers on notice with cautionary language, . . . Bell's statements are unequivocal and amount to criminal accusations. When a statement is as factually laden as the accusation of a crime, cautionary language is essentially unavailable to dilute the factual implications Thus, the immediate context of the allegedly defamatory statements indicates that they are factual assertions and not expressions of opinion.⁵⁴⁷

Fourth, the court considered the broader social context in which the defamatory material appeared.⁵⁴⁸ In this case, of course, the challenged statements appeared in a former U.S. Attorney General and federal judge's report of his investigation into Hutton's illegal practices.⁵⁴⁹ So framed, a reasonable person would clearly view Bell's statements as expressing facts.⁵⁵⁰

"Given the clear and verifiable meaning of Bell's statements" and "the serious and professional context in which they were made," the court concluded that Bell's opinion defense was unavailing.⁵⁵¹ The court then con-

546. *Id.* (citing *Ollman*, 750 F.2d at 982).

547. *Id.* (citations omitted).

548. *Id.* (citing *Ollman*, 750 F.2d at 983).

549. *Id.*

550. *Id.*

551. *Id.* at 1503.

sidered the qualified privileges that Bell had asserted as affirmative defenses.⁵⁵²

Bell first invoked the fair comment privilege, which immunizes opinions about matters of public concern.⁵⁵³ The court considered that privilege obsolete, however, in light of the First Amendment protections generally afforded statements of opinion.⁵⁵⁴ Furthermore, even if that privilege was viable, it would not apply in this case because Bell's statements were factual.⁵⁵⁵

Bell also argued that his statements were privileged because they furthered a public interest.⁵⁵⁶ In this case, the public interest was the 2,000 felony counts of mail and wire fraud to which Hutton pled guilty as a result of its illegal cash management scheme.⁵⁵⁷ Although it recognized that Bell's statements concerned a matter of public interest,⁵⁵⁸ the court rejected his public interest or common interest privilege defense.⁵⁵⁹ In reaching this conclusion, the *Pearce* court observed that in those cases in which courts had recognized a qualified privilege, the publication of the defamatory information was somehow limited.⁵⁶⁰ Not so here:

The publication was made widespread without any inquiry or urging on the part of the press. It was not a report of ongoing or previously undisclosed misconduct or criminal wrongdoing. It was not made by a public official attempting to notify the public of something they deserved to know about. The disclosures were not even limited to those matters of greatest public interest—the actions affecting the banking and securities industries. Instead, the report and press conference were in no way circumscribed. They were highly detailed and included discussions of such relatively private matters as recommending what sanctions Hutton should dole out to its employees.⁵⁶¹

After considering some additional issues not relevant here, the court denied Bell summary judgment on *Pearce*'s libel claim.⁵⁶² The case eventually went to trial, where Bell and the Hutton Group prevailed.⁵⁶³

552. *Id.* at 1503–06.

553. *Id.* at 1503.

554. *Id.*

555. *Id.* at 1504.

556. *Id.*

557. *Id.* at 1493, 1504.

558. *Id.* at 1504.

559. *Id.* at 1506.

560. *Id.* at 1505.

561. *Id.*

562. *Id.* at 1519.

563. Schallert & Williams, *supra* note 477, at 322.

C. *Recommendations for Lawyers*

Lawyers should consider several steps to minimize their potential exposure to defamation claims. First, lawyers should not rush investigations; they should take the time necessary to collect and review potentially relevant documents, interview material witnesses and reasonably pursue leads they provide, verify facts and sources of information, vet material witnesses, understand the context and environment in which the alleged misconduct occurred, and so on. In summary, they should ensure that the investigation is adequate. By doing so, they increase the probability that any factual statements in a report will be true.

Second, lawyers should qualify statements in a report of an investigation as necessary. Lawyers should appropriately include cautionary language in the report signaling that particular statements are opinions rather than expressions of fact.⁵⁶⁴

Third, although couching statements in a report of an investigation as opinions is not guaranteed to repel defamation claims, it is a helpful and often successful defensive measure.⁵⁶⁵ Lawyers can further minimize potential risk by accurately detailing the factual bases for their conclusions.

Fourth, lawyers should avoid caustic, hyperbolic, or inflammatory language in their reports.⁵⁶⁶

Fifth, lawyers should not publish reports they prepare beyond delivering them to the client or, in appropriate cases, sharing them with the government.⁵⁶⁷ Excessive or unnecessary publication of a report potentially negates qualified privileges that might otherwise attach to allegedly defamatory content.⁵⁶⁸ The denial of summary judgment for the defense in *Pearce* brightly highlights the risk posed by excessive or unnecessary publication of an investigative report.⁵⁶⁹

Sixth, if it is feasible from a business perspective, lawyers may wish to consider including an indemnification provision in their engagement letters.⁵⁷⁰ After all, the cost of defending a defamation action can be significant.⁵⁷¹ As long as the provision does not purport to prospectively limit

564. *Id.* at 329; *see, e.g.*, *Turner v. Wells*, 879 F.3d 1254, 1262–65 (11th Cir. 2018) (rejecting a defamation claim against an investigating lawyer and his law firm where the offending conclusions in the firm’s report were statements of opinion and were prefaced by cautionary language indicating that they were opinions).

565. *See, e.g.*, *Turner*, 879 F.3d at 1264–65 (finding for a lawyer and law firm on the plaintiff’s defamation claim where offending statements in the investigatory report were accurately identified as opinions).

566. Schallert & Williams, *supra* note 477, at 330.

567. *Id.*

568. DOBBS ET AL., *supra* note 483, § 550, at 265–66.

569. *See Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1504–06 (D.D.C. 1987) (rejecting Bell’s qualified privilege defense).

570. *See Schallert & Williams*, *supra* note 477, at 329 (recommending that investigating lawyers “consider including an indemnification clause within the engagement contract”).

571. *Id.*

the lawyer's potential malpractice liability to the client, there is no ethical impediment to the practice.⁵⁷²

VII. CONDUCTING AN INTERNAL INVESTIGATION ON BEHALF OF A CURRENT CLIENT

Finally, lawyers must carefully consider whether they should conduct an internal investigation for a current client. There are good reasons for organizations to ask their regular outside law firms to conduct internal investigations. Among other things, lawyers in those firms are likely to best understand the organizations' activities or business, and to know essential personnel. That familiarity should breed efficiency and effectiveness.

On the other side of the coin, an argument can be made that the same familiarity will cause investigating lawyers to gloss over problems or spare criticism. If the client is a financially significant one for the firm, the lawyers arguably may fear that a rigorous investigation will jeopardize their business relationship and accordingly opt for what critics and adversaries in subsequent litigation will call a whitewash.⁵⁷³ This is especially true where the alleged wrongdoing involves the organization's directors, officers, or senior management. In addition, if an investigation may implicate advice previously given to the client by other lawyers in the firm, the investigating lawyers may have a conflict of interest.⁵⁷⁴ For these reasons, prosecutors and regulators often cast a wary eye on investigations conducted by an organization's regular outside counsel.⁵⁷⁵

There is no uniformly right answer to the question of whether an organization's regular outside counsel should investigate alleged malfeasance within the organization. The answer may depend on the nature of

572. See MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2017) (providing that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement").

573. See generally Am. Coll. of Trial Lawyers, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 83 (2009) (observing that in recent years, prosecutors, government regulators, and independent auditors "have looked askance at the choice of regular outside corporate counsel" to conduct internal investigations "based on the fear that regular corporate counsel may have a motive to avoid criticizing, and thus alienating, senior management, who are possibly a source of sizeable past and future law firm revenues").

574. See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2017) (stating a concurrent conflict of interest exists where there is a significant risk that a client's representation will be materially limited by a personal interest of the lawyer); *id.* r. 1.10(a) (imputing conflicts of interest within a law firm).

575. See Wagner & Sandifur, *supra* note 5, at 41 (asserting that prosecutors and regulators "take a dim view of internal investigations performed by a corporation's regular counsel, especially when the allegations involve the regular counsel's previous legal advice or when the regular counsel might be viewed as beholden to the directors or officers under investigation").

the suspected misconduct, the identities of possible wrongdoers, the advice previously given to the client by lawyers in the firm, and whether the investigation has possible criminal or regulatory implications, among other factors. The point here is simply that lawyers cannot overlook this question.

VIII. CONCLUSION

Organizations of all types engage law firms to conduct internal investigations into a wide range of alleged misconduct. For law firms, internal investigations are a lucrative practice area and the publicity that such investigations sometimes attract has broad marketing value. Indeed, internal investigations are now big business for law firms. Leading law firms compete for these potentially lucrative representations. But as with all substantive practice areas, internal investigations carry professional liability and responsibility risks. So long as lawyers understand those risks they can prudently manage them. This article is intended to be a small step in that direction.