Are Your Secrets Safe?
A Discussion of the Scope, Application and Protection of Legal Privileges in the U.S. and Abroad

American Bar Association
Section of Taxation
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Agenda

• Confidentiality
• Attorney Client Privilege
• Work Product Doctrine
• Federally Authorized Tax Practitioner Privilege (IRC 7525)
• Fifth Amendment Privilege
• Spousal Privilege
• Physician/Patient Privilege
• Clergy/Penitent Privilege
• Cross-Border Considerations
ABA Model Rule of Professional Conduct 1.6:
A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or an exception applies, including (but not limited to):

• to prevent the client from committing a crime or fraud
• to prevent, 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
• to comply with other law or a court order
Confidentiality

ABA Formal Opinion 473 - Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information

- If client is available, lawyer must consult client
- If instructed by client or if client is unavailable, lawyer must assert all reasonable claims against disclosure and seek to limit subpoena or other demand on any reasonable ground
- If ordered to disclose confidential or privileged information and client is available, lawyer must consult with client about whether to produce the information or appeal
- If client and lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, lawyer should consider withdrawing from the representation
- If disclosure is ordered and client is unavailable, lawyer is not ethically required to appeal
- When disclosing documents and information, lawyer may reveal information only to the extent reasonably necessary
- Lawyer should seek appropriate protective orders or other protective arrangements
Federal Rule of Evidence 501

“The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

• the United States Constitution;
• a federal statute; or
• rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”
Limits on Testimonial Privileges

“The suppression of truth is a grievous necessity at best.” Because testimonial privileges contravene the fundamental principle that the public has a right to every person’s evidence, privileges must be strictly construed so as to be applied only to the very limited extent that “excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”

McMann v. SEC, 87 F.2d 377, 278 (Hand, L.) (1937)
Attorney Client Privilege

• Where legal advice of any kind is sought
• From a professional legal advisor in her capacity as such
• The communication relating to that purpose
• Made in confidence
• By the client
• Are at her instance permanently protected
• From disclosure by herself or by the legal advisor
• Except if the protection is waived
• Client holds the privilege
United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)

- Extension of attorney-client privilege to an agent of the attorney
- Engaged by attorney to assist the attorney, not the client
- Engagement letter between attorney and Kovel
- Payment by attorney (ideal but not strictly necessary)
- Returns can only be drafts prepared for the attorney’s use, not for filing with the IRS
- Not retroactive
- Danger: person who prepared the filed return under audit should not serve as the Kovel
Joint Defense/Common Interest

- A widely used vehicle that permits “joint defense,” i.e., privileged coordination among multiple parties, often against a mutual adversary
- Separate parties with common interests can elect to contractually “share” privileged information without waiver
- The relationship is ideally documented in a signed contract with clear provisions articulating what privileged information will be shared, what use the parties may make of such information, what would constitute a waiver, when and how a party would exit the agreement, and how privilege is intended to survive
Waiver

- **Express Waiver**
  - Accomplished by intentionally (or inadvertently) revealing privileged communications to a third party
- **Implied Waiver (or You Can’t Have Your Cake and Eat it Too)**
  - Accomplished by putting otherwise-privileged topics into controversy, usually by raising defenses to penalties
  - Reliance on advice of counsel
  - Reasonable cause and good faith (e.g., IRC 6664(c)(1))
Limitations/Exceptions


• Privilege does not prevent disclosure of communications between a client and attorney made for the purpose of committing a future crime or fraud.
Outside the United States

• **UK – Legal Advice Privilege**
  • Confidential Communications
  • Lawyer Client
  • For Purpose of Seeking or Giving Legal Advice
  • Transactional, Advisory or Contentious Advice
  • Doesn’t include: communications with third parties including interviewees, experts, auditors OR exchanges not giving or receiving legal advice
Work Product Doctrine

• *Hickman v. Taylor*, 329 U.S. 495 (1947)
• Any materials
• Prepared by an attorney or by a party at the direction of counsel (labeling recommended)
• In anticipation of litigation or to be used in current litigation
• Broader than Attorney Client Privilege
• Attorney holds the privilege
Work Product Doctrine

• Meant to protect the adversarial process
• “Anticipation of litigation” must be objectively reasonable
  • Should be timed with litigation hold
  • Could include during an IRS exam or earlier
• Distinct from Attorney Client Privilege, but both could apply
  • Work product protection may survive a waiver of ACP
Waiver

• Waiver upon disclosure to a third party *EXCEPT* when the third party is a non-adversary

• Except for “Opinion Work Product,” materials covered by AWP may be discoverable in litigation with an adverse party upon a showing of substantial need and an inability to otherwise obtain the information absent substantial hardship (Fed. R. Civ. P. 26(b)(3))
Outside the United States

• **UK - Litigation Privilege**
  • Confidential Communications
  • Lawyer Client or Lawyer/Client and Third Party
  • For the Dominant Purpose of
  • Actual or Pending Litigation (real likelihood of adversarial litigation)
  • Includes: communications with third parties including interviewees, experts, auditors AND exchanges not giving or receiving legal advice
Federally Authorized Tax Practitioner Privilege (IRC 7525)

• “communication between a taxpayer and any federally authorized tax practitioner [is privileged] to the extent the communication would be ... privileged ... if it were between a taxpayer and an attorney.”

• Limited to noncriminal tax matters
• Limited to tax advice
• Not applicable to tax shelter advice
• Not every State recognizes this privilege
• Client holds the privilege
Outside the United States

• The statutory federally authorized practitioner privilege is not recognized outside of a non-criminal, non-tax shelter U.S. federal tax proceeding
Fifth Amendment Privilege

• “No person … shall be compelled in any criminal case to be a witness against himself ….”

• Must be testimonial, incriminating and compelled

• Act of producing documents may be compelled testimony

• Witness holds the privilege
Consequences

• Invocation may increase likelihood of fraud penalty or criminal referral
• Invocation may result in adverse inference in civil litigation
• Taxpayer who bears burden of proof and invokes loses
  • *Feinberg v. Commissioner*, 916 F.3d 1330 (10th Cir. 2019)
  • Taxpayer must choose between providing evidence or forgoing tax deduction available by grace of Congress
• Possible failure of proof on an issue where taxpayer bears burden is not a form of compulsion that requires shifting the burden to the government
Key Limitations

• Witness must invoke on a question by question basis
  • Courts may disregard general assertion and enforce subpoena.
    • United States v. Pate, 721 Fed. Appx. 556 (8th Cir. 2018)
• Collective entity doctrine
  • Individual cannot rely on privilege to avoid producing records of a collective entity which are in his possession in a representative capacity even if the records incriminate him personally.
  • Limited to documents, inapplicable to oral testimony.
  • A collective entity is “an organization which is recognized as an independent entity apart of its individual members.”
  • Is a trust a collective entity? 1st, 5th, 8th and 9th Circuits say yes.
Key Exceptions

• Required Records
  • Essentially regulatory purpose
  • Customarily kept
  • Public aspects

• Foregone Conclusion
  • Government knowledge of existence; describe with reasonable particularity
  • Defendant possessed or controlled evidence
  • Evidence is authentic

• All eight Circuits that have addressed the issue concluded that one or both of these doctrines requires production of foreign bank account records.
Waiver

• Witness may waive Fifth Amendment right not to answer if
  • Prior statements by witness have created significant likelihood that finder of fact would be left with distorted view of truth, and
  • Witness had reason to know that prior statements would be interpreted as waiver.

• Waiver typically does not extend beyond that single proceeding
  • Warning: one court recently ruled that a taxpayer waived privilege when he sat silently in first IRS meeting, then submitted affidavit answering questions asked in meeting, then asserted Fifth in response to follow-up questions.
  • *United States v. Durham, 2018 WL 3628907 (No. 4:18-MC-00137) (E.D. MO 2018)*
Outside the United States

- International Covenant on Civil and Political Rights
  - 74 signatories and 167 parties, including US
  - “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees…Not to be compelled to testify against himself or to confess guilt.”
- Key difference is US allows silence in non-criminal proceedings as prophylactic against use of compelled testimony in criminal charge
Examples Outside the United States

• **Canada**
  
  • Witness cannot refuse to answer a question on grounds of self-incrimination in non-criminal proceeding, but receives use immunity.
  
  • Note that witness MUST expressly claim protections at time of compulsion before testifying.
  
  • Concern that *Nedelcu* case narrowed protection by determining that “non-incriminating” statements made in earlier civil proceeding could be used to impeach accused’s credibility.

•  *R v. Nedelcu*, 2012 SCC 59; *but see ACI Brands v. Pow*, 2014 ONSC 2784 26
Examples Outside the United States

- **Australia**
  - Immunity turns on which agency is compelling witness.
  - Witness before Australian Securities and Investments Commission cannot invoke silence and only gets use immunity.
  - In other proceedings, Evidence Act 1995 provides much broader protection than United States
  - Natural persons may claim privilege against self-incrimination on ground that the witness either (a) has committed an offense against or arising under Australian law or a law of a foreign country, or (b) is liable for a civil penalty.
Rights of Resident and Non-Resident Aliens

- Resident aliens receive same protections as U.S. citizens
- Non-resident aliens questioned by U.S. law enforcement abroad
  - Statements inadmissible in later criminal trial in United States
- Non-resident aliens appearing in civil action in United States
  - Unclear; in enforcing subpoena against Dutch businessman, court examined purported rights as a citizen and resident of Netherlands and noted that it “was not self-evident that the Fifth Amendment’s privilege against self-incrimination is available to non-resident aliens.” *Bear Stearns & Co. v. Wyler*, 182 F. Supp. 2d 679, 680–81 (N.D. Ill. 2002)
Invocation Based on Fear of Foreign Prosecution

- Fearing criminal prosecution in Lithuania and Israel, Balsys asserted privilege and refused to answer questions posed by United States
- Supreme Court held that privilege applies only when the sovereign seeking to compel the witness is the same sovereign that would later use the testimony against him.
- Any witness who fears prosecution by a foreign government must testify if granted immunity in the United States.
Application to Cross-Border Law Enforcement

• Same sovereign rule is problematic in an age where sovereigns frequently cooperate in law enforcement.
• Dictum in *Balsys* acknowledges that there might be situations in which “cooperative conduct between the United States and foreign nations could develop to a point at which a claim could be made for recognizing fear of prosecution” because such a prosecution might not be fairly characterized as distinctly “foreign.”
Use of Testimony Compelled by Foreign Sovereign

• Most alarming potential impact of same sovereign rule is that it may allow U.S. prosecutors to use testimony compelled by foreign nation.
• Reversing S.D.N.Y., Second Circuit held that testimony compelled by a foreign power could not be used against an individual in a criminal case in an American court.
  • *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017)
• Key idea is that the constitutional violation occurs at trial when the compelled testimony is used, not at the moment of compulsion
Spousal Communication Privilege

• Privilege belongs to both spouses. Either can assert it – i.e., the witness spouse can refuse to testify and other spouse can prohibit witness spouse from testifying.
• Applies to confidential communications made during the marriage.
• Privilege can be asserted at any time, even after divorce.
• Comes from old common law view that “every man’s house is his castle,” and that spousal communications privilege fosters the harmony and sanctity of the marriage relationship.
Spousal Communication Privilege

• But, not if there is not an expectation of confidentiality (e.g., the subject matter would be subject to mandatory reporting by the other spouse). *Id.*
• No privilege for any communications if third parties are present. *United States v. Taylor*, 92 F.3d 1313, 1331-32 (2d Cir. 1996) (“knowledge of the presence of a third party defeats the application of the spousal privilege”).
Spousal Testimonial Privilege

• Originally, either spouse could invoke this privilege to prevent the witness spouse from testifying.
• This view developed over time as the reasons for this privilege eroded, such as not viewing a wife as having a separate legal existence.
• \textit{Trammel v. United States,} 445 U.S. 40 (1980): The Supreme Court revisited the privilege and held that it belongs to the witness spouse and he/she can testify about any acts that he/she observed before or during the marriage and any communication made in the presence of third parties. This avoids turning the castle into a “den of thieves.”
Spousal Testimonial Privilege

• Only applies against adverse testimony against spouse when spouse is a defendant in a criminal case.
• Only valid during the marriage (does not apply if spouse is divorced) (yes, you can marry a witness to prevent testimony).
• Not limited to confidential marital communications – can assert the privilege and refuse to testify about acts and non-confidential communications.
• Waived by failure to object when the spouse is called to the stand. See United States v. Fisher, 518 F.2d 836, 840 (2d Cir. 1975).
Examples

Walter and Skylar White from *Breaking Bad*. Theme in the show is that they don’t want to get divorced – why? So Skylar can claim the testimonial privilege.

Q: Can Skylar choose to testify against Walter if she chooses to, i.e., to get leniency in her own case of money laundering?
Q: If Skylar testifies about something he told her when they were home alone, can Walter object?
Q: Does your answer change if Skylar and Walter get divorced?
Q: Assuming that they don’t get divorced, and Skylar testifies about something she observed, such as bags full of cash in the attic, can Walter object?
Spousal Privilege: Outside the United States

- **UK**: no communications privilege and limited testimonial privilege

- **Canada**: spouses can be subpoenaed to testify but are not obligated to disclose communications made during the course of marriage, if testifying spouse was the recipient of communication

- **Australia**: High Court ruled in 2011 that spousal privilege does not exist in common law, found that spouses were competent witnesses and could be compelled to testify

- Many European countries apply spousal privilege to non-marital cohabitants
Physician-Patient Privilege


There may be state law privileges that apply in civil cases, and also privacy protection for records and information under the Health Insurance Portability and Accountability Act of 1996 (HIPPA).
Physician-Patient Privilege

Common State Law Formulation:

• A confidential physician-patient relationship existed;
• During which the physician acquired the type of information contemplated by the statute;
• While attending the patient; and
• The information was necessary for medical diagnosis and treatment.
Physician-Patient Privilege: Outside the United States

- **UK:** While doctors have a professional obligation to treat communications with patients as confidential, communications are not privileged; courts can order doctors to disclose information.

- **France:** Privilege is “absolute” and in the hands of the doctor; neither a patient or court can compel testimony; if patient waives confidentiality, doctor can choose to testify.

- **Australia:** Medical privilege recognized in some states, doctor can divulge information if patient’s sanity is the matter of the dispute.

- **Japan:** Privilege recognized in both criminal and civil cases, can be waived by the patient.
Clergy-Penitent Privilege

• The clergy-penitent privilege is limited to private communications rooted in confidence and trust.

• The privilege “recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”

Clergy-Penitent Privilege

Elements under federal common law:

• The clergy-communicant privilege protects communications made to a clergymen

• In his/her spiritual and professional capacity

• Made with a reasonable expectation of confidentiality
Clergy-Penitent Privilege

Privilege only applies if the individual seeks spiritual advice:

“If, however, one seeks out the clergy only for income tax avoidance, we see no more need for a protective privilege than if the taxpayer had consulted his butcher or barber. The taxpayer is not a penitent seeking spiritual relief from his sins, only a citizen seeking relief from his obligation to pay taxes.”

*United States v. Dube*, 820 F.2d 886 (7th Cir. 1987)
Clergy-Penitent Privilege: Outside the United States

• UK: Communications with a priest are not privileged

• Canada: Newfoundland and Quebec recognize the privilege by statute; Supreme Court determined that, under common law jurisprudence, religious communications are not presumptively privileged

• Australia: In certain jurisdictions, a religious official can refuse to divulge that a confession was made or its contents, with exceptions

• Japan: Privilege exists in Code of Criminal Procedure, enacted in 1948 and modeled on US laws
Privileges: U.S. versus Foreign Jurisdictions

- Often no equivalent of US state bar memberships in other jurisdictions
- In-house counsel are often no eligible for bar membership in a foreign country
- Protection of attorney-client privileged communications is primarily a function of each individual country’s law
- Intended confidential information can receive different privileged status in different jurisdictions
- Relevant factors
  - Location of the attorney
  - Location of the pending case or matter
  - Location of the client
  - Location of the relevant documents
  - Where attorney is licensed
  - In house versus external counsel
  - Severity of the harm if the information is not privileged
  - Seriousness of the matter at stake
  - Whether the matter concerns anti-trust and unfair competition issues
## International Privileges

<table>
<thead>
<tr>
<th>Country</th>
<th>Broad or Limited Privilege</th>
<th>Privilege for In-House Legal Counsel</th>
<th>Privilege for Non-Licensed In-House Legal Counsel</th>
<th>Privilege for Foreign Licensed Attorneys</th>
<th>Does Privilege Extend to Info in Client’s Possession?</th>
<th>Separate Litigation Privilege</th>
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Recent Case In UK - Eurasian Natural Resources Corp. Ltd.

- English Law
  - Legal Advice Privilege Protects Discussions between Lawyer and Client
  - Litigation Privilege Protects Exchanges between lawyer, client and third party
- Eurasian National Resources Corp. documents prepared during an internal investigation are protected by the litigation privilege but the Court of Appeal failed to tackle the question of “who is the client” in the context of corporate communications for purposes of receiving legal advice
- Law in UK is that communications between employees of a corporation and corporate counsel are not privileged unless the employee was instructed to receive legal advice - Three Rivers
- Court of Appeal failed to extend attorney client privilege to all employees of a corporation - more restrictive approach to privilege than U.S. corporation would receive in the U.S.
U.S. Border Searches

• “Border Search Exception” to 4th Amendment (i.e. *U.S. v. Arnold* and its progeny)
• No constitutional right against unreasonable searches and seizures at the border
• Laptop, thumb drive, notes, smart phone, etc.
• Status as an attorney irrelevant for border searches
• If Border Agents demand your device, they have the right to take the device
  • Cursory search of device
  • Download full contents
  • May send for forensic search
• If claim of privilege is made, Customs Border Patrol must consult with CBP Counsel
U.S. Border Searches- How to Protect

• Take little or nothing privileged with you
• Encrypt information and shut devices down when crossing border
• Consider travel only phone that doesn’t contain sensitive data
• Upload sensitive data to a cloud storage account (and keep devices in “airplane mode” so the cloud data isn’t accessible from the device at the border)
• Let CBP officers know that you have privileged material on your device
  • 2018 CBP Directive- Requires certain procedures to be followed before border officers can search attorney-client or attorney work product materials
• Huge increase in device searches- 5,000 devices in 2015, 24,000 devices in 2016