COUNTRY REPORT: UNITED STATES

1.	What are the rules governing disclosure of documents in civil and criminal litigations in your jurisdictions? Can a party be compelled to make specific disclosures of certain documents? Please refer to any relevant texts or case law in that respect.

Civil Litigation

In federal court, the Federal Rules of Civil Procedure govern document disclosures in civil matters and address both mandatory disclosures and disclosures during the course of discovery.

Mandatory disclosures. In general, mandatory disclosures must be made without any request by an opposing party, and pertain to information that a party may use to support its claims or defenses. Mandatory disclosures fall into three categories:

(i) **Initial disclosures.** A party must disclose copies of all documents, including electronically-stored documents, that the party may use to support its claims or defenses and that are within the party's possession or control. Fed. R. Civ. P. 26(a)(1).

(ii) **Expert testimony**. A party must disclose the identity of any expert witness who may present evidence at trial. Unless otherwise stipulated or ordered by the court, expert disclosures must be accompanied by a written report prepared and signed by the expert witness containing a complete statement of all opinions the expert will express, the basis for these opinions, and the expert's qualifications. Fed. R. Civ. P. 26(a)(2).

(iii) **Pretrial disclosures**. A party must disclose an identification of each document that the party expects to offer at trial, and those that it may offer if the need arises. Fed. R. Civ. P. 26(a)(3).

Discovery. Rule 26(b) of the Federal Rules of Civil Procedure specifies the scope and limits of discovery. Generally, any matter is discoverable if it is non-privileged, relevant to any party's claim or defense, and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Whether requested discovery is proportional to the needs of the case is a function of the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* It is important to note that a matter, or document, is discoverable even if it is not admissible as evidence at trial.

Criminal Litigation

The Federal Rules of Criminal Procedure govern document disclosures in federal criminal court. Fed. R. Crim. P. 16. The United States Constitution and the Model Rules of Professional Ethics also place special disclosure responsibilities on the government in criminal cases.

Upon a defendant's request, the government must disclose any documents in its possession, custody, or control that are material to preparing a defense, that the government intends to use at trial in its case-in-chief, or that were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E). A variety of other written recordings also must be disclosed upon a defendant's request, including any of the defendant's relevant written or recorded statements, and any portion of a written record containing the substance of any relevant oral statement made before or after arrest in response to interrogation. Fed. R. Crim. P. 16(a)(1)(B). Furthermore, the results or reports of any physical or mental examination and of any scientific test or experiment must be disclosed upon a defendant's request. Fed. R. Crim. P. 16(a)(1)(F).

Defendants bear more limited, reciprocal duties of disclosure. Regarding documents in particular, if the defendant requests disclosure of any documents under Rule 16(a)(1)(E) (see preceding paragraph), then the defendant similarly must disclose its own documents to the government. Fed. R. Crim. P. 16(b)(1)(A). The defendant must permit the government, upon request, to inspect and to copy or photograph any documents that are in the defendant's possession, custody, or control and that the defendant intends to use in its case-in-chief. Fed. R. Crim. P. 16(b)(1)(A)(ii).

The United States Constitution places additional disclosure requirements on the government. Under the landmark decision in *Brady v. Maryland*, the United States Supreme Court found that due process requires the prosecution to disclose any material evidence favorable to the defendant. 373 U.S. 83 (1963). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed, and includes exculpatory and impeachment evidence. *See Strickler v. Greene*, 527 U.S. 263 (1999). Disclosures under *Brady* are thus based on a retrospective inquiry, given that the prejudicial effect of the government withholding documents favorable to the defendant can only arise upon conviction. *See United States v. Certified Environmental Services*, 753 F.3d 72 (2d Cir. 2014).

Model Rule 3.8(d) of the Model Rules of Professional Conduct[1] places a final duty of disclosure on prosecutors in criminal cases. Model Rule 3.8(d) requires prosecutors to timely disclose to the defense all information known to the prosecutor that tends to negate the guilt of the accused, or mitigates the offense, along with all non-privileged information known to the prosecutor that may mitigate a defendant's sentence. Unlike *Brady* disclosures, Model Rule 3.8(d) contains no prejudice requirement. That is, there is no requirement under Model

[1] The Model Rules of Professional Conduct are model rules drafted by the American Bar Association. Although purely advisory, the Model Rules serve as the basis of the professional ethics codes in most jurisdictions.

Rule 3.8(d) that the result of the proceeding would have been different had the prosecution disclosed the information favorable to the defense. Thus, Model Rule 3.8(d) requires timely disclosure of information helpful to the defendant, potentially in advance of, or contemporaneous with, trial. Furthermore, Model Rule 3.8(d) is a rule of professional conduct, and thus not a legal requirement which, if violated, constitutes grounds for challenging a conviction. However, violation of Rule 3.8(d) can be used as evidence of misconduct that may have resulted in a violation of due process.

2. Is the notion of legal privilege recognized in your jurisdiction? If yes, what is its legal basis? Is it considered a procedural or substantive issue? Please refer to any relevant texts or case law in that respect.

Basis of the Attorney-Client Privilege and the Duty of Confidentiality

There are two sets of rules governing the use and disclosure of information related to the representation of a client: (1) the attorney-client privilege; and (2) the duty of confidentiality pursuant to the Model Rules of Professional Conduct.

Attorney-Client Privilege

The attorney-client privilege applies to confidential communications between attorney and client for the purpose of seeking, obtaining, or giving legal assistance. This privilege is grounded in the law of evidence, and thus provides legal protection to confidential attorney-client communications by barring the introduction of such communications in evidence at trial, even in the face of a court order. Rule 501 of the Federal Rules of Evidence establishes the existence of the attorney-client privilege, but explicitly leaves the exact contours of the privilege to the federal common law.[2] Fed. R. Evid. 501.

[2] Under the United States choice of law regime, if parties from different jurisdictions are litigating a matter of state law before a federal court, and there is an applicable state law governing attorney-client privilege, then the state rule will govern. Fed. R. Evid. 501.

Courts differ on whether the attorney-client privilege is a procedural or substantive right. Some courts have found that the sole purpose of the privilege is to police disclosures in court proceedings, and therefore it cannot be a substantive right because it does not provide any legal basis to police communications external to litigation. *See Wharton v. Calderon*, 127 F.3d 1291, 1205-06 (9th Cir. 1997). Substantive rights, in contrast, are not context specific. The trend is to consider the attorney-client privilege a substantive right held by the client because "many courts have recognized...that privilege must be considered substantive because it affects conduct beyond the context of litigation." *Wellin v. Wellin*, 211 F.Supp.3d 793, 803 (D.S.C. 2016). That is, attorney-client privilege is a general protection for a type of relationship deemed socially valuable, and will influence the information exchanged between attorney and client outside the context of any litigation; the privilege is then not merely a rule dictating the process by which evidence may be gathered or introduced during litigation. *See id*.

Duty of Confidentiality

In addition to the attorney-client privilege, the Model Rules of Professional Conduct specify the professional duty of confidentiality owed by an attorney to her client. Per Model Rule 1.6, a lawyer must not reveal information "relating to the representation of a client," or use such information to the client's disadvantage. The category of information protected under Model Rule 1.6 is evidently much broader than the information protected under the attorney-client privilege. Whereas the attorney-client privilege extends only to specific attorney-client communications, the duty of confidentiality covers all information related to the representation, regardless of its source or purpose. *See Perillo v. Johnson*, 205 F.3d 775 (5th Cir. 2000). For example, a conversation between a lawyer and an eyewitness to an accident involving the lawyer's client is confidential despite not involving any client communications. Importantly, the duty of confidentiality extends to disclosure and harmful use of information about former clients in addition to current clients.

There are three general exceptions to the professional duty of confidentiality. First, a client may give informed consent to use or disclosure of confidential information. Model Rule 1.6(a). Second, a lawyer is impliedly authorized to disclose information necessary to carrying out the representation. *Id.* Third, a lawyer may reveal confidential information without the client's consent (express or implied) in a limited set of circumstances, including when the lawyer believes disclosure is necessary to:

(i) "[P]revent reasonably certain death or substantial bodily harm";

(ii) "[P]revent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services";

(iii) "[P]revent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services";

(iv) "[S]ecure legal advice about the lawyer's compliance" with the Model Rules of Professional Conduct;

(v) "[E]stablish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client";

(vi) "[C]omply with other law or a court order"; or

(vii) "[D]etect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

Model Rule 1.6(b).

The professional duty of confidentiality is grounded in the standards of professional ethics. The Model Rules thus place a bar on the use and disclosure of client information by an attorney, but pose no impediment to court-ordered disclosures. In other words, a court may

compel an attorney to reveal confidential information that does not satisfy the requirements needed for protection under the attorney-client privilege. Thus, the Model Rules provide less robust protection for a much broader range of information.

3. What are the rules protecting communications between attorneys and clients in your jurisdiction? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Attorney-Client Privilege

Attorney-client privilege protects confidential communications between an attorney and client. These elements are expanded upon below.

i. Legal Communications

Attorney-client privilege only protects communications made for the purpose of giving or obtaining legal advice. *Upjohn v. United States*, 449 U.S. 383 (1981). Of course, communications between attorneys and clients may involve multiple purposes. For instance, a client may seek both legal and business advice in the same communication. In such cases, a communication is privileged if its primary purpose is to obtain legal advice. Conversely, if a communication is primarily for a non-legal purpose, and legal advice is merely incidental, the communication will not be privileged. *See Neuder v. Battelle Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000). Given the difficulty in determining the primary purpose of a communication, some courts have held that privilege attached to communications as long as at least one of the significant purposes of the communication was to obtain legal advice. *See In re Kellogg Brown and Root*, 756 F.3d 754 (D.C. Cir. 2014). The court in *In re Kellogg Brown and Root* found that privilege may apply to a multipurpose communication without having to identify the single, primary purpose of that communication. *See id.* Rather, seeking legal advice need only be a significant reason for making the multipurpose communication. *See id.* Recently, however, other courts have maintained the primary purpose test for multipurpose communications. *See In re Grand Jury*, Nos. 21-55085, 21-55145, 2021 U.S. App. LEXIS 27420 (9th Cir. Sep. 13, 2021) (refusing to apply the significant purpose test to a context other than internal corporate investigations).

Although the purpose of a communication must be legal to benefit from the protection of attorney-client privilege, the communication need not be related to any potential or actual litigation. Furthermore, the privilege protects any oral communications as well as any documents that may be considered communications, such as letters, memoranda, emails, and text messages.

It is important to note that the attorney-client privilege does not protect the underlying information in a communication, including any documents sent by the client to the attorney not prepared by the client. Put differently, privilege cannot be invoked to protect underlying information if the client is questioned about such information at trial, or ordered by a court to disclose such information.

ii. Protected Parties

In its most basic form, attorney-client privilege protects confidential legal communications between a particular attorney and her client. However, in legal practice, there are various types of attorney-client relationships, and under certain circumstances, the attorney-client privilege will protect communications made in the course of those relationships as well. With respect to attorneys, the privilege may extend to in-house counsel, foreign attorneys, and third-party agents acting on behalf of an attorney. With respect to clients, the privilege extends to corporate clients, agents of corporate clients, and former and prospective clients.

Attorneys. The scope of protection afforded to communications between in-house counsel and company personnel turns on the purpose of the communication. If the purpose of the communication is to obtain legal advice, then the communication will be privileged. Put differently, mere formalities such as holding a law degree or having legal duties will not, in and of themselves, protect the communications of in-house counsel. Rather, in-house counsel must be acting in the capacity of legal advisor.

Whether the purpose of a communication between in-house counsel and company employees is indeed to seek legal advice will depend on which tests the relevant court will apply. As noted earlier, some courts have found that multipurpose communications are privileged so long as one of the significant purposes of the communication is to obtain legal advice. *See In re Kellogg Brown and Root*, 756 F.3d 754 (D.C. Cir. 2014). Other courts maintain the primary purpose test for communications between in-house counsel and company employees. *See, e.g., Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 209 (E.D. Pa. 2008).

Attorney-client privilege may protect communications between clients and lawyers not licensed to practice in the United States. Some courts apply a "functional equivalency" test, where privilege attaches to communications made by foreign lawyers because they are the functional equivalents of U.S. lawyers. *See Renfield Corp. v. Remy Martin*, 98 F.R.D. 442 (D. Del. 1982) (1982). Although foreign lawyers are not licensed attorneys in the United States, their status as licensed attorneys in their respective jurisdictions enables them to fulfill the functionally equivalent role of lawyers in the United States, and thus entitles their legal communications with their clients to the same protections. However, other courts apply a different test to determine whether attorney-client privilege extends to foreign lawyers. Some courts look to the home jurisdictions of the foreign lawyers and find that privilege attaches in the United States only if the foreign lawyer would have had a reasonable expectation of confidentiality in her home jurisdiction. *See Jonathan Corp. v. Prime Computer*, 114 F.R.D. 693 (E.D. Va. 1987). Still other courts apply the "touch base approach," under which "any communication touching base with the United States will be governed by the federal discovery rules," including attorney-client privilege. *See Duplan Corp. v. Deering Miliken, Inc.*, 397 F. Supp. 1146, 1169 (D.S.C. 1974).

Perhaps surprisingly, the attorney-client privilege may protect third parties with no legal qualifications whatsoever. The privilege can attach to communications between the client and an agent of the attorney if the communication is confidential and made for the purpose of obtaining legal advice from counsel. For example, in *United States v. Schwimmer*, the client provided information to an accountant at

the direction of counsel to aid counsel in analyzing financial evidence. 892 F.2d 237, 243 (2d Cir. 1989). The communication between the client and the third party was privileged because it was made at the direction of counsel and for the purpose of aiding counsel in rendering legal advice. *Id*.

Clients. The attorney-client privilege also protects a variety of clients. Corporations, as distinct legal entities, are protected by attorney-client privilege. However, a corporation is a collection of individuals employed on behalf of the corporation, and a corporation thus only communicates with counsel through those employees, including officers and directors. Attorney-client privilege protects corporate clients by protecting the communications between the corporation's own lawyer (either in-house or external) and the corporation's employees, directors, or officers. Corporate employee communications are privileged if (i) they are made to counsel at the direction of corporate superiors, (ii) the information is not available from upper-level management, (iii) the information concerns matters within the employees' corporate duties, (iv) the employees were aware that the purpose of the communications was for the corporation to obtain legal advice. *See Upjohn Co v. United States*, 449 U.S. 383 (1981). For privilege to attach to communications between counsel and corporate employees, the lawyer does not need to conduct the employee interviews herself. *See In Re Kellog Brown & Root, Inc.*, 756 F.3d 745 (D.C. Cir. 2014). Neither must the communications between attorneys and corporate clients consist of legal topics. That is, courts have upheld claims of privilege for purely factual investigations conducted by attorneys, where the corporation was seeking legal expertise and judgment in conducting the investigation. *See In re Allen*, 106 F.3d 582 (4th Cir. 1997).

The attorney-client privilege also extends beyond communications made between lawyers and current clients. Communications between lawyers and potential clients seeking legal assistance are privileged, and remain privileged, even if the attorney is not hired. *In re Grand Jury Subpoena*, 415 F.3d 333, 339 (4th Cir. 2005). However, the person seeking to invoke privilege must show that the potential client

affirmatively sought to become a client by seeking legal advice from an attorney acting in that capacity. *See id*. Communications made after the attorney has denied representation are not privileged.

Communications between attorneys and former clients also remain privileged after the attorney-client relationship has ceased. *See, e.g. United States v. Kleifgen*, 557 F.2d 1293, 1297 (9th Cir. 1977). In most jurisdictions, the privilege survives the client's death. *See, e.g. Smith & Berlin v. United States*, 524 U.S. 399 (1998) (rejecting Kenneth Starr's attempt to discover former Deputy White House Counsel Vince Foster's communications with his lawyer following Foster's suicide).

iii. Confidentiality

Privilege will only attach if the communication is confidential. The presence of third parties may waive attorney-client privilege because the communication is no longer private between the attorney and client. For attorney-client privilege to survive the presence of a third party, that third party must be the agent of either the lawyer or client, acting in a professional capacity, and necessary to obtain legal advice. *See United States v. Evans*, 113 F.3d 1457, 1464 (7th Cir. 1997). For example, the presence of a third-party friend included in the communication to offer comfort or advice in a personal capacity is not necessary to obtaining legal advice, and will waive attorney-client privilege. *See id.* at 1465.

In addition to intentional disclosures, inadvertent disclosures also may waive attorney-client privilege. Whether inadvertent disclosures waive privilege turns on the application of a balancing test. In federal court, Rule 502(b) of the Federal Rules of Evidence states that privilege is not waived if (i) the disclosure was inadvertent, (ii) the holder of the privilege took reasonable steps to prevent disclosure, and (iii) the holder promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(b).

The vast majority of state courts use a similar balancing test. Generally, the factors considered are (i) the reasonableness of the precautions taken, (ii) the client's intention as to whether to retain the confidentiality of the communication, (iii) the extent of the inadvertent production, (iv) the promptness of actions taken to retrieve privileged documents, and (v) the fundamental fairness to the respective parties. *See, e.g. Baliva v. State Farm Mut. Auto. Ins. Co.*, 275 A.D.2d 1030, 1032 (N.Y. App. Div. 2000).

Common Interest Privilege

The major exception to third-party disclosures is the joint defense, or common interest, privilege. The common interest rule is an extension of attorney-client privilege that protects communications between parties in furtherance of a joint effort or strategy. *See United States v. Krug*, 868 F.3d 82, 86 (2nd Cir. 2017). Although this expands the number of parties with whom information can be shared without waiving attorney-client privilege, the communications between parties must still advance a common legal purpose. *See id.* The common interest rule is not a blanket extension of privilege to all communications between parties with a joint defense or common interest. To that end, the common interest rule is most protective when communications are between lawyers of the respective parties in common interest. *See id.* However, the communications may still be privileged if the communication is not between respective lawyers, as long as the purpose of the communication is to obtain legal advice from counsel.

Although protected communications must be to advance a legal purpose, the common interest rule applies even if there is no active litigation. *See Schwimmer*, 892 F.3d at 244. It is sufficient for the parties to have a common interest in a legal matter, even if no litigation materializes. *See id*.

The protection provided by the common interest rule may be waived voluntarily, or by subsequent litigation between the parties in common interest. Courts are divided on which parties can voluntarily waive common interest privilege. Some courts hold that an

individual party can waive privilege for communications it produces or creates. *See, e.g., Great Am. Surplus Lines Ins. Co. v. Ace Oil Co.*, 120 F.R.D. 533, 536-38 (E.D. Cal. 1988). Other courts hold that, irrespective of which party produced that communication, waiver for any communication protected by the common interest privilege requires consent of all parties. *See, e.g., United States. Gonzalez*, 699 F.3d 974 (9th Cir. 2012). Subsequent litigation between the parties in common interest also waives common interest privilege with respect to information that is at issue in the new litigation. *See Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc*., 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997). Waiver only extends to information actually shared between the parties. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. g (2000).

To maximize chances of the common interest rule protecting communications between parties, it is best practice to enter into an agreement that specifies the scope, duration, boundaries, and parties to the common interest arrangement.

Crime-Fraud Exception

The attorney-client privilege does not apply when a client seeks advice from a lawyer for the purpose of furthering a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989). For instance, privilege does not protect a client communicating to his lawyer that he intends to bribe or threaten jury members at his upcoming trial. *See Nix v. Whiteside*, 475 U.S. 157, 174 (1986). However, to fall within the crime-fraud exception, the communication must seek the aid of the lawyer in furtherance of an ongoing or future crime or fraud. For instance, in *Newman v. State*, 863 A.2d 321, 335-36 (Md. 2004), the crime-fraud exception did not apply to the defendant telling his lawyer that he intended to commit murder because he was not seeking his lawyer's help in furthering that future crime. Furthermore, the crime-fraud exception does not apply to communications concerning past crimes or fraud. *Zolin*, 491 U.S. at 562.

4.	What rules (if any) protect documents created for purposes of arbitration/litigation? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Work-Product Doctrine

Materials prepared in advance of litigation are protected under the work-product doctrine, which was first recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine bars discovery or compelled disclosure of all oral or written materials prepared by another party or its representative in anticipation of litigation, and is meant to protect the mental impressions, opinions, or legal theories of a party's attorney or representative regarding the litigation. The court in *Hickman* recognized, however, that the work-product doctrine functions as a rebuttable presumption. Work product may be discoverable under the doctrine upon a showing of undue hardship and substantial need. The doctrine is now codified for the federal courts in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The work-product doctrine applies to materials prepared by any party or its representative, including its attorney, consultant, surety, indemnitor, insurer, or agent. Fed. R. Civ. P. 26(b)(3)(A). The work-product doctrine thus sweeps more broadly than attorney-client privilege because it protects more than communications between counsel and client, or their agents at the direction of counsel. For example, an attorney's interview with a potential witness in advance of litigation is not a communication between the attorney and her client, and thus does not fall under the protection of attorney-client privilege. However, the interview, prepared by the attorney, is protected from disclosure because it is work product.

Materials are prepared in anticipation of litigation if they would not have been prepared but for the prospect of that litigation. *See United States v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998). Thus, work product prepared in the ordinary course of business, even if by an attorney, is not protected from discovery. *See United States v. Rockwell*, 897 F.2d 1255, 1266 (3d Cir. 1990). The anticipated litigation, however, need not be imminent. *See id.*

As mentioned, unlike the attorney-client privilege, work product doctrine does not completely protect such work product from discovery. If a court determines that the need for discovery of work product is great enough, it may compel discovery. In evaluating the need for disclosure of work product, courts have drawn a line between "fact work product" and "opinion work product." *See FTC v. Boehringer Ingelheim Pharmacueticals*, 778 F.3d 142, 153 (D.C. Cir. 2015). The division between fact and opinion work product turns on whether the work product reveals a legal theory or opinion provided by an attorney using her legal knowledge. *See id.* That is, if a layperson could have generated the same work product under the circumstances, the work product will qualify as fact work product. *See id.* In contrast, opinion work product captures the mental opinions or legal theories of an attorney about the litigation. *See id.* Fact work product is discoverable upon demonstrating a substantial need. This standard is rarely met and involves situations such as witness unavailability, where the only alternative source of information is the opposing party's work product. *See Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1023 (7th Cir. 2012). The bar for discovery of opinion testimony is higher still, requiring an "extraordinary showing of necessity." *See Boehringer*, 778 F.3d at 153.

It is worth noting that the common interest rule also applies to the work-product doctrine. Materials exchanged between, or jointly produced by, parties with a common legal interest in the same anticipated litigation are protected under the work-product doctrine. *See, e.g., In re AndroGel Antitrust Litig.*, No. 1:09-CV-955-TWT, 2015 WL 9581828 (N.D. Ga. Dec. 30, 2015).

5.	What rules (if any) protect communications or documents exchanged in the context of settlement negotiations? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Evidence of compromise offers or acceptances, and any form of communications in the context of settlement negotiations, are not admissible in evidence, on behalf of any party, to prove or disprove the validity or amount of a claim or to impeach by a prior inconsistent statement. Fed. R. Evid. 408(a). Such offers or communications are only protected if made after a dispute has arisen, however. Although

an actual litigation does not need to exist, there must exist a difference of opinion between the parties that the negotiations are attempting to resolve. *See Alpex Computer Corp. v. Nintendo Co.*, 770 F. Supp. 161, 164 (S.D.N.Y. 1991).

There are two exceptions to this exclusionary rule:

(i) The negotiations or offers of compromise are (a) related to a claim in a criminal case and (b) between a party and a public office that is exercising its regulatory, investigative, or enforcement authority. Fed. R. Evid. 408(a)(2).

(ii) Conduct or communications in the context of negotiations may be admitted in evidence for purposes other than showing the validity or amount of a civil claim, *e.g.*, to prove a witness's bias, to negate a contention of undue delay, to prove an effort to obstruct a criminal investigation, or to prove that a party was on notice that its conduct was wrongful. Fed. R. Evid. 408(b).

It is worth noting that, in a civil or criminal case, (i) statements made during plea negotiations if the negotiations did not result in a guilty plea, (ii) guilty pleas that are later withdrawn, and (iii) no contest pleas are inadmissible against the defendant. Fed. R. Evid. 410(a).

6. What rules (if any) protect communications between attorneys? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Communications between attorneys are not protected unless they are covered by the common interest privilege, discussed above in Q2.

7. What rules (if any) protect other types of sensitive communications or documents (settlement negotiations, State secrets, et al.)? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

State Secrets Privilege

The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be harmful to national security and was first recognized in *United States v. Reynolds*, 354 U.S. 1 (1953). The privilege can be claimed only by the government, and specifically must be claimed by the head of the department with control over the matter in question after personal consideration by that officer. *See Zuckerbraun v. General Dynamics*, 935 F.2d 544, 546 (2d. Cir. 1991). For example, the Secretary of the Navy herself must claim the state secrets privilege for a case involving secret naval communications or documents, as was the case in *Zuckerbraun*. *See id.* The privilege may be asserted even when the government is not a party to the case. *See id.*

A court before which the state secrets privilege is invoked must evaluate the validity of the claim without disclosing the information claimed under the privilege. *See id.* In evaluating the validity of the privilege claim, a court must grant "utmost deference" to the executive's assessment of the impact that disclosure would have on national security. *See id.*

If a court finds that that the state secrets privilege applies, it must exclude the secret communication or document from evidence. This may result in dismissal if the remaining evidence is insufficient to maintain the case. *See Halkin v. Helms*, 690 F.2d 977, 998-99 (D.C. Cir. 1982).

8.	What communications or documents are protected by the rules mentioned in Q3 to 7? Please refer to any relevant text or case law in that respect.
	See answers in relevant sections above.
9.	Who is protected by the rules mentioned in Q3 to 7 (e.g., in-house counsel, foreign lawyers, third parties)? Please refer to any relevant text or case law in that respect.

See answers in relevant sections above.

10. What are the consequences of violations of the rules mentioned in Q3 to 7? Please refer to any relevant text or case law in that respect.

Violation of Attorney-Client Privilege

Typically, courts will not sanction an attorney for waiving attorney-client privilege, given that the attorney may waive the privilege as the client's agent. However, attorneys may face professional disciplinary action in the jurisdiction in which they are licensed if the privilege waiver constitutes a breach of the duty of confidentiality.

Breach of Confidentiality

Revealing or using confidential client information may result in professional sanction. Depending on the severity of the breach of confidentiality, sanctions may range from formal reprimand, to suspension, and ultimately to disbarment. Typically, formal reprimands are given for disclosures of confidential information that do not seriously prejudice the client. For example, an Indiana divorce attorney was reprimanded for discussing his former client's divorce and financial situation with a friend on the police force, after the attorney learned his former client was arrested for murdering her former husband. *See In re Rhame*, 416 N.E.2d 823 (Ind. 1981). Serious sanctions such as suspension or disbarment are typically reserved for intentional disclosures or uses of confidential information that prejudice the client and benefit the attorney. For instance, in *Stark County Bar Association v. Osborne*, 1 Ohio St. 3d (1982), an attorney was suspended for using confidential information, including about a client's poor health, to enter into business deals that were particularly advantageous for the lawyer and detrimental to his client.

11. Under what circumstances may the protection of the rules mentioned in Q3 to 7 be lost or waived? What are the consequences of a loss or waiver of such protection? Please refer to any relevant text or case law in that respect.

Waiver of Confidentiality

The conditions under which confidentiality can be waived are set out in Model Rule 1.6(a)-(b). In particular, Model Rule 1.6(b) describes all of the situations in which a lawyer may reveal confidential information without the client's consent. Model Rule 1.6(a)-(b) is discussed in Q2.

Waiver of Work Product

Work product privilege may be waived if the work product is inadvertently disclosed. Whether inadvertent disclosure results in waiver turns on the application of a balancing test. Namely, work product protection is not waived if (i) the disclosure was inadvertent, (ii) the holder of the privilege took reasonable steps to prevent disclosure, and (iii) the holder promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(b).

Notably, and in contrast to attorney-client privilege, disclosure of work-product to third parties will not necessarily waive protection vis-à-vis adverse parties to a litigation. *Skynet Electronic Co. v. Flextronics International, Ltd.*, No. 12-cv-06317 (N.D. Cal. Dec. 16, 2013). That is, the work product doctrine does not aim to protect the confidentiality of certain communications full stop, but rather to protect against adverse parties using confidential information to gain an unfair advantage in the litigation. *See id*. Thus, disclosure of work product to third parties will result in waiver only if the disclosure substantially increases the opportunity for an adverse party to obtain the information. *See id.*

It is worth keeping in mind, as discussed above in Q4, that work product enjoys less protection than confidential attorney-client communications under the attorney-client privilege. Unlike communications protected by the attorney-client privilege, if a court determines that the need for discovery of work product is great enough, it may compel discovery.

Waiver of State Secrets

As discussed above in Q7, the head of the government department with control over the matter in question must assert state secrets privilege over a communication for the privilege to apply. *See Reynolds*, 354 U.S. 1 (1953). No private party may waive this privilege. *See id.* at 7. Rather, after careful deliberation, the government may choose not to invoke the privilege, and thereby forego its protection.

Waiver of Settlement Negotiations

The protection of Federal Rule of Evidence 408 can be waived only with the consent of all parties to the litigation because the rule, by its plain language, protects all parties from having settlement negotiations disclosed. Fed. R. Evid. 408 Advisory Committee Notes. Thus, even the party putting forward the settlement offer may not put the offer, or the negotiations, in evidence. *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d. Cir. 1992).

Waiver of Attorney-Client Privilege

Waiver of privilege can be intentional, inadvertent, or implied.

i. Intentional Waiver

The client holds the privilege, and thus technically has the ultimate authority to decide whether the privilege may be waived intentionally (although the attorney may intentionally waive the privilege as the client's agent).

The client's ownership of the legal privilege has important implications when the client is a corporation. In the corporate context, the privilege belongs to the control group, which in most instances is the board of directors. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985). Privilege belongs to whoever currently controls the corporation during any stage of the corporation's existence or through any corporate combination, including sale, merger, or bankruptcy. *See id.* For example, after an acquisition, privilege covering the communications of the target corporation belongs to the control group of the acquiring corporation, *i.e.*, the board of directors of the parent company.

Per Federal Rule of Evidence 502(a) the scope of intentional waivers extends to disclosed and undisclosed information that concerns the same subject-matter, and ought in fairness to be considered together. While the Federal Rule of Evidence 502 does not define "fairness," the Explanatory Notes state that a "party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation." Fed. R. Evid. 502, Judicial Conference Committee Note on Subdivision (a). Thus, a party may not disclose part of a communication that the party views as favorable, and withhold the remainder of the communication that the party believes is unfavorable. The situation of selective disclosure will occur most often when the disclosing party affirmatively uses the partially-disclosed communication to support one of its claims or defenses. It is in precisely such situations when a court is most likely to find that partial disclosure is unfair, and that the disclosing party has waived privilege for the remainder of the communication. *See e.g. Banneker Ventures v. Graham*, 253 F.Supp. 3d 64, 74 (D.D.C. 2017).

ii. Inadvertent Waiver

Discussed as part of answer to Q3.

iii. "At Issue" Waiver

Additionally, when a client brings a malpractice claim against an attorney, the client waives attorney-client privilege with respect to the legal advice that the client places at issue. *See Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P.C.*, 499 F. Supp. 2d 475, 478 (S.D.N.Y. 2007). However, there is a split among the federal courts regarding when a privileged communication is sufficiently "at issue" to result in waiver. Some courts find that a communication is at issue in a dispute if the party asserting privilege makes an assertion that makes the privileged information "relevant" to the litigation, and application of the privilege would deny the opposing party access to information vital to defending against the assertion. *See Hearn v. Rhey*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). Other courts find the relevancy test under *Hearn* too broad, and find that waiver will only occur if the party asserting privilege relies on the privileged communication in establishing an element of their claim or defense. *See In re Erie County*, 546 F.3d 222, 229 (2d Cir. 2008).