CHAPTER 1. THE ATTORNEY-CLIENT PRIVILEGE AND IN-HOUSE CORPORATE COUNSEL

§ 1:1	Introduction
§ 1:2	The client—In general
§ 1:3	—Who speaks for the client?
§ 1:4	—Can officers and directors be co-clients?
§ 1:5	The attorney—In general
§ 1:6	—Counsel's agents—Accountants, investigators or experts
§ 1:7	— Other employees
§ 1:8	The communication
§ 1:9	In confidence—In general
§ 1:10	—Establishing confidentiality—Corporate intent
§ 1:11	——Statements intended for communication to others
§ 1:12	-Maintaining confidentiality-Inside the corporation
§ 1:13	 —Labeling and segregation of documents
§ 1:14	— —Outside the corporation
§ 1:15	For the purpose of obtaining legal advice—In general
§ 1:16	—Legal or business advice
§ 1:17	—Legal or personal advice
§ 1:18	—Particular matters—Internal investigations
§ 1:19	——Patent work
§ 1:20	— — Tax advice
§ 1:21	Waiver and loss of privilege—In general
§ 1:22	—Who may assert or waive the privilege?
§ 1:23	—Inadvertent waivers
§ 1:24	—Deliberate disclosures
§ 1:25	—Placing the attorney-client relationship at issue
§ 1:26	—Crime-fraud exception
§ 1:27	—The Garner doctrine
Bibliog	raphy
Append	lix 1-1. Desk Memorandum to Alert Corporate Employees Whom Corporate Counsel Represents
Append	lix 1-2. Sample Joint Defense Agreement

Appendix 1-3. Sample Retainer Letter With Consultant Appendix 1-4. Model Non-Waiver Provision in Letter or

Agreement Governing Inadvertent Production of Privileged Documents

CHAPTER 2. THE WORK-PRODUCT DOCTRINE AND IN-HOUSE CORPORATE COUNSEL.

	NSEL
§ 2:1	Introduction
§ 2:2	The doctrine—Opinion and ordinary work product
§ 2:3	—Tangible and intangible work product
§ 2:4	—Prepared by an attorney or party
§ 2:5	—In anticipation of litigation—In general
§ 2:6	— —Reasonable apprehension of litigation and
	motivation for document's creation
§ 2:7	 — Documents created for dual purposes
§ 2:8	 — Documents prepared for prior litigation
§ 2:9	Waiver, exceptions and the loss of work-product
	protection—In general
§ 2:10	—Who may assert or waive protection?
§ 2:11	—Inadvertent waivers
§ 2:12	—Deliberate disclosures
§ 2:13	—Substantial need and undue hardship
§ 2:14	—Placing the work product at issue
§ 2:15	—Testimonial use
§ 2:16	—Crime-fraud exception

Bibliography

CHAPTER 3. ETHICAL ISSUES FOR INSIDE COUNSEL

Ş	3:1	Introduction
_	3:2	Licensing and conflict of law for corporate counsel: Where must the corporate counsel be licensed and what ethics rules apply?
Ş	3:3	When is corporate counsel's conduct governed by the ethical rules?
Ş	3:4	Corporate law department as a "firm"—Imputed disqualification
Ş	3:5	—Vicarious civil liability of corporate counsel for acts of other counsel
ş	3:6	Corporate counsel as legal advisor—In general
Ş	3:7	—The interests of the corporation versus the interests of management: Model Rule 1.13
Ş	3:8	—Special problems in identifying the client—Corporate affiliates
ş	3:9	——Contest for control of the corporation by takeover
Ş	3:10	——Derivative litigation
Ş	3:11	—Duties to the entity—The duty of confidentiality

xviii

§ 3:12	— —Du	ty to be informed
§ 3:13		ty to offer advice
§ 3:14		s to constituents—The errant officer
§ 3:15	— —Pa	rtners and coventurers
§ 3:16	—Closel	ly held corporations
§ 3:17	Corpora	te counsel as business advisor
§ 3:18	corpora	te counsel as advocate—Is non-litigating ate counsel governed by Model Rule 3.1 to 3.7?
§ 3:19		and the tribunal
§ 3:20		porate counsel's ethical duty to resign because roper or unlawful corporate conduct
§ 3:21	Adverse genera	party's contact with corporate employees—In
§ 3:22	—The "i	no-contact" rule applies beyond adjudicative
§ 3:23	_	acting current corporate employees
§ 3:24		act with former employees
§ 3:25		et through a third party
§ 3:26		acts by government investigators and
	prosect	utors
§ 3:27		ct with the federal government as litigant
§ 3:28		esting corporate employees not to communicate posing parties or counsel
§ 3:29		esting corporate employees not to talk to l investigators
§ 3:30	Ethical	responsibility for the actions of other lawyers in-lawyers in corporate counsel's office
§ 3:31		ics of dealing with regulators
§ 3:32		limitations on the attorney as director
§ 3:33		restrictions on contact with the press
§ 3:34		ions on working for competitors
§ 3:35		limits on consultation
Bibliogr	aphy	
Append	ix 3-1.	State-by-State Rules Governing Right to Practice
Append	ix 3-2.	2012 ALAS Loss Prevention Manual
Append	ix 3-3.	American Bar Association Formal Ethics Opinion 97-407 Lawyer as Expert Witness or Expert Consultant
Append	ix 3-4.	ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 Conflicts of Interest in the Corporate Family Context
Append	ix 3-5.	Limitation in Retainer Letter Re Corporate Affiliates
Append	ix 3-6.	ABA Comm. on Ethics and Professional

	Responsibility, Formal Op. 91-361 Representation of a Partnership
Appendix 3-7.	Model Informed Consent Provision for Joint Venturer
Appendix 3-8.	Code of Federal Regulations
Appendix 3-9.	ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 Communications with Represented Persons
Appendix 3-10.	American Bar Association Formal Ethics Opinion 97-408 Communication with Government Agency Represented by Counsel
Appendix 3-11.	ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 93-375 The Lawyer's Obligation to Disclose Information Adverse to the Client in the Context of a Bank Examination
Appendix 3-12.	American Bar Association Formal Ethics Opinion 98-410 Lawyer Serving as Director of Client Corporation
Appendix 3-13.	Parallel Tables of Restatement Third Section Numbers and of Annual Meeting Draft Section Numbers
Appendix 3-14.	Additional ABA Comm. On Ethics and Professional Responsibility Opinions

CHAPTER 4. OVERSEEING CIVIL LITIGATION

	2,1
§ 4:1	Introduction
§ 4:2	Initial planning
§ 4:3	Initial assessment and strategic evaluation
§ 4:4	Staffing
$\S 4:5$	Billing—Task based billing
§ 4:6	—Budgeting and billing
§ 4:7	—Alternative billing arrangements: Their genesis,
	utility and limitations
§ 4:8	Periodic reporting—In general
§ 4:9	—Written reports versus oral reports
§ 4:10	—Contents of written analysis
§ 4:11	Periodic meetings and regularly scheduled conference
	calls
§ 4:12	Trial book
§ 4:13	The strategic plan and monitoring—In general
§ 4:14	—Discovery plan
$\S~4:15$	—Agreements on the strategic direction of the
	litigation

§ 4:16	Prior approval of motions, travel, depositions, discovery, legal research
§ 4:17	Experts, consultants and others
§ 4:18	Separate counsel for individual employee/officer defendants
§ 4:19	Relationships with outside counsel
§ 4:20	Settlement
§ 4:21	Managing the public relations and news coverage
§ 4:22	Corporation as plaintiff
§ 4:23	Role of inside counsel at trial
§ 4:24	Restrictions on access of inside counsel to confidential information

Bibliography

Appendix 4-1. PriceWaterhouseCoopers Report Uniform Task Based Management System (UTBMS)

Appendix 4-2. Sample Budget Form

CHAPTER 5. OVERSEEING CORPORATE CRIMINAL INVESTIGATIONS AND LITIGATION

§ 5:1	Introduction: The high stakes involved in a corporate
	criminal investigation
§ 5:2	Chapter overview
§ 5:3	Strategic considerations—The prosecutor's discretion
$\S 5:4$	—To fight or to cooperate?
§ 5:5	Corporate criminal liability: when a corporation is liable for criminal conduct by an employee
§ 5:6	Individual liability for corporate crimes
§ 5:7	Retaining outside counsel—Counsel for the corporation
§ 5:8	—Counsel for officers, directors, and employees
§ 5:9	Investigating allegations of possible criminal conduct—Goals of the retaining counsel
§ 5:10	—Risks of the counsel's investigation
§ 5:11	—Protecting the confidentiality of the investigation
§ 5:12	 Notifying employees of the investigation and collecting relevant documents
§ 5:13	—Interviews of employees
§ 5:14	—Preventing obstruction of justice
§ 5:15	Grand jury investigations—Issues corporate counsel should be prepared to address
§ 5:16	—An overview of federal grand jury practice
§ 5:17	—Producing documents in response to a grand jury subpoena <i>duces tecum</i>
§ 5:18	—Communicating with prosecutors and monitoring the investigation

§ 5:19	—When warran	the corporation is served with a search
§ 5:20	Voluntar	y disclosures and other forms of self-reporting and conduct—In general
§ 5:21		s to avoid
§ 5:22		res under the federal securities laws of
0		l investigations and illegal conduct
§ 5:23		eral Sentencing Guidelines for organizations—
§ 5:24	—Determ	nining whether the guidelines apply
§ 5:25		erview of how the guidelines apply
§ 5:26	—Restitu	ation
§ 5:27	—Fines	
§ 5:28	-Probat	ion
§ 5:29	—Specia	l assessments, forfeiture, and cost
§ 5:30	—Steps	an organization can take to reduce its likely e under the guidelines
§ 5:31		al consequences of conviction—Introduction
§ 5:32		nsion and debarment
§ 5:33	_	ion of health care providers
§ 5:34		ivil False Claims Act and related issues
Ü		ng collateral estoppel and global settlements)
§ 5:35		collateral consequences
§ 5:36	Successo	r liability
§ 5:37	Domont a	1 11 1
5 0.01	rarent-s	ubsidiary issues
§ 5:38		e discipline
-	Employe	·
§ 5:38	Employe aphy	·
§ 5:38 Bibliogra	Employe aphy ix 5-1.	e discipline Agreement for Indemnification and
§ 5:38 Bibliogra Appendi	Employe aphy ix 5-1. ix 5-2.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of
§ 5:38 Bibliogra Appendi	Employe aphy ix 5-1. ix 5-2. ix 5-3.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of Possible Contacts by Government Agents Memorandum From Counsel to Corporate Custodian of Records Instructing Custodian to Collect Documents Relevant to Internal
§ 5:38 Bibliogra Appendi Appendi	Employe aphy ix 5-1. ix 5-2. ix 5-3.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of Possible Contacts by Government Agents Memorandum From Counsel to Corporate Custodian of Records Instructing Custodian to Collect Documents Relevant to Internal Investigation Memorandum From Corporate Custodian of Records to Employees Instructing Them to Provide Her With Documents Relevant to
§ 5:38 Bibliogra Appendi Appendi Appendi	Employe aphy ix 5-1. ix 5-2. ix 5-3. ix 5-4.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of Possible Contacts by Government Agents Memorandum From Counsel to Corporate Custodian of Records Instructing Custodian to Collect Documents Relevant to Internal Investigation Memorandum From Corporate Custodian of Records to Employees Instructing Them to Provide Her With Documents Relevant to Investigation Pre-Interview Notification to Corporate
§ 5:38 Bibliogra Appendi Appendi Appendi Appendi Appendi Appendi	Employe aphy ix 5-1. ix 5-2. ix 5-3. ix 5-4. ix 5-6.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of Possible Contacts by Government Agents Memorandum From Counsel to Corporate Custodian of Records Instructing Custodian to Collect Documents Relevant to Internal Investigation Memorandum From Corporate Custodian of Records to Employees Instructing Them to Provide Her With Documents Relevant to Investigation Pre-Interview Notification to Corporate Employees in Criminal Investigations
§ 5:38 Bibliogra Appendi Appendi Appendi Appendi	Employe aphy ix 5-1. ix 5-2. ix 5-3. ix 5-4. ix 5-6. ix 5-7.	Agreement for Indemnification and Advancement Memorandum From Counsel to Employees Advising Them of Investigation and of Possible Contacts by Government Agents Memorandum From Counsel to Corporate Custodian of Records Instructing Custodian to Collect Documents Relevant to Internal Investigation Memorandum From Corporate Custodian of Records to Employees Instructing Them to Provide Her With Documents Relevant to Investigation Pre-Interview Notification to Corporate Employees in Criminal Investigations United States Sentencing Guidelines

- Exclusion from Participation in Medicare and Appendix 5-9. State Health Programs, 42 U.S.C.A. § 1320a-7; 42 C.F.R. §§ 1001.101 et seq.
- Liability for False Claims Against the United Appendix 5-10. States Government, 31 U.S.C.A. §§ 3729 et
- Parallel Tables of Restatement Third Section Appendix 5-11. Numbers and of Annual Meeting Draft Section Numbers
- Contractor Business Ethics Compliance Appendix 5-12. Program and Disclosure Requirements

CHAPTER 6. INDIVIDUAL RIGHTS AND LIABILITIES OF CORPORATE COUNSEL

- § 6:1 Introduction § 6:2 Civil liabilities—In general § 6:3 —Liability to the corporate employer § 6:4 —Liabilities to corporate officers and employees
- § 6:5 —Civil liability to third parties § 6:6 Employment rights of corporate counsel—In general
- § 6:7 —Dismissal and wrongful termination of at will corporate counsel
- § 6:8 —At-will counsel's legal rights for ethics-based discharge
- § 6:9 —Discrimination-based employment suits by inside counsel
- § 6:10 —Breach-of-contract claims by inside counsel
- § 6:11 —State and federal whistle-blower protection statutes
- § 6:12 Restricting lawyers from practice before federal agencies
- § 6:13 Malpractice insurance
- § 6:14 Corporate indemnity and prospective limitations of corporate counsel's liability
- § 6:15 Limitations on litigating against the company
- § 6:16 Taking documents from corporations
- § 6:17 Qui tam suits
- § 6:18 Criminal exposure for corporate counsel—In general
- § 6:19 —Theories of prosecution of corporate lawyers
- § 6:20 —Corporate counsel's responses to law enforcement
- —The limit on a lawyer's ability to disclose privileged § 6:21 information to protect himself
- § 6:22 —Ethical rules can provide a defense for lawyers
- § 6:23 Attorney-director

Bibliography

Appendix 6-1. Professional Liability Policy

CHAPTER 7. CERTIFICATION AND RECORDKEEPING OBLIGATIONS UNDER THE SARBANES-OXLEY ACT OF 2002

- § 7:1 Introduction
- § 7:2 Certification under Section 302 of the Act
- § 7:3 Certification under Section 906 of the Act
- § 7:4 Recordkeeping requirements

Bibliography

CHAPTER 8. INSIDE COUNSELS' SARBANES-OXLEY PRIMER: 17 C.F.R. PART 205, THE "UP-THE-LADDER" REPORTING RULES

- § 8:1 Introduction
- § 8:2 Who is an "attorney appearing and practicing before the commission"?
- § 8:3 What conduct triggers the reporting requirements?
- § 8:4 Once you conclude that there is an obligation to report under the final rules, what reporting is required?
- § 8:5 What are the regulatory obligations of attorneys hired to investigate whether there are material violations?
- § 8:6 What are the obligations of a CLO?
- § 8:7 What sanctions apply to violations of the reporting requirements?
- § 8:8 What are the obligations of supervisory and subordinate attorneys?
- § 8:9 When may a reporting attorney disclose issuer confidences?
- § 8:10 What if an issuer discharges a reporting attorney?
- § 8:11 What are the rules if I believe that the obligations of Sarbanes-Oxley conflict with the ethical rules of my state or might require me to disclose information that I believe is subject to an attorney-client privilege under state law?

Bibliography

Table of Laws and Rules

Table of Cases

Index