65 Rocky Mt. Min. L. Inst. 18 (2019)

ETHICS FOR IN-HOUSE COUNSEL: BEST PRACTICES FOR ESTABLISHING (AND MAINTAINING) ATTORNEY-CLIENT AND WORK-PRODUCT PRIVILEGES IN AN ELECTRONIC WORLD

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§ 18.01 Introduction[*]

Establishing and maintaining the attorney-client and work-product privileges for in-house counsel can be particularly tricky in the electronic world we live in today. Electronic communications offer ease and convenience, but this form of communication also creates risks of waiving a privilege, along with scrutiny in litigation to determine if a privilege even applies in the first place. These risks are especially heightened for the in-house counsel that wears many hats—attorney, business advisor, and negotiator. This chapter will examine the creation, and potential waiver, of the attorney-client privilege and work-product doctrine between in-house counsel and their business

client; whether the attorney-client privilege applies when in-house counsel are providing mixed business and legal advice; and the ethical rules relating to electronic communications and e-discovery.

§ 18.02 In-House Counsel Communications Protected by Attorney-Client Privilege and Work-Product Doctrine

The attorney-client privilege is an evidentiary privilege, held by the client, which applies to confidential communications between an attorney and his or her client. It has been recognized as "the oldest of the privileges for confidential communications known to the common law."[1] The privilege is codified under federal law and the laws of the states addressed in this chapter.[2] The privilege's "fundamental purpose 'is to safeguard the

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[*]Cite as Tracy K. Hunckler, Ryan W. Thomason & Carlin A. Yamachika, "Ethics for In-House Counsel: Best Practices for Establishing (and Maintaining) Attorney-Client and Work-Product Privileges in an Electronic World," 65 *Rocky Mt. Min. L. Inst*. 18-1 (2019).

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[1]United States v. Zolin, 491 U.S. 554, 562 (1989) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

[2]This chapter addresses the attorney-client privilege in the states of California, Colorado, New Mexico, Texas, and Utah, as well as under federal law. For each jurisdiction's codified version of the attorney-client privilege, see Cal. Evid. Code § 954; Colo. R. Evid. 502; Colo. Rev. Stat. § 13-90-107(1)(b); N.M. R. Evid. 11-503; Tex. R. Evid. 503; Utah R. Evid. 504; Fed. R. Evid. 502, respectively. Rather than describe the privilege in detail, the federal government chose to defer to the judicial system in its application of the common law privilege. *See* Fed. R. Evid. 501, 502.

confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.' "[3] In order for a client to be afforded the attorney-client privilege, the following elements must be satisfied: (1) the client must have sought legal advice (2) from a professional legal adviser acting in his or her capacity as such, and (3) the communications were related to that purpose[4] and (4) were made in confidence by the client.[5]

The attorney-client privilege only protects those covered communications that are intended to be confidential.[6] The moment this expectation of confidentiality ceases, the privilege ceases.[7] "A confidential communication . . . is generally defined as a communication not intended to be disclosed to third parties other than parties reasonably necessary for the transmission of the message or those to whom disclosure furthers the rendition of legal services."[8] A communication is considered confidential

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[3]Costco Wholesale Corp. v. Superior Court, 219 P.3d 736, 740 (Cal. 2009) (quoting Mitchell v. Superior Court, 691 P.2d 642, 646 (Cal. 1984)); *see also* Losavio v. Dist. Court, 533 P.2d 32, 34 (Colo. 1975) ("The purpose of the attorney-client privilege is to secure the orderly administration of justice by insuring candid and open discussion by the client to the attorney without fear of disclosure."); Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys."); *Upjohn*, 449 U.S. at 389 ("[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[4]For a discussion of situations where there is a mixed purpose for the communication (e.g., legal and business), see § 18.03, *infra*.

[5]*See* United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997); *see also* Santa Fe Pac. Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, ¶ 14, 175 P.3d 309 ("The elements of [the] attorney-client privilege . . . are (1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client."); Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 618 (7th Cir. 2009) (In order for the attorney-client privilege to cover a communication, the court must determine "(1) whether 'legal advice of any kind [was] sought . . . from a professional legal adviser in his capacity as such'; and (2) whether the communication was 'relat[ed] to that purpose' and 'made in confidence . . . by the client.'" (alterations in original) (quoting United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997))).

[6]United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958); *see also* United States v. Robinson, 121 F.3d 971, 976 (5th Cir. 1997) ("It is vital to a claim of privilege that the communication have been made and maintained in confidence." (quoting United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976))).

[7]*Tellier*, 255 F.2d at 447.

[8]*In re* Royce Homes, LP, 449 B.R. 709, 723 (Bankr. S.D. Tex. 2011); *see also Tellier*, 255 F.2d at 447 ("[I]t is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others.").

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when it is transmitted between a client and his or her attorney in the course of that relationship, with the expectation that it will remain confidential, and so long as the client does not later disclose the information to any third party other than those who are present to further the interest of the client or to whom disclosure is reasonably necessary to accomplish the purpose for which the attorney is consulted.[9]

The work-product doctrine is implicated when in-house counsel prepares writings reflecting legal opinions and observations from factual investigations.[10] The work-product doctrine protects from discovery documents and tangible things prepared by a party or its representative in anticipation of litigation.[11] "The general standard to be applied is whether, in light of the nature of the document and the factual situation in the particular case, the party resisting discovery demonstrates that the document was prepared or obtained in contemplation of specific litigation."[12]

The scope of this privilege has been expanded in California to apply not just to writings created by an attorney in anticipation of a lawsuit, but also to writings prepared by an attorney while acting in a nonlitigation capacity.[13] California courts have justified this expanded scope by finding that "protecting attorneys' work product when they act in a nonlitigation legal capacity furthers the important goal of reducing the likelihood of litigation," and that there is "no valid reason to differentiate between the writings reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation."[14]

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[9]*See, e.g.*, Cal. Evid. Code § 952; Utah R. Evid. 504; Tex. R. Evid. 503; N.M. R. Evid. 11-503; People v. Tucker, 232 P.3d 194, 198 (Colo. App. 2009) (to be treated as confidential, there must be an expectation that the communication would be kept confidential).

[10]*See* Upjohn Co. v. United States, 449 U.S. 383, 399-401 (1981); Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1097 (Cal. 2007).

[11]*See* State *ex rel*. Brandenburg v. Blackmer, 2005-NMSC-008, ¶ 11, 110 P.3d 66; Hawkins v. Dist. Court, 638 P.2d 1372, 1376-77 (Colo. 1982); *see also In re* DISH Network, LLC, 528 S.W.3d 177, 181 (Tex. App.—El Paso 2017) ("The [work product] protection extends to materials developed and communications made in anticipation of litigation or for trial for or by a party or its representatives, including the party's attorneys, employees, and agents.").

[12]*Hawkins*, 638 P.2d at 1379; *see also* Reed v. Davis, No. 06-16-00038-CV, 2017 WL 1101141, at *5 n.12 (Tex. App.—Texarkana Mar. 24, 2017) (mem. op.) ("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." (quoting Nat'l Tank Co. v. Brotherton, 851

S.W.2d 193, 205 (Tex. 1993))).

[13]Rumac, Inc. v. Bottomley, 192 Cal. Rptr. 104, 107-08 (Ct. App. 1983); *see also* Cnty. of Los Angeles v. Superior Court, 98 Cal. Rptr. 2d 564, 574 (Ct. App. 2000) ("[The work-product doctrine] applies as well to writings prepared by an attorney while acting in a nonlitigation capacity.").

[14]*Rumac*, 192 Cal. Rptr. at 105, 108.

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The work-product doctrine is especially strong, and disclosure is particularly disfavored, in situations where an attorney prepares written notes or memoranda of witnesses' oral statements because those writings tend to disclose the attorney's mental impressions (e.g., what the attorney chose to transcribe and the inferences drawn therefrom).[15] The attorney's work product may be discoverable, however, where the attorney's file contains relevant, non-privileged facts that are essential to the preparation of another party's case, or where the availability of witnesses has changed.[16] When in-house counsel communicates these facts to a business client in connection with providing legal advice, however, the attorney-client privilege may still serve to protect such communication even where the protections of work product are not available.

The protections afforded by both the attorney-client privilege and work-product doctrine can be lost through waiver. In general, the right to claim a privilege for any protected communication is waived when the holder of the privilege[17] voluntarily discloses the communication to a person who has no interest in maintaining its confidentiality or otherwise authorizes its disclosure by another person.[18] Where, for example, communications that would otherwise be protected by the attorney-client privilege are shared by a corporate officer with an outside third party or another employee of the

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[15]*Upjohn*, 449 U.S. at 399-400; *see also* Coito v. Superior Court, 278 P.3d 860, 869 (Cal. 2012).

[16]*Upjohn*, 449 U.S. at 399; *Hawkins*, 638 P.2d at 1376–77; *see also* Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1047 (Colo. 1986) ("Documents prepared in anticipation of litigation or for trial are discoverable 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'" (quoting Colo. R. Civ. P. 26(b)(3))).

[17]The business client holds the attorney-client privilege but the in-house counsel holds the protection afforded by the work-product doctrine. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) (corporation's management found to hold the power to waive the attorney-client privilege, which is normally exercised by its current officers and directors); Losavio v. Dist. Court, 533 P.2d 32, 35 (Colo. 1975) (the attorney-client privilege is held, and can only be waived, by the client); *In re* Arterial Vascular Eng'g, Inc., No. 05-99-01753-CV, 2000 WL 1726287, at *4, 6 (Tex. App.—Dallas Nov. 21, 2000) (unpublished) (only the attorney, not the client, can waive the protection offered by the work-product doctrine).

[18]*See* Cal. Evid. Code § 912(a); Tex. R. Evid. 511(a); N.M. R. Evid. 11-511; Utah R. Evid. 510; McDermott Will & Emery LLP v. Superior Court, 217 Cal. Rptr. 3d 47, 63 (Ct. App. 2017); *In re Arterial*, 2000 WL 1726287, at *4 (In applying California substantive law to waiver analysis, the court held that "[t]he privilege is waived if the person to whom the information [was] disclosed is a stranger to the consultation or possesses interests adverse to the client."); BP Alaska Exploration, Inc. v. Superior Court, 245 Cal. Rptr. 682, 695 (Ct. App. 1988). For an in-depth analysis of waiver of the attorney-client privilege and protection of the work-product doctrine, see Sarah A. Strunk, "Corporate Compliance: Corporate Audits and Investigations," 65 *Rocky Mt. Min. L. Inst.* 20-1, § 20.02[1], [2] (2019).

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company who is not reasonably necessary to accomplish the purpose of the consultation with in-house counsel, the privilege is waived.[19] An inadvertent disclosure of a protected communication, however, does not always constitute waiver of the privilege, nor does it always give rise to a breach of an ethical duty owed to a client by its attorney.[20]

[1] Numerous "Hats" Worn by In-House Counsel

For the attorney-client privilege to apply, the business client[21] must intend to seek confidential legal advice from its in-house counsel. In some situations, in-house counsel may also provide business advice to the client. It is important to remember that no privilege applies to business advice, even if given by an attorney.[22] This means that any electronic communication reflecting solely business advice from in-house counsel to his or her client is fair game and discoverable in litigation.[23] Opposing litigators can have a field day with these types of communications because in-house counsel may have drafted the message thinking that a privilege applied. Moreover, the privilege may not apply if in-house counsel is merely acting as a business negotiator.[24] And then there is the difficult situation where the client seeks, and the in-house counsel provides, both business and legal advice at the same time. This will be discussed in further detail in § 18.03, below.

Practice Tip: To help avoid ambiguity in determining which "hat" in-house counsel is wearing with regard to his or her electronic communications, we recommend counseling the business client to specify that it is seeking legal advice from the in-house counsel in the body of the communication. The communication should be labeled "CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED" or words to that effect in the subject line or toward the top of the

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[19] *See, e.g.*, Cal. Evid. Code § 952.

[20] *See McDermott Will & Emery*, 217 Cal. Rptr. 3d at 63–64 (noting that California courts have consistently held that inadvertent disclosures do not constitute waiver). See § 18.04[1], *infra*, for a discussion on an attorney's ethical duties relating to inadvertent disclosures through electronic communications.

[21] While the corporation or company is the business client, the business client can only act through individuals such as employees and officers. As discussed in Strunk, employees historically had to be in the "control group" for the privilege to apply, but now courts tend to look at the underlying subject matter of the communication, rather than the title of the employee, to evaluate a claim of privilege. *See* Strunk, *supra* note 18, at § 20.02[1].

[22] *See* Chi. Title Ins. Co. v. Superior Court, 220 Cal. Rptr. 507, 514 (Ct. App. 1985); Bhandari v. Artesia Gen. Hosp., 2014-NMCA-018, ¶ 12, 317 P.3d 856; *In re* Fairway Methanol LLC, 515 S.W.3d 480, 489 (Tex. App.—Houston [14th Dist.] 2017).

[23] *See generally Chi. Title Ins.*, 220 Cal. Rptr. at 514; *Bhandari*, 2014-NMCA-018, ¶ 12.

[24] *Chicago Title Ins.*, 220 Cal. Rptr. at 514; Zurich Am. Ins. Co. v. Superior Court, 66 Cal. Rptr. 3d 833, 846 (Ct. App. 2007); Interphase Corp. v. Rockwell Int'l Corp., No. 3:96-cv-00290, 1998 WL 664969, at *2 (N.D. Tex. Sept. 22, 1998).

communication. Similarly, when in-house counsel provides legal advice or work product via electronic communication, in-house counsel should indicate in the body of the message that he or she is providing legal advice and/or work product even if the business client failed to specify that was the intent in its original message. The in-house counsel's communication also should be labeled to reflect its confidential and privileged nature. By following these recommendations, the intent of the parties will be reflected in the body of the communication, assisting with protection of the communication in the event of litigation. Additionally, use of these labels will assist litigation counsel with easily identifying communications that may be subject to protection, but as discussed in the following section, labels are not controlling.

[2] Overuse of Privilege Labels

While labeling electronic communications as attorney-client privileged or attorney work product can assist with identifying privileged communications and establishing intent of the parties to communicate about legal matters, use of such labels for all communications involving in-house counsel, even though they are not legal in nature, is problematic. Overuse of labels could result in a court declining to give any weight to the label and closely scrutinizing all of the client's privilege claims. It is important to remember that labels are not determinative of whether the court will find

the document privileged so they should be used with understanding and purpose. If the business client is seeking legal advice or providing information to in-house counsel to assist with providing legal advice, then it is a good practice to label the electronic communication “CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED.” If, however, the business client (or in-house counsel) thinks the label controls and starts using the label on all electronic communications without regard for the legal purpose of the communication, the applicability of the privilege will be questioned. Opposing counsel, and more importantly the trier of fact, may question whether other electronic communications with that label should no longer be protected as privileged if the basis for withholding the information is a false label.

Practice Tip: Educate the business client on when the attorney-client privilege applies and caution the business client to use labels designating communications as such only when the client is intending to communicate information protected by the privilege. Likewise, in-house counsel should not use attorney-client privilege or work-product labels on all communications with the business client. When communicating in a non-legal context, no labels should be used.

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[3] Thorny Issue of Chain Emails

The difficult question of whether a communication is privileged becomes more complicated in situations involving chain emails and other forms of technology, such as group texts. All too often, legal advice is sought by a business group by way of an email that includes all members of the business group and the in-house counsel. Often, what originated as an email seeking legal advice turns into a business conversation among the group with in-house counsel being copied on the communication. The subsequent business conversations may arguably be related to the legal advice, so does the privilege apply to all of these communications? In many instances, the answer will come down to the trier of fact's discretion as to whether the privilege applies and whether the privilege was waived by sending legal advice to participants for whom the communication was not necessary—risky propositions.[25] The risks increase when the business client then forwards the privileged communications to outside third parties. If those third parties were not reasonably necessary to further the purpose of the legal advice, all of the prior communications become discoverable because the privilege has been waived.

Practice Tip: Advise the business client to avoid forwarding electronic communications that include in-house counsel's legal advice to others within the company unless it is absolutely necessary, and advise the business client that it must never forward legal advice to an outside third party. The business client should frequently be reminded of these warnings and in-house counsel should do everything possible to stay between the business client and outside third parties. Likewise, in-house counsel should avoid responding to chain emails unless necessary. When responding to a business client's request for legal advice, in-house counsel should exercise his or her best judgment in considering whether to respond only to the sender without copying others who were on the original email, with an admonition in the email that it should not be shared, so as to avoid the risk of the communication being disseminated to too many people or being converted into a business communication down the chain. As will be discussed in § 18.02[5], below, first in-house counsel should consider whether a conference call or meeting is warranted in lieu of using email.

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[25] *See, e.g.*, Hamdan v. Ind. Univ. Health N., LLC, No. 1:13-cv-00195, 2014 WL 2881551 (S.D. Ind. June 24, 2014); Nalco Co. v. Baker Hughes Inc., No. 4:09-cv-01885, 2017 WL 3033997 (S.D. Tex. July 18, 2017); Pearlstein v. BlackBerry Ltd., No. 2:13-cv-07060, 2019 WL 1259382 (S.D.N.Y. Mar. 19, 2019).

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[4] Client Who Copies In-House Counsel on Electronic Communications

It is common to encounter the business client who regularly copies in-house counsel on electronic messages containing sensitive information in an attempt to protect it from disclosure. The business client is under the false impression that if in-house counsel is copied, the communication is not discoverable by other parties because it is "privileged." Merely copying an attorney on an electronic message, however, does not automatically render it protected by the attorney-client privilege.[26] As discussed in § 18.02[2], above, much more is required, including, for example, that the business client sought legal advice and the communication relates to that purpose.

Obviously, there are instances when in-house counsel is being copied on an electronic communication where the communication is protected by the attorney-client privilege, but that is not always the case. For example, the privilege would apply when the business client forwards legal advice obtained from in-house counsel to other employees to whom the advice was reasonably necessary. The privilege also would apply when the business client is requesting factual information that in-house counsel needs in order to provide requested legal advice. Outside of these clear examples, ambiguities can arise as to whether a privilege will attach to the communication in which in-house counsel is copied. Certainly, one might argue that in-house counsel was copied so that in-house counsel could provide legal advice on the subject matter of the communication. Protecting the privilege in these circumstances, however, can be extremely difficult if the body of the electronic message does not expressly ask in-house counsel for such advice. Without an express request for legal advice, it is left to the trier of fact to sort through the issues and determine whether a privilege applies, perhaps based on declarations from the sender and in-house counsel as to the intent of the communication.

> **Practice Tip:** Advise your business client that the attorney-client privilege does not apply to an electronic communication just because in-house counsel is one of the recipients of the message. Inform your business client that if legal advice is being sought, the electronic communication should be sent directly to in-house counsel, not as a carbon copy, and the communication should expressly state what legal advice is being sought. If in-house counsel is copied on an electronic communication without such an express request and it is not otherwise clear to in-house counsel that the message is protected by the attorney-client privilege,

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[26] *Hamdan*, 2014 WL 2881551, at *5.

> in-house counsel should consider asking the business client if legal advice on the subject matter is being sought. If it is, in-house counsel might reply to the electronic message confirming that intent to create a written record thereof. In-house counsel should then carefully evaluate which of the recipients of the original electronic communication should receive the legal advice to avoid waiver of the privilege by including recipients to whom the communication was not reasonably necessary.

[5] Stepping Back to the "Good Ol' Days" of Oral Communications

When oral communications are used to communicate between in-house counsel and his or her business client, the risk of waiving a privilege or a determination that no privilege applies is diminished because there is no written record of the oral communication. Picking up the phone, walking down to the business client's desk, or holding meetings will help protect privileged communications in litigation so long as all involved understand the legal purpose of the communication and no one discloses the communication to unnecessary third parties.

Written communications are much easier to scrutinize years after the communication has

occurred. While memories fade, the electronic words are preserved. What's more, it is too easy to hit the “forward” button on the computer keyboard without considering whether the recipients are parties necessary to the communication so as to preserve a privilege claim.

> **Practice Tip:** We recommend that in-house counsel use oral communications to communicate privileged information to business clients when feasible and when the circumstances so warrant. Obviously, there are times when in-house counsel will provide legal advice or share work product with his or her business client via electronic message, but our suggestion is to consider whether it makes the most sense to do so before resorting to this form of communication.

§ 18.03 Application of Attorney-Client Privilege to In-House Counsel's Mixed Business and Legal Advice

It is clear that communications between in-house counsel and the business client that are intended to be confidential and pertain to providing legal advice are protected by the attorney-client privilege.[27] But how do courts treat confidential communications between in-house counsel and the client that involve both legal and business advice? Is the entire

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[27] *See* § 18.02, *supra*.

communication protected by the attorney-client privilege, or just the portions relating to the legal advice? The answer to this question depends on the jurisdiction in which the privilege is being litigated. Federal law and all states covered by this chapter, except California, look at the purpose of the individual communication when deciding whether the communication is subject to the attorney-client privilege.[28] In those jurisdictions, if the purpose of the communication is in connection with providing legal advice, the individual communication will be deemed privileged. Alternatively, California has opted to follow a more liberal approach and looks to the purpose of the relationship between the attorney and the client when determining whether an individual communication is privileged.

[1] Dominant Purpose of the Relationship Test

California employs the dominant purpose of the relationship test when determining whether a communication between an attorney and corporate employee is protected by the attorney-client privilege.[29] “In assessing whether a communication is privileged, the initial focus of the inquiry is on the ‘dominant purpose *of the relationship*’ between attorney and client and not on the purpose served by the individual communication.”[30] If the communications were made during an attorney-client relationship, they are privileged even if they contain factual information that might otherwise be discoverable through some other means.[31]

While California has employed the dominant purpose of the relationship test, California courts still caution attorneys to be careful when mixing business and legal advice:

> [W]here the legal advice activities of the attorney “were so intertwined with activities which were wholly business or commercial . . . a clean distinction between the two roles became impossible to make. This merging of business and legal activities jeopardizes the assertion of the attorney-client privilege, since the attorney and the client in effect have become indistinguishable.”[32]

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[28] *See* § 18.03[1], *infra*.

[29] *See* Costco Wholesale Corp. v. Superior Court, 219 P.3d 736, 742 (Cal. 2009); City of Petaluma v. Superior Court, 204

Cal. Rptr. 3d 196, 203 (Ct. App. 2016); *see also* Aetna Cas. & Sur. Co. v. Superior Court, 200 Cal. Rptr. 471, 476 (Ct. App. 1984).

[30] *City of Petaluma*, 204 Cal. Rptr. 3d at 203 (quoting *Costco*, 219 P.3d at 746).

[31] *Costco*, 219 P.3d at 746; *City of Petaluma*, 204 Cal. Rptr. 3d at 203. *But see* L.A. Cnty. Bd. of Supervisors v. Superior Court, 386 P.3d 773 (Cal. 2016) (holding that under a Public Records Act request, the attorney-client privilege does not categorically shield from disclosure everything in a legal billing invoice if the matter is inactive, but invoices for pending and active legal matters are subject to the attorney-client privilege).

[32] Umpqua Bank v. First Am. Title Ins. Co., No. 2:09-cv-03208, 2011 WL 997212, at *3 (E.D. Cal. Mar. 17, 2011) (quoting 2,022 Ranch v. Superior Court, 7 Cal. Rptr. 3d 197, 209 (Ct. App. 2003)); *see also* Chi. Title Ins. Co. v. Superior Court, 220 Cal. Rptr. 507, 515 (Ct. App. 1985).

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The dominant purpose of the relationship test has been employed by California courts (and federal courts applying California law) even though there has been an entanglement of business and legal advice. *Umpqua Bank v. First American Title Insurance Co*. demonstrates how far-reaching the attorney-client privilege is in California in situations where an attorney is providing both business and legal services to a corporate client.[33] In *Umpqua Bank*, a district court applying California law held that communications between First American Title Insurance Company (First American) and an attorney employed to perform the dual functions of in-house claims counsel and claims adjuster for First American were privileged.[34] Umpqua Bank attempted to compel First American to produce certain indispensable documents related to an insurance claim that First American asserted were subject to the attorney-client privilege.[35] The court concluded that the documents were subject to the privilege. In holding the dominant purpose of the relationship between the attorney performing the dual functions and First American to be one of an attorney and client, the court found compelling the fact that the attorney was acting both as an attorney and the claims adjuster assigned to the case, and that First American employed the attorney to provide First American with a legal opinion concerning the claims made by a third party.[36] In so ruling, the court found that these two activities were so intertwined that a clean distinction between the attorney's roles was impossible to make.[37] Despite the entanglement, the court still found the dominant purpose of the relationship to be that of an attorney and client.[38]

[2] Primary Purpose of the Specific Communication Test

Colorado, New Mexico, Texas, and Utah are among the states that adhere to a heightened application of the attorney-client privilege as compared to the dominant purpose of the relationship test applied in California. In these states, and under federal law, courts look at the purpose of the *communication* when determining whether the attorney-client privilege is

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[33] 2011 WL 997212.

[34] *Id*. at *3-4.

[35] *Id*. at *1.

[36] *Id*. at *3.

[37] *Id*.

[38] *Id*.

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applicable.[39] Under this view, courts will look at the main purpose of the individual communication rather than the dominant purpose of the relationship when determining whether a particular communication is subject to the attorney-client privilege.[40] If the purpose of the communication

was to facilitate the rendition of legal services, the communication will be deemed privileged.[41] If, however, the primary purpose of the communication was non-legal, the privilege will not apply and the communication will be discoverable (unless protected by other rules of evidence).[42]

Courts applying this heightened standard have permitted the discovery of items that might otherwise have been considered privileged in California. In *Bhandari v. Artesia General Hospital*, the Court of Appeals of New Mexico affirmed a lower court's ruling that a memorandum prepared by a hospital's general counsel was not privileged.[43] The hospital had conducted an investigation of one of its employees in which the legal department was involved.[44] At the conclusion of the investigation, it was determined that the employee had violated his contract and the hospital should terminate his employment.[45] In addition, the hospital decided to terminate the employee's wife, who worked at the hospital as well.[46] In order to accomplish these goals, the hospital gave the employee's wife two options: she could resign and the hospital would allow her husband to resign as well, or if she did not resign, the hospital would fire her husband.[47] The general counsel for the

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[39] *See* Bhandari v. Artesia General Hosp., 2014-NMCA-018, ¶ 12, 317 P.3d 856; Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court, 718 P.2d 1044, 1049 (Colo. 1986); DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, ¶ 43, 303 P.3d 1187; Jackson v. Kennecott Copper Corp., 495 P.2d 1254, 1257 (Utah 1972) (requiring holder of privilege to demonstrate that primary purpose of providing data to attorney was for legal services and not to commit a crime or tort). Note, however, that Texas courts have opted to look at the purpose of the communication rather than the *primary* purpose of the communication when determining whether the communication is subject to the attorney-client privilege. *See In re* Fairway Methanol LLC, 515 S.W.3d 480, 489 (Tex. App.—Houston [14th Dist] 2017) ("[T]he language of [Tex. R. Evid.] 503(b) does not require that the *primary* purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services.").

[40] *See, e.g.*, *Bhandari*, 2014-NMCA-018, ¶¶ 9-17; *In re Fairway Methanol*, 515 S.W.3d at 487-88; *Nat'l Farmers Union*, 718 P.2d at 1049; *DCP Midstream*, 2013 CO 36, ¶ 41.

[41] *In re Fairway Methanol*, 515 S.W.3d at 489.

[42] *See Bhandari*, 2014-NMCA-018, ¶¶ 16-17; *In re Fairway Methanol*, 515 S.W.3d at 489.

[43] *Bhandari*, 2014-NMCA-018, ¶ 21.

[44] *Id*. ¶ 4.

[45] *Id*.

[46] *Id*. ¶ 5.

[47] *Id*.

hospital, who also served as the senior vice president, prepared a memorandum concerning the termination process and a script designed to direct the hospital's representatives toward their goal of forcing the employees' resignation during a planned meeting with the two employees.[48] The wife sued the hospital for breach of contract, economic coercion/bad faith, and misrepresentation.[49] After finding the memorandum was not privileged, the district court allowed the wife to admit the memorandum in its entirety into evidence at trial.[50] The hospital appealed.[51]

The appellate court concluded that, while the general counsel prepared the memorandum for legal purposes with regard to the husband, the general counsel prepared the memorandum for a business purpose with regard to the termination of the wife.[52] It is for this reason that the court affirmed the lower court's holding that the memorandum was not privileged.[53] In so holding, the court articulated the following rule for situations where it is not clear whether the primary purpose of a communication is for legal or business advice: a court "should conclude the communication is for a business purpose, unless evidence clearly shows that the legal purpose outweighs the

business purpose."[54]

Marten v. Yellow Freight System, Inc. further illustrates the sometimes harsh result that is produced when courts apply the primary purpose of the specific communication test.[55] The plaintiff in *Marten* brought a claim against his employer for retaliation, sex discrimination, outrage, defamation, false imprisonment, and assault and battery.[56] During discovery, the plaintiff asked the defendant to produce all minutes of any meeting at which the defendant decided to terminate, suspend, or place the plaintiff on probation.[57] The defendant objected on the grounds that the minutes were subject to the attorney-client privilege, among other things. The defendant contended the privilege applied because an in-house attorney was present "to ensure that the reasons and decision to discharge [the plaintiff] were legally sound under the facts of the case" and that the minutes in question

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[48] *Id*. ¶ 6.

[49] *Id*. ¶ 8.

[50] *Id*.

[51] *Id*.

[52] *Id*. ¶ 21.

[53] *Id*.

[54] *Id*. ¶ 18.

[55] No. 2:96-cv-02013, 1998 WL 13244 (D. Kan. Jan. 6, 1998).

[56] *Id*. at *4.

[57] *Id*. at *7.

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contained "communications from managerial employees which were for the purpose of obtaining legal advice . . . ."[58] The plaintiff filed a motion to compel, which was the subject of the opinion.[59]

The court ultimately found that the minutes were not subject to the attorney-client privilege and granted the plaintiff's motion to compel production of the minutes in their entirety.[60] The court reasoned that the business purposes of the meeting predominated.[61] In support of the court's conclusion, the court found the primary function of the Employee Review Committee, of which the in-house counsel was a voting member, was to decide what employment action to take against an employee, and that any legal implications of such employment action were incidental to the business purposes.[62] Additionally, the court further supported its conclusion by stating that the fact that the in-house counsel cast a vote at the meeting was a strong indication that the predominant purpose of his role at the meeting was a business purpose rather than legal.[63] The court ultimately found the minutes not to be privileged despite having acknowledged that the in-house attorney may have provided legal advice at the meeting because the attorney acted beyond the role of legal counsel when performing "an act of business" by voting.[64]

The holdings in *Bhandari* and *Marten* illustrate the contrast between jurisdictions that look to the purpose of the communication when determining if a communication is privileged and California's dominant purpose of the relationship test. Given the differences in how a court might treat a given communication between an attorney and client, in-house counsel should be aware of the law in his or her state.

Practice Tip: If in-house counsel provides his or her business client both business and legal

advice in the same electronic communication, in-house counsel should recognize that there is a risk that the communication may not be protected by the attorney-client privilege. If the intent is to have an electronic communication protected by the attorney-client privilege, the most conservative course of action is to avoid any discussion of business advice in

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[58] *Id*.

[59] *Id*. at *1.

[60] *Id*. at *10-11 (holding also that the minutes were not protected by the work-product doctrine).

[61] *Id*. at *8.

[62] *Id*.

[63] *Id*.

[64] *Id*.

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that electronic communication. Practical realities may not make this feasible, but at a minimum, in-house counsel should limit the discussion of business advice in an electronic communication that is intended to be privileged so that a trier of fact can objectively see from the face of the communication that it was primarily for a legal purpose.

§ 18.04 Ethical Duties Relating to Electronic Communications

In addition to establishing and maintaining privileges when communicating electronically, in-house counsel should also be mindful of certain ethical duties that apply in our electronic world.[65] In an age when technology is constantly evolving and email is heavily relied upon, attorneys, including in-house counsel, must have a basic understanding about technology in order to uphold the ethical duties owed to their client. Most relevant to this discussion is counsel's duty to provide competent representation, to maintain confidentiality, and to understand and comply with electronic discovery ("e-discovery").[66]

[1] Duties of Competence and Confidentiality

Attorneys have a duty to provide competent representation to a client.[67] "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[68] As part of competent representation, attorneys must keep up to date on all relevant changes in technology, as well as substantive legal issues.[69] Indeed, because technology is an essential component of business and legal practice, attorneys must be mindful of their duty of competence and other duties that are implicated when technology is utilized.

Except for limited circumstances, attorneys have a duty not to disclose information relating to the representation of a client without first having obtained the client's informed consent.[70] Such duty extends to inadvertent

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[65] *See generally* Robert E. Cattanach & Emily Stapf, "Cybersecurity: Information Governance and Incident Response; Ethics and Privilege Considerations," 62 *Rocky Mt. Min. L. Inst*. 3-1 (2016).

[66] "Electronic Discovery, also known as e-discovery, is the use of legal means to obtain [electronically stored information] in the course of litigation for evidentiary purposes." State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion 2015-193, at 1 n.2 (June 30, 2015).

[67] Am. Bar Ass'n (ABA), Model Rules of Prof'l Conduct R. 1.1.

[68] *Id.*

[69] Model Rule 1.1 cmt. 8.

[70] Model Rule 1.6(a).

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disclosures.[71] So long as attorneys make reasonable efforts to prevent inadvertent disclosures, however, no ethical violation will be found.[72]

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the attorney's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[73]

In this regard, ethical duties of attorneys pertaining to technology have evolved over the years. The American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility (Committee) has addressed the duty of confidentiality as it relates to technology and the duty of competence on several occasions. The first was in 1999 when the Committee issued Formal Opinion 99-413 addressing an attorney's duties related to unencrypted emails.[74] The Committee determined that an attorney generally may transmit information relating to the representation of a client over the internet without violating Rule 1.6(a) of the ABA Model Rules of Professional Conduct (Model Rules) so long as the attorney has undertaken reasonable efforts to prevent inadvertent or unauthorized access.[75] The Committee based its opinion on the technology available in 1999, the then-current law as the Committee knew it, and a belief that email communications sent unencrypted over the internet posed "no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy."[76]

The Committee revisited the topic in 2017 in response to the evolving role and risks of technology in the practice of law that have occurred since the issuance of Formal Opinion 99-413.[77] Eighteen years later, in Formal Opinion 477R, the Committee noted that, unlike in 1999, attorneys communicate almost exclusively through email now.[78] Additionally, the ABA had since adopted "technology amendments" to the Model Rules, updated

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[71] Model Rule 1.6(c).

[72] Model Rule 1.6 cmt. 18.

[73] *Id.*

[74] ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 99-413 (Mar. 10, 1999).

[75] *Id.*

[76] *Id.*

[77] ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 477R (May 22, 2017).

[78] *Id.*

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the Comments to Model Rule 1.1 on attorney technological competence,[79] and added paragraph (c)[80] and a new Comment to Model Rule 1.6, which provides that an attorney is required "to act competently to safeguard information relating to the representation of a client against unauthorized

access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[81]

The Committee ultimately articulated the following rule:

> A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.[82]

Whether an attorney has violated his or her ethical duties is a fact-driven inquiry for which there are no bright-line rules.[83]

The Committee offered the following considerations as guidance for attorneys: (1) an attorney should appreciate the nature of the potential cyber threat, including consideration of the sensitivity of the information and the risk of the matter for cyber intrusion; (2) an attorney "should understand how [his or her company's] electronic communications are created, where client data resides, and what avenues exist to access that information"; (3) an attorney "should understand and use electronic security measures to safeguard client communications and information"; (4) an attorney should determine how to protect electronic communications about the client's matter based on the content and type of communication, including whether encryption or personal delivery should be used; (5) an attorney should "follow the better practice" of labeling communications as privileged and confidential; (6) an attorney "must establish policies and procedures, and periodically train employees, subordinates and others

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[79] In 2012, the ABA modified Comment 8 to Model Rule 1.1 to state that lawyers "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." Model Rule 1.1 cmt. 8; *see* Formal Opinion 477R.

[80] Model Rule 1.6(c).

[81] Model Rule 1.6 cmt. 18; *see* Formal Opinion 477R.

[82] Formal Opinion 477R.

[83] *Id*.

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assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients"; and (7) an attorney should perform due diligence on non-attorneys and vendors who are assisting with communication technology.[84]

As noted by the Committee, it is especially important for attorneys to understand technology. It is clear by the language used in Formal Opinion 477R that attorneys need to do more than purchase and install "anti-virus" software. Attorneys must not only understand the software they are installing, but also must have, at a minimum, a basic understanding of the threats the anti-virus software is meant to protect against. This can be a difficult task as malicious software designed to infiltrate the data of others is constantly changing in order to "beat" security software.

> **Practice Tip:** It is prudent for in-house counsel to gain and maintain a fundamental understanding of the software their company utilizes and the risks posed to such software by a third party's malicious software. In-house counsel should strongly encourage the company to

employ a robust in-house information technology (IT) department or hire an outside party to maintain the security of the company's electronic data. In-house counsel should engage in continuous dialogue with technical experts about new and evolving cybersecurity risks and anti-virus software to stay on top of the changes in technology and threats thereto. Additionally, in-house counsel should be cognizant of the sensitivity of their company's information and determine whether more protective measures should be utilized when storing and sending sensitive information. What security measures are utilized will likely be determined by the company's preferences, the type of information at issue and, to a certain extent, the potential harm to the company if an unauthorized third party were to obtain such information.

[2] E-Discovery Duties

An attorney's duty of competence extends to e-discovery as it relates to electronically stored information (ESI) and related technology.[85] Generally, a party has a duty to preserve evidence (including ESI) when the party knows or should have known that such evidence could be relevant

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[84] *Id.*

[85] ESI is information that is stored in "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Cal. Civ. Proc. Code § 2016.020.

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to pending or future litigation.[86] Failing to preserve evidence may have a profound impact on a company involved in litigation.[87]

The duty of competence[88] plays a significant role in a company's duty to preserve evidence. To competently and effectively counsel a company, in-house counsel must advise the company of its duty to preserve evidence. In doing so, in-house counsel must necessarily understand how the company stores information and be cognizant of the company's document retention policy, which dictates the parameters for routinely purging documents. In-house counsel must also articulate to the company when and what evidence must be preserved under the applicable rules of civil procedure and what the penalties are for failing to preserve that evidence.

The State Bar of California adopted Formal Opinion 2015-193, which addresses an attorney's duty of competence as it relates to e-discovery.[89] While the formal opinion is nonbinding on in-house counsel practicing outside of California, it offers guidance that should be followed by all attorneys whose practice involves technology.

In Formal Opinion 2015-193, the State Bar of California Standing Committee on Professional Responsibility and Conduct created a hypothetical fact pattern involving an attorney who lacks knowledge of the company's

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[86] *See* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F.Supp2d 598, 612-13 (S.D. Tex. 2010); *see also* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary. 'While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.'" (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991))).

[87] *See* Fed. R. Civ. P. 37(e) ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment."); *see also* Nuvasive, Inc. v. Madsen Med., Inc., No. 3:13-cv-02077, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016) (parties are permitted to present evidence to the jury regarding the loss of ESI where such information was unintentionally not preserved).

[88]For discussion of an attorney's duty of competence, see § 18.04[1], *supra*.

[89]*See* State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Opinion 2015-193 (June 30, 2015) (also discussing the ethical duty of confidentiality when an attorney fails to ensure that e-discovery excludes privileged and trade secret information).

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technology and becomes involved in e-discovery.[90] In reliance on the representation of his client that all electronic information the opposing party sought had already been provided to the attorney in hard copy format, the attorney chose not to review an electronic copy of the client's data retrieved by a third-party vendor who was jointly hired by all parties to the case.[91] Upon review of the electronic data, opposing counsel accused the attorney of spoliation of evidence. When the attorney then hired an e-discovery vendor to check the electronic data, he discovered that data indeed had been routinely deleted from the client's computers as part of the client's normal document retention policy even though there was a duty to preserve the data.[92]

Formal Opinion 2015-193 described the attorney's ethical duty of competence in e-discovery as follows:

> The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation.[93]

If the attorney lacks the proper skill and resources to handle e-discovery, the attorney has three options: (1) "acquire sufficient learning and skill," (2) "associate or consult with someone with expertise to assist," or (3) decline the representation.[94] The opinion went on to state that the attorney may have violated the duty of competence by failing to supervise the client's IT department when he failed to explain the discovery process to the IT department and relied on the IT department's statements that the attorney received physical copies of all the electronic information sought by the opposing party.[95]

Also related to the duty to preserve evidence is an attorney's duty not to obstruct another party's access to evidence.[96] To uphold his or her duty, an attorney necessarily needs to have a basic understanding of the ESI sought by the opposing party. If in-house counsel is unaware of the procedures

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[90]*Id*. at 1-2.

[91]*Id*. at 2.

[92]*Id*.

[93]*Id*. at 3.

[94]*Id*.

[95]*Id*. at 5-6.

[96]Model Rule 3.4(a) ("A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.").

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for handling and storing ESI within a company, in-house counsel cannot competently determine how to allow opposing parties to access that information in discovery.

In sum, an attorney cannot competently represent and advise a business on legal matters pertaining to e-discovery without possessing an understanding of the procedures and policies implemented by the company in its storage and retention of electronic information. Nor can an attorney allow an opposing party to access evidence if the attorney is unaware of these policies and procedures and how to structure the retrieval of data to protect the client's best interests.

> **Practice Tip:** In-house counsel should acquire the necessary knowledge of the practices and procedures used by their company to store and retain electronic information. In-house counsel should also advise their company of the rules of civil procedure governing e-discovery so the company can create and maintain sound policies that conform to the applicable jurisdictional rules governing e-discovery, including the unintentional destruction of evidence after receiving an e-discovery litigation hold notice.

§ 18.05 Conclusion

This chapter highlights steps that in-house counsel can take to protect privileges and comply with ethical duties in the electronic era in which we live today. It is worth restating that oral communications are sometimes the best approach to protecting privileges. Electronic communications, however, are understandably prevalent now, and it is important to educate the business client on the best approach to communicating in this fashion while maintaining privileges.