CORPORATE COUNSEL GUIDELINES 2026-2027 UPDATE HIGHLIGHTS

- Case law addressing the application of the attorney-client privilege to a company's low-level employee, to statements of the company's engineer following a workplace accident, to a company's agent under the functional equivalent doctrine, to outside accountants, to email exchanges among non-legal employees using a privileged email channel created under the direction of counsel (§§ 1:3, 1:6, 1:7); case law and ethics opinions discussing issues such as whether communications with generative AI platforms are confidential and protected by the attorney-client privilege (§§ 1:5, 1:8, 1:10, 1:13); what constitutes business versus legal advice (§§ 1:16, 1:18); whether a supervisor or co-venturer may waive the attorney-client privilege (§ 1:22); application of the common interest exception (§§ 1:23, 1:24); 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); whether compliance with a subpoena, filing a bad faith claim, or asserting a good faith belief in the lawfulness of one's conduct results in a waiver of the attorney-client privilege (§§ 1:24, 1:25); application of the crime-fraud exception to tortious conduct (§ 1:26); and what constitutes good faith under the *Garner* doctrine (§ 1:27).
- Case law addressing the application of the work-product doctrine to documents created by a client or a pro se litigant through a generative AI platform (§§ 2:4, 2:11); to emails from outside consultants to insurer's attorney where consultants were retained by the insurer prior to commencement of the attorney-client relationship (§ 2:4); case law discussing issues such as whether the in-anticipation-of-litigation requirement is met where the documents were prepared during an internal investigation prompted by the receipt of a subpoena, or where an insured's counsel advises the insurer's counsel of the retention of counsel following denial of the claim (§ 2:6); and whether work product generated by an insured's counsel in a bad faith claim should be subject to the rule rendering work product protection unavailable to documents prepared by the insurer's counsel in defense of the bad faith claim (§ 2:14).
- Ethics opinions addressing a number of matters, including licensing requirements for in-house counsel working

remotely from another jurisdiction (§ 3:2); Rule 1.6 and the disclosure obligations of an attorney in a motion to withdraw from the representation (§ 3:20); the ethical responsibility of a lawyer for the acts of a non-lawyer (§ 3:30); and the prohibition against non-compete agreements for in-house counsel (§ 3:34); case law addressing a variety of issues, such as whether a company has a duty to confirm the licensing status of its in-house counsel, or may rely on a good faith belief that its counsel is authorized to practice law; the disciplinary authority of a state court over an out-of-state licensed attorney practicing federal immigration law within the state (§ 3:2); the sufficiency of the evidence to rebut the presumption of shared confidences so as to preclude disqualification of conflicted counsel (§ 3:4); the failure of corporate counsel to report up-the-ladder under Rule 1.13 as a basis for a breach of fiduciary duty claim (§§ 3:7, 3:13); the efficacy of an advance waiver to prevent disqualification of a conflicted attorney (§ 3:8); the ethical propriety of counsel representing a company and its part-owner in action against the other part-owner involving both derivative and direct claims and counterclaims (§ 3:10); what constitutes a breach of the duty of confidentiality under Rule 1.6 (§ 3:11); and the liability of corporate counsel for aiding and abetting a CEO's breach of fiduciary duty (§ 3:20).

- Recent surveys on the use of outside counsel (§ 4:4); authoritative commentary on the need to develop a discovery approach that can adapt to changing technologies and data types (§ 4:14); and case law involving the imposition of sanctions for reckless conduct in preserving electronic documents and information in violation of a litigation-hold (§ 4:14).
- Recent sentencing statistics for corporations convicted of criminal offenses (§§ 5:1, 5:26-5:30); guidance to federal prosecutors from the Criminal Division of the Justice Department on priorities and policies in combatting corporate and white-collar crime under the new administration; the issuance by the Justice Department of a department-wide Corporate Enforcement and Voluntary Self-Disclosure Policy (§§ 5:3, 5:20); amendments to the U.S. Sentencing Guidelines governing organizational defendants that eliminate specific grounds for departing from the applicable guidelines range (§§ 5:27); and case law involving the sufficiency of a complaint for securities fraud based on disclosures relating to loss contingencies (§ 5:22), and the imposition of a mandatory exclusion for a health care company following a misdemeanor conviction for drug misbranding (§ 5:33).
- Case law involving a variety of issues, such as the viability of a claim against an attorney by a non-client based on an implied attorney-client relationship; the duty of corporate

counsel to disclose the CEO's fraudulent conduct to an investor; the liability of corporate counsel for misleading statements made to a corporate director prior to, and in connection with, his decision to accept a seat on the board (§ 6:5); and the right of an attorney to maintain a retaliation claim under Section 1514A of the Sarbanes-Oxley Act (§ 6:11); an ethics opinion addressing the question of whether a former corporate counsel may serve as a qui tam relator in an action under the False Claims Act (§ 6:17).

- Commentary addressing the SEC's enforcement of the certification requirements under Section 302 of the Sarbanes-Oxley Act (§ 7:2).
- Case law reaffirming the absence of a private right of action under SEC's Part 205 reporting obligations for attorneys (§ 8:1).