

CORPORATE COUNSEL GUIDELINES

2025-2026 UPDATE HIGHLIGHTS

- Case law addressing the application of the attorney-client privilege to a company’s agent under the functional equivalent doctrine (§ 1:3), to outside consultants, investigators, and non-legal employees (§ § 1:3, 1:6, 1:7, 1:18), to summaries of witness statements (§ 1:8); case law discussing issues such as implied representation (§ 1:4), what constitutes legal versus business advice (§ 1:16), the right of a terminated CEO to assert the attorney-client privilege, the standing of a parent corporation to assert the privilege over a subsidiary’s documents, and the effect of a merger on assertion of the privilege (§ 1:22), the effect of a clawback agreement incorporated into a protective order and the consequences for failing to notify opposing counsel of the receipt of an inadvertent disclosure (§ 1:23), and the application of the common interest exception to waiver of the attorney-client privilege (§ 1:24).
- Case law addressing the work-product doctrine, including issues such as whether notes of employee interviews by a compliance manager qualify as protected work product (§ 2:3), the necessity for in camera review where communications involve non-attorney participants discussing legal advice (§ 2:4), whether notice of a potential claim and the preparation of an incident report satisfy the “in anticipation of litigation” requirement (§ 2:6), whether deliberate disclosures to a potential litigation funder and disclosures during a mediation constitute waivers of work-product protection (§ 2:12), the application of the common interest exception to waiver of work-product protection (§ 2:12), and what constitutes a sufficient showing of substantial need so as to warrant disclosure of protected work product (§ 2:13).
- Ethics opinions addressing a number of matters, including a corporate lawyer’s duty to advise corporate constituents of the lawyer’s role (§ § 1:4, 3:14), to advise the corporation about future action that poses potential legal risks to corporate constituents who act on behalf of the corporation (§ § 3:7, 3:13, 3:14), to obtain informed consent from a disinterested constituent when representing the corporation in a derivative action (§ § 3:8, 3:10), to be reasonably knowledgeable about the risks of generative artificial intelligence and the on-going threats to cyber security in order to prevent inadvertent or unauthorized disclosures of

confidential information (§ 3:11), and to conduct further inquiry into the facts and circumstances of a representation, both at its inception and during its course, as required by the 2023 amendments to Rule 1.16(a) (§ 3:20), and the duty of government attorneys to comply with state ethical rules when dealing with represented persons (§ § 3:26, 3:30); case law discussing a variety of issues, including the disqualification of a conflicted out-of-state attorney and his law firm where ethical screens are not recognized in the jurisdiction governing the attorney's conduct (§ § 3:2, 3:4), the creation of an implied, personal attorney-client relationship between corporate counsel and a corporate executive (§ 3:14), the imposition of disciplinary sanctions for failing to provide oversight of a paralegal (§ 3:30), and what constitutes highly prejudicial conduct in violation of Model Rule 3.6 governing contact with the press (§ 3:33).

- Recent surveys on the use of outside counsel (§ 4:4); and case law addressing competitive decisionmaking, the role of in-house counsel, and the risk of inadvertent disclosures of protected information (§ 4:24).
- Recent sentencing statistics for corporations convicted of criminal offenses (§ § 5:1, 5:26-5:30); guidance from the Justice Department on factors for prosecutors to consider in assessing a corporation's compliance program (§ 5:3); amendments to the Federal Acquisition Regulations regarding what agencies should consider in determining the sufficiency of a contractor's disclosures as to its "present responsibility" (§ 5:20); amendments to the U.S. Sentencing Guidelines eliminating acquitted conduct as a factor for courts to consider in sentencing a defendant (§ 5:23); and case law affirming the imposition of a mandatory exclusion for a health care provider following conviction for a misdemeanor offense (§ 5:33).
- Case law addressing issues such as whether a union counsel also represents a union member so as to preclude counsel's representation of the union in an action against the union by the union member (§ 6:4), whether in-house counsel is entitled to a whistleblower award under the Dodd-Frank Wall Street Reform and Consumer Protection Act and its implementing regulations, and may maintain a wrongful discharge action based on a violation of public policy (§ 6:11); and ethics opinions addressing whether a former in-house attorney may represent current and former employees (§ 6:15), and whether an attorney may disclose confidential information where the client commits a crime against the attorney or a person associated with, or related to, the attorney (§ 6:21).
- Case law discussing whether misstatements or omissions in a certification under Section 302 of the Sarbanes-Oxley Act are actionable under the securities laws (§ 7:2).