

Table of Contents

CHAPTER 1. THE ATTORNEY-CLIENT PRIVILEGE

§ 1:1	Introduction
§ 1:2	Overview of the attorney-client privilege—The law of privilege
§ 1:3	—Application to the corporate client—United States
§ 1:4	—Globally
§ 1:5	Parties to the privilege
§ 1:6	—Client—Corporations
§ 1:7	— — —Federal courts
§ 1:8	— — —State courts
§ 1:9	—Subsidiaries
§ 1:10	— —Limited liability companies
§ 1:11	— —Successor
§ 1:12	— —Dissolved or defunct entity
§ 1:13	— —Individual employees
§ 1:14	— —Former officers and directors
§ 1:15	— —Functional equivalents
§ 1:16	— —Insurer
§ 1:17	—Attorneys—Bar membership
§ 1:18	— —Agents of the lawyer
§ 1:19	— — <i>De facto</i> attorney
§ 1:20	— —Acting in capacity as lawyer
§ 1:21	— — —Limited involvement
§ 1:22	— — —Corporate responsibilities
§ 1:23	—Patent agents
§ 1:24	Access to privileged corporate materials
§ 1:25	Types of communications covered—Communications versus information
§ 1:26	—Attorney’s advice to the client
§ 1:27	— —Dual purpose communications
§ 1:28	— <i>Ex parte</i> communications
§ 1:29	—Lawyer-auditor communications
§ 1:30	—Corporate records
§ 1:31	—General reports
§ 1:32	—Billing statements
§ 1:33	—Investigative reports
§ 1:34	—Settlement records
§ 1:35	—Manuals
§ 1:36	—Notes

ATTORNEY-CLIENT AND OTHER PRIVILEGES

- § 1:37 —Artificial intelligence
- § 1:38 —Illegal or fraudulent conduct
- § 1:39 The confidentiality of the communications—
 - Expectation of confidentiality
- § 1:40 —Physical maintenance of confidentiality
- § 1:41 —The presence of third parties
- § 1:42 —Dual representation
- § 1:43 —Corporate e-mail account
- § 1:44 Exceptions—The “last-link” exception
- § 1:45 —The joint-client exception
- § 1:46 —The crime-fraud exception
- § 1:47 —Self-protection exception
- § 1:48 —Fiduciary-duty exception
- § 1:49 —Whistleblower statutes
- § 1:50 Asserting a claim of privilege
- § 1:51 —Entity to determine validity of claim
- § 1:52 —Filter protocols
- § 1:53 —The privilege log
- § 1:54 —*In camera* inspections
- § 1:55 —Protective orders
- § 1:56 —Reservation of privilege
- § 1:57 —Appeals
- § 1:58 Waiver
 - Types of waivers—Express waiver
 - — —Intentional waiver
 - — —Inadvertent waiver
 - — —Involuntary waiver
 - — —Implied waiver
 - — —Development of adversarial relationship
 - — —Offensive use waiver
 - — —Common-interest theory
 - — —Testimonial review
 - — —Subject matter
 - — —Partial waiver—Generally
 - — —Effects
 - New requirements—McNulty memorandum
 - Who may waive the privilege?—Client
 - —Corporate representative
 - —Shareholder
 - —Change of corporate control
 - —Corporate organization
 - —Bankruptcy
 - —Personal versus corporate assertions of the privilege
 - —Shareholder suits
- § 1:80 — —Employee Retirement Income Security Act Suits and the Fiduciary Exception

TABLE OF CONTENTS

§ 1:81	—Timing
§ 1:82	Privilege and technology
§ 1:83	—Fax messages
§ 1:84	—E-mail
§ 1:85	—Cellular and cordless telephones
§ 1:86	—Voice mail
§ 1:87	—Format of electronic records
§ 1:88	—Keyword search protocol
§ 1:89	—Websites
§ 1:90	Records kept at outside counsel's offices
§ 1:91	Overview of other important privileges—The ombudsman privilege
§ 1:92	—The joint-defense privilege
§ 1:93	—The act-of-production privilege
§ 1:94	—OSHA compliance program
Appendix 1–A.	ABA Statement of Policy Regarding Lawyer's Responses to Auditor's Requests for Information

CHAPTER 2. TAX PRACTITIONER PRIVILEGE

§ 2:1	Introduction
§ 2:2	The attorney-client privilege
§ 2:3	—Requirements of privilege
§ 2:4	—Waiver
§ 2:5	The work-product doctrine
§ 2:6	The tax practitioner privilege (§ 7525)
§ 2:7	—Text of § 7525
§ 2:8	—“Authorized federal practitioner”
§ 2:9	—“Tax advice”
§ 2:10	—Asserting the privilege
§ 2:11	—IRS enforcement procedure
§ 2:12	—“Corporate tax shelters”
§ 2:13	—“Corporate tax shelters”—Establishing the existence of a tax shelter
§ 2:14	— —Written communication
§ 2:15	—“Corporate tax shelter”—Promotion
§ 2:16	Crime-fraud exception
§ 2:17	Advice for maintaining the privilege
§ 2:18	Conclusion

CHAPTER 3. NEW STANDARDS OF PROFESSIONAL CONDUCT UNDER THE SARBANES-OXLEY ACT OF 2002

§ 3:1	Introduction
-------	--------------

- § 3:2 Overview of the 2002 Act
- § 3:3 Attorney conduct rules
- § 3:4 —Retaliation claims
- § 3:5 Financial experts and codes of ethics
- § 3:6 Conclusion
- Appendix 3-A. Section 307, “Rules of Professional Responsibility for Attorneys”
- Appendix 3-B. Part 205, “Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission, in the Representation of an Issuer,” 17 C.F.R. Part 205
- Appendix 3-C. Section 406, “Code of Ethics for Senior Financial Officers”
- Appendix 3-D. Section 407, “Disclosure of Audit Committee Financial Expert”
- Appendix 3-E. [Name of Company]—Code of Business Conduct and Ethics

CHAPTER 4. THE SELF-EVALUATIVE PRIVILEGE

- § 4:1 Introduction
- § 4:2 Elements
- § 4:3 The self-evaluative privilege is a qualified privilege
- § 4:4 The evaluative/factual distinction
- § 4:5 *In camera* inspection
- § 4:6 Privilege logs
- § 4:7 Confidential treatment of the information
- § 4:8 Disclosure to the government
- § 4:9 Materials prepared for mandatory government reports—Product safety reports
- § 4:10 —Accident reports
- § 4:11 —Affirmative action plans
- § 4:12 Investigative materials—Employment discrimination claims
- § 4:13 Beyond the Title VII cases in the corporate context
- § 4:14 Voluntary internal reviews
- § 4:15 Medical peer reviews
- § 4:16 —Federal labor laws
- § 4:17 Environmental audits
- § 4:18 —EPA self-policing incentive policy
- § 4:19 — —New owners
- § 4:20 —States’ privileges
- § 4:21 — —What they cover
- § 4:22 — —What they except

TABLE OF CONTENTS

§ 4:23	— — —Waiver
§ 4:24	— — —Legally required information
§ 4:25	— — —Information obtained by observation
§ 4:26	— — —Fraudulent purpose
§ 4:27	— — —Stipulation
§ 4:28	— — —Evidence of noncompliance without reasonable diligence
§ 4:29	— — —Imminent and substantial danger
§ 4:30	— — Conditions precedent to getting the privilege
§ 4:31	— —Burden of proof
§ 4:32	— —Immunity for voluntary disclosure
§ 4:33	— —No effect on other privileges
§ 4:34	—Self-policing policy and criminal violations
§ 4:35	—EPA corporate-wide audit agreements
§ 4:36	—Summary
§ 4:37	Privacy audits and the self-evaluative privilege
§ 4:38	Conclusion
Appendix 4-A.	EPA Policy—Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations 65 Fed. Reg. 19617 (Apr.11, 2000)
Appendix 4-B.	EPA Memorandum on Statement of Principles: Effect of State Audit Immunity/ Privilege Laws on Enforcement Authority for Federal Programs

CHAPTER 5. OPERATION OF THE ATTORNEY-CLIENT PRIVILEGE IN THE EUROPEAN UNION

§ 5:1	Introduction
§ 5:2	Scope of the privilege
§ 5:3	— <i>AM & S</i> : Confining the scope of legal privilege
§ 5:4	—The court of justice's test
§ 5:5	— —Who will decide what communications are confidential?
§ 5:6	— —What communications will be covered?
§ 5:7	— —How can the privilege be waived?
§ 5:8	—The bottom line
§ 5:9	International reaction to <i>AM & S</i>
§ 5:10	<i>John Deere</i> : The commission applies <i>AM & S</i>
§ 5:11	Conclusion
Appendix 5-A.	<i>AM & S Europe Ltd. v. Commission</i> Court of Justice of the European Communities Case No. 155/79, Judgment May 18, 1982
Appendix 5-B.	<i>John Deere</i> Commission Decision of December

- 14, 1984 Relating to a Proceeding under Article 85 of the EEC Treaty (IV/30.809—John Deere)
- Appendix 5-C. *Hilti Aktiengesellschaft v. Commission* Order of the Court of First Instance (Second Chamber) of April 4, 1990 Case No. T-30/89
- Appendix 5-D. Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. Judgment of the Court of First Instance, Joined Cases T-125/03 and T-253/03, September 17, 2007
- Appendix 5-E. Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. Judgment of the European Court of Justice, Case C-550/07, September 14, 2010

CHAPTER 6. THE WORK-PRODUCT DOCTRINE

- § 6:1 Introduction and overview—The work-product doctrine as a rule of procedure
- § 6:2 —What is “work product”?
- § 6:3 — —Mental impressions and strategies
- § 6:4 —What is “work product”?—Litigation file
- § 6:5 —What is “work product”?—Factual information
- § 6:6 — — —Billing records
- § 6:7 — — —Identification of documents
- § 6:8 — —Public records documents
- § 6:9 — —Records derived from attorney’s unethical conduct
- § 6:10 — —Public relations documents
- § 6:11 — —Documents created by third party
- § 6:12 — — —Expert reports
- § 6:13 — — —Artificial intelligence
- § 6:14 Asserting the work-product doctrine
- § 6:15 Ordinary versus opinion work product
- § 6:16 —Disclosure of opinion work product
- § 6:17 —Disclosure of ordinary work product
- § 6:18 —Accessibility of electronic data
- § 6:19 In anticipation of litigation
- § 6:20 —Imminency of proceeding
- § 6:21 —Purpose of documents
- § 6:22 — —Dual purpose documents
- § 6:23 — —Ordinary course of business documents
- § 6:24 — —Internal corporate investigations
- § 6:25 — —Affidavit
- § 6:26 —Settlement agreement
- § 6:27 Subsequent litigation
- § 6:28 Waiver—Effect of voluntary disclosure

TABLE OF CONTENTS

- § 6:29 —Failure to provide privilege log
- § 6:30 —Reliance-on-counsel defense and waiver
- § 6:31 —The scope of waiver
- § 6:32 —Implied waiver and its effect on the work-product doctrine
- § 6:33 —Mediation records
- § 6:34 Crime-fraud exception
- § 6:35 Bad faith exception
- § 6:36 Conclusion

CHAPTER 7. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

- § 7:1 Introduction
- § 7:2 Which comes first—The privilege or the exception?
- § 7:3 Timing of the communication
- § 7:4 The client's intent in communicating
- § 7:5 Proving the application of the crime-fraud exception—Two-step test
 - § 7:6 — —Commission of crime or fraud
 - § 7:7 — —In furtherance of crime or fraud
 - § 7:8 —Review of documents—*In camera*
 - § 7:9 — —Ethical wall
 - § 7:10 —Degree of proof
 - § 7:11 —Examination of witness
 - § 7:12 Application to in-house counsel
 - § 7:13 Whose crime or fraud are we talking about?
 - § 7:14 How is “fraud” defined for purposes of the exception?
 - § 7:15 Is the exception limited to “crimes” and “frauds”?
 - § 7:16 The crime-fraud exception and the work-product doctrine—In general
 - § 7:17 —The “attorney misconduct” exception
 - § 7:18 Ethical constraints and the crime-fraud exception

CHAPTER 8. THE JOINT DEFENSE PRIVILEGE

- § 8:1 Introduction
- § 8:2 Scope of the privilege—What communications are protected?
 - § 8:3 —What communications are protected?—Timing
 - § 8:4 — —The joint defense agreement
- § 8:5 Elements—Common interest
 - § 8:6 —Existence of an agreement
 - § 8:7 —Status of litigation
 - § 8:8 Waiving the privilege

CHAPTER 9. PRACTICAL ADVICE FOR PROTECTING THE PRIVILEGES

- § 9:1 Introduction
- § 9:2 Points to keep in mind
- § 9:3 Technological considerations
- § 9:4 —Telephone
- § 9:5 —E-mail
- § 9:6 —Fax machine
- § 9:7 Checklist for protecting confidential communications
- § 9:8 Instructions to company attorneys regarding legends to
claim privilege
- § 9:9 —Attorney-client privilege
- § 9:10 —Work-product doctrine
- § 9:11 —Self-evaluative privilege
- § 9:12 Sample forms to protect attorney-client privilege

Bibliography

Table of Laws and Rules

Table of Cases

Index