



1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACC.COM

Attorney-Client Privilege Erosion in the In-House Context

(Last Updated 4/09)

Supplemental Material

Provided by Susan Hackett

This bibliography can be found (and is regularly updated) online at

<http://www.acc.com/advocacy/privilege-bibliography>

General Information:

ACC's Attorney-Client Privilege homepage: (offers articles, resources, testimony, links, etc.)

<http://www.acc.com/advocacy/keyissues/privilege.cfm>

ACC's Pragmatic Practices in Privilege Protection:

<http://www.acc.com/public/attyclientpriv/ragpract.pdf>

ACC's Attorney-Client Privilege InfoPAK (a manual summarizing the privilege):

<http://www.acc.com/resource/v6327>

"Wither" Attorney-Client Privilege

An ACC Docket article by ACC's General Counsel, Susan Hackett, on Privilege in the In-house Context Post-Enron: <http://www.acc.com/protected/pubs/docket/sept05/wither.pdf>

ACC Acts to Protect the Privilege:

Attorney Client Privilege Protection Act of 2007/08 (endorsed by ACC and its coalition partners): The same legislation introduced in December of 2006 was reintroduced in 2007 by Senator Specter as S.186: <http://www.acc.com/chapters/aust/upload/S186 Atty Client Privilege Protection Act.pdf>. Identical legislation was introduced on July 12, 2007, in the House as H.R. 3013 [<http://www.acc.com/public/attyclientpriv/hr3013.pdf>] and passed the House on voice vote. The current iteration of the bill is in the Senate Judiciary Committee, and new legislation was reintroduced by Senator Specter in June of 2008 as S. 3217:

<http://www.acc.com/advocacy/keyissues/upload/accpa2008.pdf>

ACC Statement: Senator Specter Re-introduces S. 186 as S. 3217, an amended bill:

<http://www.acc.com/aboutacc/newsroom/pressreleases/2008/Attorney-Client-Privilege-Protection-Bill.cfm>

ACC Statement: US House Adopts HR 3013 - Attorney-Client Privilege Protection Act of 2007

<http://author.acc.com/aboutacc/newsroom/accinthenews/Not-above-the-Law-2.cfm>

ACC's 2005 survey: Is the Privilege Under Attack?

<http://www.acc.com/Surveys/attyclient.pdf>

ACC's 2006 survey: The Decline of the Attorney-Client Privilege in the Corporate Context

<http://www.acc.com/Surveys/attyclient2.pdf>

The Veasey Report – ACC's 2007 member survey pipelining privilege and prosecutorial abuse stories relayed by respected neutral Former Chief Justice of Delaware E. Norman Veasey.

<http://www2.acc.com/public/veasey.pdf>

ACC and its Coalition's Executive Summary of Why Congress Should Act to Protect the Attorney-Client Privilege:

<http://www.acc.com/public/policy/attyclient/attyclientcoalitionmcnultyrebuttal.pdf>

ACC and its Coalition partners' testimony before the US Senate's Judiciary Committee hearings, September 18, 2007

- Coalition to Protect the Attorney-Client Privilege's statement on the hearings (ACC's statement): <http://www2.acc.com/public/coalition-statement.pdf>

- Statement of former Attorney General Dick Thornburgh

<http://www2.acc.com/public/thornburgh-testimony.pdf>

- Statement of Andrew Weissmann, former head of the DOJ's Enron Task Force

<http://www.acc.com/public/senatejudiciary.pdf>

- ABA written submission to the Senate for the hearings:

<http://www.acc.com/public/aba-testimony.pdf>

ACC and its Coalition partners' testimony before the US House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, March 12, 2007:

- Testimony of ACC Board Chairman Richard T. White:

<http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf>

- Testimony of Andrew Weissmann, former DOJ Enron Task Force Chairman:

<http://www.acc.com/legalresources/resource.cfm?show=16255>

- Testimony of ABA President Karen Mathis:

<http://www2.acc.com/public/policy/attyclient/abatestimonytohousejudsubcomm.pdf>

- Testimony of William Sullivan, Partner, Winston & Strawn:

<http://www.acc.com/advocacy/keyissues/loader.cfm?csModule=security/getfile&pageid=61909&page=/index.cfm&qstring>

- Testimony of Barry Sabin, US Department of Justice:

<http://www.acc.com/advocacy/keyissues/loader.cfm?csModule=security/getfile&pageid=61939&page=/index.cfm&qstring=>

ACC and its Coalition partners' testimony before the US Senate Judiciary Committee, September 12, 2006:

<http://www2.acc.com/public/attyclientpriv/coalitionsenjudtestimony.pdf>

Testimony and Statements made at the Senate Hearings (Sept. 12, 2006):

<http://www2.acc.com/public/attyclientpriv/writtentestimonyussenate.pdf>

**ACC and its Coalition partners' testimony before the US House of Representatives
Judiciary Subcommittee on Crime, Terrorism and Homeland Security, March 7, 2006:**
<http://www.acc.com/legalresources/resource.cfm?show=16229>

Letter to Sen. Leahy from former US Attorneys supporting S. 186 (6/2008):
<http://www.acc.com/resource/v9833>

Letter from former DOJ officials re the need for action on legislation (2007):
<http://www2.acc.com/public/attyclientprivissue.pdf>

Letter from former senior DOJ officials criticizing the Thompson Memo (2006):
<http://www2.acc.com/public/attyclientpriv/agsept52006.pdf>

**Letter from former senior DOJ officials - US Sentencing Commission (re Thompson)
(2005):**
<http://www2.acc.com/public/policy/attyclient/doj.pdf>

ACC Policies and Comments/Testimony on Attorney-Client Privilege Issues:

- The Auditor's Need For Its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions (ACC endorsed position paper, 2004):

<http://www.acc.com/public/article/attyclient/debate.pdf>

- Comments of the Association of Corporate Counsel to the ABA Attorney-Client Privilege Task Force Hearings (2005)

<http://www.acc.com/public/comments/attyclient/privilege.pdf>

- American Corporate Counsel Association November, 2002 Policy:
In-House Counsel's Role in Ensuring Corporate Responsibility

<http://www.acc.com/public/accapolicy/corpresponspolicy.pdf>

- ACC and Coalition Comments to US Sentencing Commission on Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege (August 2005)

<http://www.acc.com/public/accapolicy/attyclient.pdf>

ACC's Comparison "Chart" The Thompson and McNulty Memos and S. 186/H.R. 3013:

<http://www.acc.com/public/attyclientpriv/mcnultychart.pdf>

ABA Attorney-Client Privilege Task Force homepage:

Contains Task Force reports to the ABA House of Delegates, which are law review type articles outlining privilege issues. These include resolutions on privilege passed by the ABA House in August of 2006 which focus on privilege erosion in the context of audits and problems associated with employee or individual rights (a la the KPMG issues). It also has a resources section, where collected material resides, and info on Task Force activities. ACC is a member of the Task Force and supports their efforts.

<http://www.abanet.org/buslaw/attorneyclient/home.shtml>

**Department of Justice/Prosecutorial Practices Eroding the
Attorney-Client Privilege:**

DOJ Charging Policies Used to Assess Corporate Cooperation – Chronological Order

The DOJ's Holder Memorandum (1999):

<http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>

Establishment of the DOJ's Corporate Fraud Task Force (2002) (Executive Order 13271):

<http://www.usdoj.gov/dag/cftf/execorder.htm>

The DOJ's Thompson Memorandum (2003):

http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm

The DOJ's response to the ABA regarding proposals to amend the Thompson Memo:

<http://www2.acc.com/public/attyclientpriv/dojresponsetoaba.pdf>

Then-US Attorney Jim Comey's Guidance on Interpretation of the Thompson Memo, and other DOJ discussions of the government's Corporate Crime/Fraud Task Force (2003)

http://www.justice.gov/usao/eousa/foia_reading_room/usab5106.pdf

The DOJ's McCallum (2005) Memorandum:

<http://www2.acc.com/public/attyclientprvlg/mccallumwaivermemo.pdf>

McNulty Statement on Thompson Memo Before Senate Judiciary Committee, Sept. 2006:

<http://www.acc.com/advocacy/keyissues/loader.cfm?csModule=security/getfile&pageid=61969&page=/index.cfm&qstring>

The McNulty Memo (Dec. 2006) (amending the Thompson Memo):

http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf

- Deputy AG McNulty's prepared remarks on release of the Memo:

http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm

- DOJ Executive Summary of the McNulty Memo:

<http://www.acc.com/public/policy/attyclient/dojexecsummary.pdf>

The "Morford" Memo on DPAs and NPAs / Monitors (3/08)

<http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf>

The "Filip" Letter and Sen. Specter's response (July 2008, prior to the release of Filip Memo)

The Filip Letter: <http://www.acc.com/legalresources/resource.cfm?show=16449>

Sen. Specter's Response: <http://www2.acc.com/public/specterlettertodagfilip.pdf>

The New DOJ Guidelines retracting the McNulty Memo policies (issued by DAG Filip in August of 2008), now housed in the US Attorney's manual:

<http://www2.acc.com/public/prin-fede-pros-busi-orga.pdf>

Info on the DOJ's Corporate Fraud Task Force

<http://www.usdoj.gov/dag/cftf/>

Review Significant Criminal Cases and Charging Documents of the DOJ against corporate targets

<http://www.usdoj.gov/dag/cftf/cases.htm>

DOJ's Fact Sheet report on the Corporate Fraud Task Force Fifth Anniversary
http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html

Securities and Exchange Commission Practices Eroding the Privilege:

The SEC's new guideline - essentially repeals privilege waiver as defined by the Seaboard Report (October 2008)

<http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

SEC's Seaboard Report [the SEC's internal document setting policy on (non-) "recognition" of privilege, picking up on the same concepts developed in the DOJ's Thompson Memorandum]:

<http://www.sec.gov/litigation/investreport/34-44969.htm>

SEC Proceedings Against In-House Counsel

<http://www.acc.com/protected/article/ethics/seccrimproceed.pdf>

SEC speeches particularly informative to the attorney-client privilege and gatekeeper debate:

SEC's general counsel explains the 307 rules and their context:

<http://www.sec.gov/news/speech/spch040304gpp.htm>

SEC's director of enforcement speaks on lawyers' responsibilities as gatekeepers of client conduct and shareholder interests:

<http://www.sec.gov/news/speech/spch092004smc.htm>

SEC Commission Atkin's Remarks before the Federalist Society (see about page 6):

<http://www.sec.gov/litigation/investreport/34-44969.htm>

Privilege in the Audit Process

ACC's Interim Report of the Working Group to Improve the Relationship Between Lawyers and Auditors: <http://www2.acc.com/php/cms/index.php?id=368>

ACC's Comments on the Financial Accounting Standards Board's Proposals to Amend FAS 5: story and links.

The proposed rule, if adopted, will force companies to disclose privileged information and legal work product that could negatively impact their liability, litigation strategies and defense rights. Over 140 Companies have joined ACC in comments to the FASB. See the comments and more at the link below:

<http://www.acc.com/advocacy/news/ACC-and-135-CLOs-Statement.cfm>

FASB Amendments to FAS 141(R)-1, Accounting for Assets Acquired and Liabilities Assumed in a Business Combination That Arise from Contingencies (issued April 1, 2009). Moving away from FAS 141(R) as issued in December 2007, the changes effectively return the

standards to their original form with regard to reporting litigation related contingencies. While FAS 141(R) is limited to accounting in business combinations, it parallels some requirements under FAS 5: http://www.fasb.org/pdf/fsp_fas141r-1.pdf

ACC and the Courts - Privilege as a Court-Protected Doctrine:

Conference of Chief Justices Statement Supporting the Attorney-Client Privilege (and instructing States's Courts to Create Commissions to examine erosion issues):
<http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html>

ACC's Comments to the Federal Courts' study committee examining proposed FRE 502 and its limited waiver provisions:

June of 2006:

<http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16218>

January of 2007: <http://www.acc.com/public/policy/attyclient/accfre502comments.pdf>

All ACC Amicus (listing and links) on privilege-related issues:

<http://www2.acc.com/php/cms/index.php?id=291>

ACC's amicus briefs in U.S. v. Textron, supporting privilege in the audit process and encouraging the court to rule that documents divulged to auditors in the course of assuring financial integrity should not be deemed as waived to the government or third parties.

--Filed 4/22/09:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212>

--Filed 4/8/08:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15823>

ACC's Amicus in a Texas Supreme Court case regarding the confidentiality of privileged documents produced to an auditor by a client during the regular audit process and then sought in discovery by a third party in litigation against the client.

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15845>

ACC's amicus brief on limited waiver concerns: (QWEST)

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15844>

ACC's amicus briefs on the issue of government pressure on companies to deny employees' indemnification and fee advancement under corporate policies:

- *US v. Stein/KPMG* case (3 amicus on related issues as requested by Judge Kaplan):

- <http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15825>

- <http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15843>

- <http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15841>

- Judge Kaplan's decision in KPMG finding the Thompson Memo unconstitutional:

http://www2.acc.com/public/attyclientpriv/kpmg_decision.pdf

- Judge Kaplan's dismissal of the charges against 13 of the 16 KPMG defendants:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15833>

- *Lake/Wittig* case:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15848>

ACC's amicus in *Teleglobe v. BCE*, in which privilege rights of the employer-entity of an in-house legal team that provided advice for both the employer entity and affiliates in the corporate family are discussed:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15837>

Amicus of five Canadian corporations interested in the *Teleglobe v. BCE* case:

<http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15838>

Third Circuit Opinion in *Teleglobe v. BCE* – Judge Ambro (citing to ACC's brief, amongst others): <http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15834>

ACC's amicus in *Broadcom v. Qualcomm*, which argues that a jury instruction to consider absence of opinion of counsel an adverse inference further erodes attorney client privilege in the corporate context:

<http://www.acc.com/advocacy/news/acc-files-amicus-brief.cfm>

ACC's amicus in *Tyco executive case, NY v. Kozlowski and Schwartz*, opposes an attempt by former Tyco executives to obtain attorney work product:

<http://www.acc.com/advocacy/news/ny-court-of-appeals-affirms-ruling.cfm>

Other Related Issues:

ACC's Gatekeeper/Liability homepage:

<http://www.acc.com/advocacy/keyissues/gatekeeping.cfm>

ACC Reports: Corporate Counsel in the Liability Crosshairs (2007)

<http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15927>

ACC's "Paradise Tarnished: Today's Sources of Liability Exposure for Corporate Counsel" (2006)

<http://www.acc.com/legalresources/resource.cfm?show=16075>

Corporate Counsel: Caught in the Crosshairs (2005 - Lamberth)

<http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16038>

ACC's Leading Practices Profile: Indemnification and Insurance Coverage for In-House Lawyers

<http://www.acc.com/vl/membersonly/PracticeProfile/loader.cfm?csModule=security/getfile&pageid=16814>

ACC's Sarbox 307 – Part 205 Rules homepage: This is the site of a significant number of primary and commentary resources on the SEC's new attorney conduct rules promulgated under the authority given in Sarbanes-Oxley Section 307, and codified at 17 CFR Part 205.

<http://www2.acc.com/legres/corpresponsibility/attorney.php>

Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-house Counsel

<http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16079>

The appendix to this article contains the ABA Model Rules of Professional Conduct 1.6 (Confidentiality) and 1.13 (Organization as Client), which are most relevant to this discussion. The issue of lawyers as whistleblowers raises privilege questions in the context of privileged attorney-client conversations and information that the plaintiff lawyer would wish to introduce in order to make his or her case for retaliatory discharge.

Responsive Measures for Government Investigations (Warin)

<http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16040>

ACC's InfoPAK on Responding to a Government Investigation:

<http://www.acc.com/legalresources/resource.cfm?show=77637>

ACC's InfoPAK on Conducting an Internal Investigation:

<http://www.acc.com/legalresources/resource.cfm?show=19675>

If you are an in-house counsel and not an ACC member, and therefore need a temporary password to access some of these documents, please contact Susan Hackett at hackett@acc.com.