

TABLE OF CONTENTS

CHAPTER 1

Introduction

§ 1.01	Introduction	1-1
§ 1.02	Finding the Law of Privilege for Corporations	1-4
	[1] Privilege in the Federal Courts	1-4
	[2] Privilege in the States	1-5
§ 1.03	Asserting and Supporting a Claim of Privilege	1-9
	[1] Asserting Privilege under the Federal Rules of Civil Procedure	1-10
	[a] Document Requests	1-10
	[b] Subpoenas (and Standing to Object)	1-16
	[c] Interrogatories	1-21
	[d] Depositions	1-23
	[e] Protective Orders	1-24
	[f] Availability of Immediate Appeal	1-28
	[2] State Practice	1-29
	[3] Supporting a Claim of Privilege	1-30
	[a] Privilege Logs	1-30
	[b] <i>In Camera</i> Review	1-31

CHAPTER 2

Attorney-Client Privilege

§ 2.01	Introduction	2-4
§ 2.02	Application and Elements	2-6
	[1] The Attorney-Client Privilege in Federal Courts	2-10

CORPORATE PRIVILEGES

	[2]	The Attorney-Client Privilege in State Courts	2-13
	[3]	Application of Foreign Privilege Law in American Courts	2-14
	[4]	Implications of Foreign Privilege Law for American Corporate and In-House Counsel	2-21
	[5]	Attorney-Client Privilege in Congressional Proceedings	2-24
§ 2.03		Who Controls the Attorney-Corporate Client Privilege	2-25
	[1]	Corporate Officers and Directors	2-25
	[2]	Lower Level Employees	2-28
	[3]	Trustees in Bankruptcy	2-29
	[4]	Purchasers of Assets	2-31
	[5]	Successor Corporations	2-33
	[6]	The Attorney-Client Privilege in the Parent-Subsidiary Corporate Context	2-34
	[7]	Receivers and Liquidators	2-36
	[8]	Corporate Dissolution	2-39
§ 2.04		Extent of the Privilege	2-40.1
	[1]	The <i>Upjohn</i> Decision	2-40.1
	[2]	The Attorney-Corporate Client Privilege in the Federal Courts After <i>Upjohn</i>	2-42
	[a]	The Subject Matter Test	2-42
	[b]	The Weinstein Test	2-43
	[c]	Other Approaches	2-44
	[3]	States' Treatment of the Attorney-Corporate Client Privilege After <i>Upjohn</i>	2-44
§ 2.05		Application of the Attorney-Corporate Client Privilege	2-50
	[1]	Status of the Employee	2-50
	[a]	Former Employees	2-50
	[b]	Employees of Subsidiary or Parent Corporations	2-52
	[c]	Non-Employee Corporate Agents	2-54
	[2]	Provision of Legal Services	2-58
	[a]	Was the Attorney Acting as an Attorney?	2-58
	[b]	Legal vs. Business Functions	2-60
	[c]	In-House Counsel	2-66

TABLE OF CONTENTS

	[d] Experts and Other Persons Assisting Attorney	2-73
[3]	Confidentiality of the Communication . . .	2-82
[4]	Nature of the Advice	2-86
[5]	Communication of Facts and Communication from Attorney to Client	2-95
[6]	Attorney-Client Privilege and Special Board Committees	2-100
[7]	Professional Responsibility and Contacts with Current and Former Employees	2-105
	[a] Current Employees	2-106
	[i] Minority Approaches	2-106
	[ii] Majority Approach	2-107
	[b] Former Employees	2-108
	[c] Non-Employee Corporate Agents . . .	2-108
§ 2.06	Waiver of the Privilege	2-108.1
[1]	Scope of the Waiver	2-108.3
[2]	Waiver by Inadequate Compliance with Civil Discovery Rules	2-113
	[a] Federal Civil Discovery	2-113
	[i] Document Requests	2-113
	[ii] Subpoenas	2-117
	[iii] Interrogatories	2-118
	[iv] Depositions	2-119
	[b] State Practice	2-119
[3]	Voluntary Disclosure to Third Parties . . .	2-119
	[a] Limited vs. Complete Waiver in Governmental Investigations . . .	2-123
	[i] Minority Approach	2-124
	[ii] Majority Approach	2-126
	[iii] Selective Waiver Pursuant to Confidentiality Agreements with Government Agencies	2-129
	[iv] Waiver from Disclosure of Facts to the Government . . .	2-130
	[v] Safe-Harbor for Disclosures to Banking Regulators Under Section 607 of the Financial Services Regulatory Relief Act of 2006	2-132

CORPORATE PRIVILEGES

	[b]	Disclosure of Privileged Communication Within a Privileged Relationship . . .	2-132
	[4]	Waiver by Placing the Attorney-Client Relationship “At Issue”	2-134
	[5]	Lack of Due Care to Preserve the Confidentiality of the Communication	2-150
	[a]	Presence of Third Parties	2-150
	[b]	File Maintenance	2-154
	[c]	Inadvertent Production of Documents	2-154
§ 2.07		Exceptions to Privilege	2-160
	[1]	Fiduciary Exception	2-160
	[2]	Crime-Fraud Exception	2-169
	[3]	The Self-Defense Exception	2-175
§ 2.08		Information Technology	2-179
	[1]	Communications Made in Confidence	2-179
	[2]	Specific Technologies and the Attorney-Client Privilege	2-180.1
	[a]	Landline Telephones	2-180.1
	[b]	Facsimile Communications	2-181
	[c]	Wireless Telephones	2-181
	[d]	Electronic Mail	2-185
	[i]	Forms of E-Mail	2-187
	[ii]	Use of Employer-Owned Equipment for E-Mail	2-189
	[e]	Internet	2-193
	[3]	The Fourth Amendment and Federal Statutes	2-194
§ 2.09		Practical Issues	2-199
	[1]	Negative Inference Based on Assertion of Privilege	2-199
	[2]	Depositions of In-House Counsel as Corporate Representative	2-202
§ 2.10		Sarbanes-Oxley Considerations	2-204
	[1]	Introduction	2-204
	[2]	Part 205 Reporting Requirements	2-206
	[3]	Permissive Disclosure of Client Confidences to the SEC	2-208
	[a]	Self-Defense	2-208
	[b]	Illegal Acts	2-208
	[i]	Policy Issues	2-209
	[ii]	Scope of Sarbanes-Oxley Section 307	2-210

TABLE OF CONTENTS

vii

	[iii] Disclosure Protected by Attorney-Client Privilege	2-211
	[iv] Conflict with State Ethics Rules; Preemption	2-212
[4]	Responsibilities of Supervisory and Subordinate Attorneys	2-216
[5]	Proposed Noisy Withdrawal and Alternative Provisions	2-217
	[a] Noisy Withdrawal Proposal	2-217
	[b] The Proposed Alternative to Noisy Withdrawal	2-219
	[c] SEC Response to Criticism of Noisy Withdrawal	2-219
[6]	The Qualified Legal Compliance Committee (“QLCC”)	2-220

CHAPTER 3

Work Product Privilege

§ 3.01	Introduction	3-2
§ 3.02	Application and Elements	3-4
	[1] General Background	3-4
	[2] Qualified Privilege	3-6
	[3] Proceedings in Which the Privilege May Be Asserted	3-6
	[4] Three Factor Test	3-8
	[5] Who Can Assert the Privilege	3-9
	[6] Materials Covered by the Privilege	3-12
	[7] Federal and State Practice	3-14
§ 3.03	In Anticipation of Litigation	3-16
	[1] Causation	3-17
	[2] Defining “In Anticipation” Temporally	3-28
	[3] Applicability in Separate Lawsuit	3-31
§ 3.04	Fact and Opinion Work Product	3-33
	[1] Fact Work Product	3-34
	[a] Substantial Need	3-37
	[b] Undue Hardship to Find Substantially Equivalent Information	3-38
	[2] Opinion Work Product	3-41

§ 3.05	Common Law Compared with the Federal Rules of Civil Procedure	3-51
	[1] Common Law	3-51
	[2] Federal Rules of Civil Procedure	3-52
§ 3.06	Application to Non-Lawyers	3-57
§ 3.07	Waiver of Work Product Protection	3-61
	[1] Overview of Waiver	3-61
	[2] Causes of Waiver	3-64
	[a] Disclosure to Party with Common Interest in Litigation	3-67
	[b] Disclosure to Government	3-70
	[3] Scope of Waiver	3-75
§ 3.08	Practical Issues	3-77
	[1] Standard and Computerized Databases	3-77
	[a] Use of Databases	3-77
	[b] In Anticipation of Litigation	3-78
	[c] Database Organization—Fact or Opinion?	3-79
	[2] Experts and Consultants	3-81
	[a] Preliminary Investigative Stage: Non-Testifying Experts	3-81
	[b] Trial Preparation Stage: Testifying Experts	3-82
	[3] Internal Investigations	3-89
	[a] Internal Investigations Conducted Prior to or Irrespective of the Anticipation of Litigation	3-90
	[b] Materials Protected and Not Protected by Work Product Privilege	3-90
	[c] Materials Prepared by Third Parties	3-92
	[d] Disclosure to Third Parties	3-92
	[4] Potential Witnesses	3-94
	[a] Notes and Memoranda of Meetings with Potential Witnesses	3-94
	[b] The Identity of Witnesses and Interviewees	3-94
	[5] Auditors' Inquiries About Pending Litigation and Other Accounting Documents	3-96

CHAPTER 4

Joint Defense Privilege/Common Interest Doctrine

§ 4.01	Introduction	4-2
§ 4.02	Application and Elements	4-5
	[1] Relationship to Underlying Privilege	4-5
	[2] Common Interest vs. Common Strategy	4-9
	[3] Elements of a Common Legal Interest	4-12
	[a] Whether Parties May Have Some Adverse Interests	4-14
	[b] Existence of Ongoing or Anticipated Litigation	4-17
	[c] Whether Communications Must Be Between Attorneys	4-20
	[d] Non-Parties to a Litigation	4-22
	[e] Communications in “Furtherance”	4-25
	[f] Commercial vs. Legal Interest	4-25
	[4] Waiver of the Joint Defense Privilege	4-27
	[a] Original Parties	4-27
	[b] Successors-in-Interest	4-30
	[c] Enforcing Privilege When a Party Settles	4-31
§ 4.03	Application in the Corporate Context	4-33
	[1] Parties that are Co-Defendants	4-34
	[2] Parties to a Negotiation	4-34
	[3] Parties in a Parent-Subsidiary Relationship	4-38
	[4] Parties who are Successors-in-Interest	4-38
§ 4.04	Ethical Issues and Disqualification of Counsel	4-39
	[1] Disqualification of Counsel	4-39
	[2] Imputation of Disqualification	4-46
	[3] Advance Waiver of Conflict by Joint Defense Partner	4-47
§ 4.05	Practicalities of the Joint Defense Agreement	4-49
	[1] Benefits of a Written Agreement	4-50
	[2] Typical Provisions	4-54
	[a] Scope of the Joint Defense Relationship	4-54

CORPORATE PRIVILEGES

	[b] Disclaimer of Attorney-Client Relationship and Waiver of Conflicts	4-55
	[c] Obligations and Privileges of the Parties	4-56
	[3] <i>Form</i> : Joint Defense Agreement	4-57
§ 4.06	Multiple Clients Represented by a Single Attorney: The Joint Client Doctrine	4-62
	[1] Privilege Under the Joint Client Doctrine	4-64
	[2] Ethical Considerations Under the Joint Client Doctrine	4-66
§ 4.07	Practical Issues	4-68
	[1] Disclosure of the Agreement Itself	4-68
	[2] Successors to the Joint Defense Privilege	4-69
	[3] Enforcing Privilege When a Party Settles	4-70
	[4] Sale or Disposition of Jointly Represented Subsidiary	4-71

CHAPTER 5

Privilege Against Self-Incrimination

§ 5.01	Introduction	5-1
§ 5.02	Application and Elements	5-3
	[1] Collective Entity Doctrine	5-6
	[a] Inapplicability of the Fifth Amendment Privilege	5-8
	[b] The Corporate Representative's Fifth Amendment Privilege: The "Representative Capacity" Doctrine	5-9
	[c] Act of Production Privilege	5-12
	[d] "Corporate Records" Defined	5-18
	[e] "Custodian of Records" Defined	5-20
	[f] Size and Form of the Collective Entity	5-20
	[2] Personal Documents	5-21
§ 5.03	State Practice	5-25
§ 5.04	Waiver of the Fifth Amendment Privilege	5-27
	[1] Affirmative or Explicit Waiver	5-27

TABLE OF CONTENTS

xi

[2]	Testimonial Waiver	5-30
	[a] “Further Incrimination” Test	5-32
	[b] “Distortion” Test	5-32
[3]	Temporal Waiver	5-33

CHAPTER 6

Self-Evaluation Privilege

§ 6.01	Introduction	6-1
§ 6.02	Elements and Limitations	6-9
	[1] Elements	6-9
	[2] Limitations	6-13
§ 6.03	Applications	6-16
	[1] Employment Discrimination	6-16
	[a] Limiting Privilege to Government-Mandated Reports	6-16
	[b] Rejecting Privilege in Employment Discrimination Cases	6-18
	[2] Safety Reviews and Tort Claims	6-22
	[3] Environmental Audits	6-24
	[a] Common Law Self-Evaluation Privilege	6-24
	[b] State Statutory Privileges	6-26
	[c] Federal Protection for Environmental Audits	6-29
§ 6.04	Practical Issues	6-31

CHAPTER 7

Accountant-Client Privilege

§ 7.01	Introduction	7-1
§ 7.02	Application and Elements	7-3
	[1] Federal Common Law	7-3
	[2] Federal Statutory Law	7-6
	[3] State Statutory Law	7-9
§ 7.03	Practical Issues	7-15
	[1] Common Interest	7-15
	[2] Shareholder Litigation	7-15

CORPORATE PRIVILEGES

CHAPTER 8

Trade Secrets and Business Strategy

§ 8.01	Introduction	8-1
§ 8.02	Trade Secret Privilege: Application and Elements	8-5
	[1] State and Federal Sources of the Privilege	8-7
	[2] Test for the Application of the Privilege	8-10
	[a] Whether the Information Is a Trade Secret	8-11
	[b] Whether Disclosure Would Be Harmful	8-18
	[c] Whether the Information Is Relevant and Necessary	8-22
	[d] Balancing Test and Public Interest	8-23
§ 8.03	The Business Strategy Privilege	8-27
§ 8.04	Practical Issues: Protective Orders	8-29
	[1] Overview	8-29
	[2] <i>Form</i> : Protective Order	8-35

CHAPTER 9

Confidential Submissions to Government Agencies

§ 9.01	Introduction	9-2
§ 9.02	The Freedom of Information Act	9-4
§ 9.03	FOIA and Agency Procedures	9-13
§ 9.04	Reverse-FOIA Suits	9-15
§ 9.05	Exemptions Under FOIA	9-17
	[1] Classified by Executive Order	9-23
	[2] Internal Agency Rules and Practices	9-24.1
	[3] Statutorily Protected Information	9-27
	[4] Commercially Sensitive Information	9-31
	[a] Privileged and Confidential Information	9-32
	[b] The Relationship between FOIA Exemption 4 and the Trade Secrets Act	9-38
	[5] Internal Memoranda that Would Be Protected in Civil Litigation	9-39

TABLE OF CONTENTS

xiii

	[6] Personnel and Medical Information	9-43
	[7] Investigative Files	9-50
	[a] Exemption 7(A)	9-52
	[b] Exemption 7(B)	9-52
	[c] Exemption 7(C)	9-53
	[d] Exemption 7(D)	9-56
	[e] Exemption 7(E)	9-57
	[f] Exemption 7(F)	9-58
	[8] Bank Examination Information	9-60
	[9] Geological and Geophysical Data	9-60.1
§ 9.06	Specific Agencies and the Confidential Treatment of Submissions	9-61
	[1] Federal Trade Commission	9-61
	[a] The Federal Trade Commission Act	9-61
	[b] The Hart-Scott-Rodino Act	9-63
	[c] The Antitrust Civil Process Act	9-63
	[d] The International Antitrust Enforcement Assistance Act	9-64
	[2] Securities and Exchange Commission	9-64
	[a] The Securities and Exchange Commission and FOIA	9-65
	[b] Specific Securities Statutes	9-67
	[c] SEC Investigations	9-68
	[d] SEC and International Enforcement	9-68

CHAPTER 10

Financial Privacy and Bank Records

§ 10.01	Introduction	10-1
§ 10.02	Protection for Bank Records Under Federal Law	10-3
	[1] Constitutional Protections	10-4
	[2] Right to Financial Privacy Act	10-4
	[3] Gramm-Leach-Bliley Act	10-6
	[4] No Evidentiary Privilege	10-8
§ 10.03	Protection for Bank Records Under State Law	10-9
	[1] Constitutional Protections	10-9
	[2] State Right to Financial Privacy Statutes	10-12
	[a] In General	10-12

CORPORATE PRIVILEGES

	[b] The California Statute	10-14
	[c] Intersection of Federal and State Financial Privacy Statutes	10-15
[3]	Protection Under State Common Law	10-16
	[a] Standards for Disclosure	10-17
	[b] Application to Loan Customers	10-18
	[c] Practical Considerations	10-19
[4]	Determining the Governing State Law	10-19
§ 10.04	The Fair Credit Reporting Act	10-21

CHAPTER 11**Personnel Files**

§ 11.01	Introduction	11-1
§ 11.02	Protection of Personnel Files under Federal Law	11-3
	[1] Federal Limitations on Discovery of Personnel Records	11-3
	[2] Personnel Files under the Federal Freedom of Information Act	11-13
§ 11.03	Protection of Personnel Records Under State Law	11-16
	[1] State Constitutional Protections	11-16
	[2] State Statutory Protections	11-18

CHAPTER 12**Confidentiality in Settlement Negotiations
and Mediation Proceedings**

§ 12.01	Introduction	12-1
§ 12.02	Federal Rule of Evidence 408	12-3
	[1] Protection of Settlement Communications under Rule 408	12-4
	[2] Protection of Information Prepared for Settlement Negotiations	12-9
	[3] Extending Rule 408: Discovery of Settlement Communications	12-11
§ 12.03	State Law Protection of Settlement Communications	12-17

TABLE OF CONTENTS

xv

§ 12.04	Protection of Communications by Private Settlement Agreement	12-20
§ 12.05	Communications in Mediation Proceedings	12-23
	[1] Protection of Mediation Communications under Federal Law	12-23
	[2] Protection of Mediation Communications under State Law	12-26

CHAPTER 13

Tax Returns and Tax Return Information

§ 13.01	Introduction	13-1
§ 13.02	History	13-3
§ 13.03	Current State of the Law	13-4
	[1] Required Nexus with Internal Revenue Service	13-5
	[2] Relationship Between Internal Revenue Code Section 6103 and Freedom of Information Act	13-7
	[3] Effect of Prior Disclosure	13-8
§ 13.04	Penalties for Improper Disclosure of Confidential Tax Information	13-10
§ 13.05	State Law and the Confidentiality of Tax Information	13-11
§ 13.06	Third Parties' Duty to Maintain Confidentiality of Tax Information	13-12

CHAPTER 14

Deliberative Process Privilege

§ 14.01	Introduction	14-1
§ 14.02	Application and Elements	14-3
	[1] Federal Practice	14-6
	[a] Federal Common Law	14-6
	[b] The Deliberative Process Privilege Under Exemption 5 of the Freedom of Information Act	14-18
	[c] Waiver	14-24
	[2] State Practice	14-25

Appendices

APPENDIX A: Federal Rules of Evidence: Selected Provisions

Rule 401. Definition of “Relevant Evidence”	A-1
Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	A-1
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	A-1
Rule 407. Subsequent Remedial Measures	A-1
Rule 408. Compromise and Offers to Compromise	A-2
Rule 501. General Rule [of Privilege]	A-2
Rule 502. Attorney-Client Privilege and Work Product: Limitations on Waiver	A-2

APPENDIX B: Federal Rules of Civil Procedure: Selected Provisions

Rule 1. Scope and Purpose of Rules	B-1
Rule 26(b)(1). Scope of Discovery	B-1
Rule 26(b)(2). Limitations on Frequency and Extent	B-1
Rule 26(b)(3). Trial Preparation Materials	B-2
Rule 26(b)(5): Claims of Privilege or Protection of Trial-Preparation Materials	B-3
Rule 26(c). Protective Orders	B-3

APPENDIX C: Supreme Court Standards (Proposed Federal Rules of Evidence): Selected Provisions

Rule 401. Definition of “Relevant Evidence”	C-1
Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible	C-1
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time	C-1
Rule 407. Subsequent Remedial Measures	C-2
Rule 408. Compromise and Offers to Compromise	C-2
Rule 501. Privileges Recognized only as Provided	C-2
Rule 502. Required Reports Privileged by Statute	C-2
Rule 503. Lawyer-Client Privilege	C-3
Rule 508. Trade Secrets	C-4
Rule 511. Waiver of Privilege by Voluntary Disclosure	C-4

TABLE OF CONTENTS

xvii

Rule 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege	C-4
Rule 513. Comment Upon or Inference from Claim of Privilege Instruction	C-4

APPENDIX D: Uniform Rules of Evidence: Selected Provisions

Rule 401. Definition of “Relevant Evidence.”	D-1
Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.	D-1
Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.	D-1
Rule 407. Subsequent Remedial Measures	D-1
Rule 408. Compromise and Offers to Compromise	D-2
Rule 501. Privileges Recognized Only As Provided	D-2
Rule 502. Lawyer-Client Privilege	D-2
Rule 507. Trade Secrets	D-4
Rule 510. Waiver of Privilege by Voluntary Disclosure	D-4
Rule 511. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege	D-4
Rule 512. Comment upon or Inference from Claim of Privilege; Instruction	D-4

APPENDIX E: Freedom of Information Act (5 U.S.C. § 552)

5 U.S.C. § 552. Public Information; Agency Rules, Opinions, Orders, Records and Proceedings	E-1
---	-----

APPENDIX F: Federal Tax Confidentiality Statutes: Selected Provisions

26 U.S.C. §§ 6103(a) & (b). Confidentiality and Disclosure of Returns and Return Information [General Rule and Definitions]	F-1
26 U.S.C. § 6713. Disclosure or Use of Information by Preparers of Returns	F-5
26 U.S.C. § 7213. Unauthorized Disclosure of Information	F-5

CORPORATE PRIVILEGES

26 U.S.C. § 7216. Disclosure or Use of Information by Preparers of Returns	F-7
26 U.S.C. § 7431. Civil Damages for Unauthorized Inspection or Disclosure of Returns and Return Information	F-8
26 U.S.C. § 7525. Confidentiality Privileges Relating to Taxpayer Communications	F-10

**APPENDIX G: Federal Statutes Governing Interception
of Wire Oral and Electronic
Communications: Selected Provisions**

18 U.S.C. § 2510. Definitions	G-1
18 U.S.C. § 2511. Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited	G-4
18 U.S.C. § 2515. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications	G-10

**APPENDIX H: Uniform Trade Secrets Act with
1985 Amendments**

Section 1. Definitions	H-1
Section 2. Injunctive Relief	H-2
Section 3. Damages	H-2
Section 4. Attorney's Fees	H-3
Section 5. Preservation of Secrecy	H-3
Section 6. Statute of Limitations	H-3
Section 7. Effect on Other Law	H-3
Section 8. Uniformity of Application and Construction	H-3
Section 9. Short Title	H-4
Section 10. Severability	H-4
Section 11. Time of Taking Effect	H-4
Section 12. Repeal	H-4

APPENDIX I: [Reserved]

APPENDIX J: Trade Secrets Act (18 U.S.C. § 1905)

18 U.S.C. § 1905. Disclosure of Confidential Information Generally	J-1
---	-----

INDEX	I-1
------------------------	-----