poena powers to compel the appearance before it, or before a person or body designated by it, of a United States citizen or resident physically present in a foreign country.

(2) The following methods may be used to have foreign records authenticated for use in any ensuing criminal proceeding in the United States Courts:

(a) Stipulation—It may be possible to get the defendant in any subsequent litigation to stipulate the authenticity of the records in question.

(b) Voluntary Testimony—It may be possible to have the appropriate witness or official voluntarily appear and testify as to authenticity of the records in question.

(c) 18 U.S.C. § 3491, *et seq.*—These provisions provide a method by which certain foreign documents can be made admissible in a criminal proceeding in the United States. Under the procedures contemplated by these provisions the party wishing to have foreign documents authenticated (*i.e.*, either the United States or the defendant) may, after appropriate notice to the opposite party, apply for the issuance of a commission to an appropriate consular officer. 18 U.S.C. § 3492. The consular official, acting pursuant to the commission, can then take the testimony of the authenticating witness in accordance with the provisions of 18 U.S.C. § 3493. If the consular officer taking the testimony is satisfied, upon all the testimony taken, that the foreign document in question is genuine, he shall certify such document to be genuine under the seal of his office in accordance with 18 U.S.C. § 3494. After the additional requirements of 18 U.S.C. § 3494 relative to the transmittal of the document to the court are satisfied, the document shall be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under § 3492 of this title that such document (or the original thereof in case such document is a copy satisfies the requirements of § 1732 of Title 28 relating to records maintained in the regular course of business). It is possible that the witness or official will refuse to voluntarily testify. In that event, and providing there is a tax treaty between the foreign government involved and the United States, the foreign government should be requested to compel the witness or official to testify. The foreign agent conducting the interview would then be in a position to ask the necessary questions in the presence of the United States consul (U.S. v. Hav).

(d) Affidavit—In *United States v. Leal*, the court was faced with the question of whether certain documents originating in Hong Kong could be admitted into evidence in a criminal prosecution in the United States. The records in question consisted of the affidavit of the assistant manager of a Hong Kong hotel to which was attached an original hotel registration card and certain telephone booking orders of the defendant and his wife. In this proceeding the Government did not attempt to use the mechanism established by 18 U.S.C. § 3491, *et seq.* Rather, the court allowed the Government to rely solely upon 28 U.S.C. § 1732 (the Federal Business Records Act). Essentially, the procedure which the Government followed was that outlined in Fed. R. Crim. P. 44(a)(2) for authenticating foreign official records. Thus, the assistant manager for the hotel gave a sworn statement before the United States Vice Consul in Hong Kong explaining that he chose not to go to Guam to testify, describing the contents of the attached original hotel records, attesting that he was the official custodian thereof and that the documents had been prepared or witnessed by himself or by persons under his authority and had constantly been in the hotel under his supervisory control, and stating that they constituted records prepared in the normal course of business of the hotel.

(e) Authentication By Testimony From Foreign Government Official—In the case of *United States v. Quong*, the court was faced with questions concerning the admissibility of records obtained from a foreign business. In that case a Canadian law enforcement officer picked up the books and records which had been assembled by an officer of a Canadian company. The officer then transmitted the documents to the United States and testified in the United States District Court as to their authenticity. The court held that the procedure followed was substantially in accordance with the Business Records Act (28 U.S.C. § 1732) and ruled that the records were admissible. The court noted that the officer had taken the records directly from the custodian and that the dates on the records corresponded with dates shown on other records whose admissibility was not in question. Taking this into account the court found that they were kept in the regular course of business and were, therefore, admissible.

343.6 *(4-13-81)* 9781
Dual Representation

(1) Treasury Department Circular No. 230 (Rev. 6-79), which covers the practice of attorneys, certified public accountants, enrolled agents, and enrolled actuaries before the Internal Revenue Service, provides the following with respect to dual representation:

§ 10.29 Conflicting Interests

No attorney, certified public accountant, or enrolled agent shall represent conflicting interests in his practice before the Internal Revenue Service, except by express consent of all directly interested parties after full disclosure has been made.

(2) Dual representation exists when a summoned third-party witness is represented by an attorney, certified public accountant, enrolled agent, or other person who also represents the taxpayer or another interested party. It may also occur where an attorney under investigation represents a third-party witness in that investigation or where an attorney-witness seeks to represent another witness in the same investigation. An interested party is one who has a significant pecuniary interest in the testimony of the witness or who, by virtue of the nature of the investigation and the known facts, may be incriminated by the witness.

(3) Except as provided below, the mere existence of a dual representation situation which may potentially have an adverse impact on the investigation will not, without some action by the attorney to impede or obstruct the investigation, provide a sufficient basis for seeking a disqualification. However, where an attorney's representation has substantially prejudiced the questioning of a third-party witness and, as a result, has significantly impaired the progress of the investigation, the Service will request the Department of Justice to seek a court order, as part of the summons enforcement proceeding, to disqualify that attorney as counsel for that witness.

(4) In view of the well-established principle granting a person the right to counsel of one's choice, this disqualification procedure will only be used in extreme circumstances, such as where an attorney has taken some action to improperly or unlawfully impede or obstruct the investigation. It is essential that the interviewing officer have sufficient facts to support such allegations.

(5) The provisions referring to "attorneys" apply to other representatives (nonattorneys) who represent witnesses or taxpayers.

(6) Interview of Witness

(a) Upon learning that counsel represents both the taxpayer under investigation (or other interested party) as well as the summoned witness, the interviewing officer should give consideration to exploring with the attorney, prior to the interview of the witness whether or not the attorney realizes that his representation of both the subject of the investigation and the witness may occasion a conflict of interest.

(b) If, after discussing the potential conflict of interest situation with the attorney the question is not resolved, at the outset of the interview of the witness, the interviewing officer should ask the following of the witness:

1 Do you wish the attorney to be present during the questioning?

2 Did you hire the attorney for this purpose?

3 Are you paying for the attorney's services, either alone or in conjunction with someone else—if the latter, do you know who?

4 Do you know that the attorney also represents the taxpayer?

5 Do you know that the attorney is being paid by the taxpayer (or some other person)?

(c) In those instances where the interviewing officer becomes aware of the potential conflict of interest during the interview, he/she should explore the issue by asking the questions listed. In some situations it may be appropriate for the interviewing officer to tell the witness that in his/her view, the interest of the taxpayer under investigation conflicts with that of the witness.

(d) After disclosure of the dual or multiple representation has been made, if the witness unequivocally states that he/she wishes the attorney in question to represent him/her and that he/she is utilizing the services of the attorney in this matter, then the interview should proceed.

(e) However, if the witness states that he/she does not wish to retain that attorney because of the possible conflict of interest, then the witness should be given the opportunity of either proceeding with the interview without an attorney present or adjourning the interview to a specific future date in order to afford the witness an opportunity to secure the services of another attorney. If the witness refuses to pro-

ceed to obtain the services of another attorney within a reasonable period of time, the witness should be notified that his/her failure to comply with the summons may result in a recommendation to the Department of Justice that a summons enforcement proceeding be initiated.

(7) Obstruction of Interview

(a) If the interviewing officer has reason to anticipate that an attorney will improperly impede or obstruct the questioning of a witness, he/she should consult with District Counsel prior to the interview with respect to the manner of conducting the questioning.

(b) Speculation that the objective of the investigation might be frustrated is insufficient grounds upon which to seek disqualification of an attorney. The fact that the attorney for the summoned witness also represents the taxpayer or other interested party does not provide a basis for concluding that the presence of such attorney would obstruct the investigation.

(c) Thus, the mere potential for obstruction is generally an insufficient basis to justify a recommendation for disqualification of an attorney. There must be active obstruction by an attorney before disqualification will be sought. A suit to disqualify an attorney for obstruction will be undertaken only where the facts clearly indicate that he/she has actively impeded the investigation.

(d) Unjustifiable obstruction by an attorney may take a variety of forms. It is, therefore, impossible to set forth the precise factual circumstances under which the Government would ask a court to disqualify an attorney as counsel for a third-party witness.

(e) The following is an example of a circumstance which may provide the basis for a recommendation for the institution of litigation to seek the disqualification of an attorney:

Taxpayer and third-party witness are both represented by the same attorney. The witness is summoned to testify. The attorney refuses to permit the witness to answer questions for other than legitimate reasons or disrupts the questioning by repeatedly making frivolous objections to the questions, or asserts frivolous claims of privilege or defenses on behalf of the witness to delay the investigation, or so disrupts the interview that the interviewing officer, with due diligence and preseverance, is unable to proceed with the interview. [*Backer* v. *Commissioner*]. This is not intended to suggest that there is anything inherently wrong in claiming the Fifth Amendment privilege.

A careful distinction must be drawn between situations in which the proper remedy is to compel the witness to answer and those in which the attorney may be disqualified because of this conduct. The latter is an extreme remedy which will only be sought in very unusual circumstances, as courts are reluctant to deprive a person of his/her choice of attorney. District Counsel, therefore, will make a considered determination on a case-by-case basis prior to seeking disqualification of an attorney.

(8) Suspension of Interview

(a) If the interview is suspended because of the attorney's actions, the witness should be given the opportunity to secure the services of another attorney within a reasonable period of time or proceed without an attorney. If the witness declines either to proceed without an attorney or retain a new one within a reasonable period of time, the witness should be informed that a summons enforcement proceeding and an action to disqualify the attorney will be recommended.

(b) Upon suspension of an interview, the interviewing officer will consult with his/her manager. If the manager is in accord with the interviewing officer's view that the facts present an appropriate case for litigation, a request will be made to District Counsel that they recommend to the Department of Justice that it seek judicial enforcement of the summons and exclusion of the attorney from representing the witness.

(c) Suspension of an interview should be made judiciously in view of the time delays in the investigation that may be caused by such action.

(d) A record should be made of the circumstances in each instance where an interview is suspended because of dual representation and/or obstruction by an attorney. The interviewing officer should also have a verbatim transcript of the interview (if possible) so that the factual allegations concerning the attorney's conduct at the interview may be proven.

(9) Procedures where an attorney will be excluded prior to interviewing witness are:

(a) Where an individual taxpayer under investigation attempts to appear with a summoned witness as the witness' attorney, the witness should be told that the taxpayer/attorney is the person under investigation and that he/she will not be allowed to be present during the questioning. The witness should be given the opportunity of either proceeding with the interview without the taxpayer present of adjourning the interview to a specific future date in order to afford the witness an opportunity to secure the services of another attorney. If the witness refuses to either proceed with the interview without the attorney's representations or to adjourn for the purpose of obtaining a new representative, the interview will be terminated and a request will be made to District Counsel for judicial enforcement of the summons and exclusion of the taxpayer from representing the witness.

(b) A witness may appear pursuant to a summons accompanied by an attorney who also represents the taxpayer (or other interested party) where the taxpayer (or other interested party) has already made exculpatory statements to the Service alleging that the witness was criminally responsible for circumstances to be discussed during the interview. In this case, the witness will be told that the attorney also represents the taxpayer (or other interested party) and that the agent believes that an irreconcilable conflict of interest exists which could prejudice the investigation. The witness should then be given the opportunity of either proceeding with the interview without the attorney present or adjourning the interview to secure the services of another attorney. If the witness insists upon retaining the same attorney despite the assertion of a conflict of interest, the interviewing officer will terminate the interview and a request will be made to District Counsel for judicial enforcement of the summons and exclusion of the attorney.

(c) Where a witness appears pursuant to a summons and is accompanied by a person (other than the taxpayer) who does not represent the individual witness, such person may be excluded from the interview. An example of a situation in which a person may be excluded from the interview is where a corporate official (witness) is summoned in his/her individual capacity regarding an examination of the corporation and an attorney representing the corporation, who does not also represent the witness, attempts to attend the interview. However, if the witness refuses to be interviewed if that person is excluded and the person is a designee of the taxpayer within the meaning of IRC 6103(c) and its regulations, the interview will proceed unless the interviewing officer makes a determination that continuation of the interview will impede development of the case. If such a determination is made, the interview will be terminated and a request will be made to District Counsel for a recommendation for judicial enforcement of the summons by the Department of Justice and exclusion of the person from any future interviews pursuant to the court's order.

344 *(1-18-80)* 9781
Privileged Communications

344.1 *(1-18-80)* 9781
Conditions for Privileged Communications

(1) There are certain special types of relationships in which information communicated by one person to the other is held confidential and privileged between them. The one to whom the information has been imparted cannot be compelled to divulge it without the consent of the other. There are four fundamental conditions: [Sec. 244—8 Wigmore (3d Ed.) 2285]

(a) The communications must originate in a confidence that they will not be disclosed;

(b) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties

(c) The relation must be one which in the opinion of the community ought to be diligently fostered;

(d) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

344.2 *(1-18-80)* 9781
Attorney and Client Privilege

(1) The attorney-client privilege must be strictly construed. Mere attorney-client relationship does not make every communication by the client to his/her attorney confidential. The communication must have been made to the attorney in his/her capacity as such, employed to give legal advice, represent the client in litigation, or perform some other function strictly as an attorney. When it does apply, the privilege covers corporate as well as individual clients. Basically, attorney-client privilege does not include a right to withhold the name of a client. [*Colton v. U.S.*] However, an attorney's refusal to furnish a client's name has been upheld where it would indirectly amount to disclosure of communications of a confidential nature, as, where the attorney has delivered a check to the Internal Revenue Service in payment of a client's tax but refuses to name the client. [*Tillotson v. Boughner; Baird v. Koerner; Colton v. U.S.*] Dates and amounts of legal fees paid by a client to his/her lawyer do not constitute a privileged communication. [In re Wasserman and Carliner.]

(2) If the attorney is a mere scrivener or a conduit for handling funds, or the transaction involves a simple transfer of title to real estate, without consultation for legal advice, communications from the client to the attorney are not privileged. [*McFee v. U.S.; Polock v. U.S.*] Neither are communications privileged which have been made in the course of seeking business rather than legal advice. [*U.S. v. Vehicular Parking, Ltd.*] The privilege is ordinarily inapplicable to communications made to a person who acts as both attorney and accountant, if they have been made solely to enable him/her to audit the client's books, prepare a Federal income tax return, or otherwise act purely as an accountant. [*Olender v. U.S.*] However, some courts have held that a privileged communication can occur between a client and attorney in the process of preparing a tax return. [*Colton v. U.S.; U.S. v. Kovel*] A person who consults an attorney for help or advice in perpetrating a future crime of fraudulent act is not consulting the attorney for the legitimate purposes intended to be protected, and communications by the client or intended client in connection with such consultation are not privileged. [*Genevieve A. Clark v. U.S.; Pollock v. U.S.*]

(3) A communication by a client to an attorney in the presence of a third person is no longer privileged, unless the third person's presence is indispensable to the communication, e.g., the attorney's secretary. [*Himmelfarb v. U.S.*] Likewise, a client's communication loses its privilege when the attorney relates it to a third person unless that person's services are necessary to furnishing the legal advice. Thus, the records of a bank from which an attorney has bought a cashier's check for an undisclosed client for delivery to the Internal Revenue Service are not covered by the attorney-client privilege, even if the attorney may withhold the client's name. The bank in such case is a third party whose services are not indispensable to communications between client and attorney, and not part of any giving of legal advice. [*Schulze v. Rayunec*] On the same theory, a bank to which an attorney sends a client to work out an estate plan is not essential to communications by the client to the attorney, and information that the client gives the bank is not privileged. Similarly, communications by the client to the attorney are not privileged if the client obviously intended them to be divulged to third persons. [*U.S. v. Thomas G. McDonald; U.S. v. Tellier; Banks v. U.S.*] This includes the contents of closing statements and sales contracts prepared by the attorney, which the client necessarily expected to divulge to other parties at the closing, [*U.S. v. McDonald*] or information

imparted by the client to include in his/her tax return [*Colton v. U.S.*] or to furnish to the Internal Revenue Service in connection with a proposed civil settlement of tax liability. [*Banks v. U.S.*] Likewise, communications between an attorney and a third party not essential to the furnishing of legal advice would not be privileged. [*Schulze v. Rayunec*]

(4) Courts disagree as to an attorney's right to refuse production of a taxpayer-client's records in his/her possession, basing their determination upon whether or not the client could have withheld the records. [*U.S. v. Judson*] Courts which deny the claim of attorney-client privilege point out that every taxpayer is required to keep records for examination by the Commissioner (26 USC 54), [*Falsone v. U.S.; U.S. v. Willis*] or that persons who engage in the business of wagering are required to keep daily records showing gross amounts of wagers (26 USC 3287). [*U.S. v. Willis*] Courts holding the contrary view say that where a taxpayer has already refused to give information on the ground of possible self-incrimination or could have done so, his/her attorney cannot be compelled to produce the taxpayer's records, or workpapers made from them by the taxpayer's accountant at the attorney's request in connection with a pending tax investigation. [*U.S. v. Judson; In re Fahey.*]

344.3 *(2-8-82)* 9781
Accountant and Client Privilege

(1) There is no privilege between an accountant and a client under common law or Federal law. [*Falsone v. U.S.; Lustman v. Commr.; U.S. v. Bowman*] The accountant's workpapers belong to the accountant, are not privileged, and must be produced. [*Deck v. U.S.; Bouschor v. U.S.*] A taxpayer may be required by summons to produce an accountant's workpapers in his/her possession. A Fifth Amendment claim is not appropriate since the privilege protects a person only against being incriminated by his/her own compelled testimonial communications, and the accountant's workpapers are not the taxpayer's nor do they contain the taxpayer's testimonial declarations. (*Fisher v. U.S.*) Neither may an attorney refuse to produce workpapers prepared by the taxpayer's accountant (other than at the attorney's request in connection with a pending investigation).

(2) An accountant employed by an attorney, [*U.S. v. Kovel*] or retained by a taxpayer at the attorney's request to perform services essential to the attorney-client relationship, [*U.S. v. Judson*] may be covered by the attorney-client privilege.

344.4 *(5-9-80)* 9781
Husband and Wife Privilege

(1) Communications between husband and wife, privately made, are generally assumed to have been intended to be of a confidential nature, and are therefore held to be privileged. It is essential, however, that the communications must be, from their nature, fairly intended to be of a confidential nature. If it is obvious from the circumstances or nature of a communication that no confidence was intended, there is no privilege. [*Wolfle v. U.S.; U.S. v. Mitchell; Blau v. U.S.*] For example, communications between husband and wife voluntarily made in the presence of their children old enough to understand them, or other members of the family within the intimacy of the family circle, are not privileged. [*Wolfle v. U.S.*] Likewise, communications made in the presence of a third party are usually regarded as not privileged, and this has been held to be so even though the third party was a stenographer for one of the spouses, where the stenographer was not a person essential to the communication. [*Wolfle v. U.S.*]

(2) Privilege is not extended to communications made outside the marriage relations, as, before marriage, [*U.S. v. Mitchell*] or after divorce. [*Yoder v. U.S.*] Further, the privilege applies only to communications, and not to acts. The mere doing of an act by one spouse in the presence of the other is held not to be a communication. [8 Wigmore (3d Ed.) Sec. 2337] For example, in the Mitchell case where a husband induced his wife to participate in a violation of Federal law and took the proceeds from her, it was held that the taking of money was an act, not a communication, and therefore not privileged. It has been held in an income tax case where the taxpayer's wife voluntarily turned over his business records to a revenue agent without his consent, that the records were not a communication between husband and wife, and not confidential between them. [*U.S. v. Ashby*] It has also been stated that the privilege should not apply to situations where the wife is employed in her husband's business office, and she would learn only what any other secretary would learn. [*U.S. v. Nelson E. Jones*]

(3) Communications remain privileged after termination of the marriage by death of one spouse. [8 Wigmore (3d Ed.) 2341] Likewise, the privilege as to communications made during marriage does not terminate by divorce. [8 Wigmore (3d Ed.) 2341; *Pereira v. U.S.*]

(4) In addition to the privilege of a husband or wife to prevent the other from disclosing confidential communications that occurred during the marriage, there exists an independent privilege of one spouse to refuse to testify adversely against his/her spouse. With respect to this privilege, the testifying spouse alone has the choice of whether or not to refuse to testify adversely against his/her spouse on any act he/she observed before or during the marriage and on any non-confidential communications [*U.S. v. Trammel*]. The spouse may not be compelled to testify nor foreclosed from testifying.

344.5 *(1-18-80)* 9781
Clergyman and Penitent Privilege

Privilege between clergyman and penitent has been recognized in the Federal courts. [*Mullen v. U.S.; Totten v. U.S.*] This privilege has not been extended to financial matters, such as contributions made through a clergyman.

344.6 *(1-18-80)* 9781
Physician and Patient Privilege

As a general rule Federal Courts do not recognize any privilege between physician and patient.

344.7 *(1-18-80)* 9781
Psychotherapist-Patient Privilege

(1) Federal Rule of Evidence 504 specifically provides for a psychotherapist-patient privilege.

(2) Ordinarily a special agent will not need information from a psychotherapist regarding the mental condition of his/her patient. However, such information may be necessary if a taxpayer raises a defense based on his/her mental condition. If a request is made and if the psychotherapist resists, or is expected to resist furnishing the information, the special agent should obtain a waiver of privilege from the taxpayer. The waiver should protect the psychotherapist from any future claim that the privilege was violated. A copy of the waiver should be retained in the case file. A suggested form of waiver is shown in Exhibit 300-18.

344.8 *(1-18-80)* 9781
Informant and Government Privilege

(1) This privilege allows enforcement agencies to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with inforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [*Roviaro v. U.S.*] The contents of a communication are not privileged unless they tend to reveal the informant's identity. [*Roviaro v. U.S.*]

(2) This privilege differs from all the others in that it is waivable only by the Government whereas the others are for the benefit of, and waivable by, the individual. Where disclosure of an informer's identity or the content of the communication is relevant and helpful to the defense of an accused or is essential to a fair determination, the trial court may order disclosure. [*Rugendorf v. U.S.; Roviaro v. U.S.; Scher v. U.S.*] If the Government then withholds the information, the court may dismiss the indictment. [*Roviaro v. U.S.*]

(3) Generally, if it is shown that the informant participated in the act which is the basis for a criminal prosecution the court will require disclosure of his/her identity. For example, where the informant has been used to buy narcotics or conterfeit money from the defendant, the courts have held that nondisclosure was improper. [*Roviaro v. U.S.; Conforti v. U.S.; Portomene v. U.S.*] On the other hand, where there is sufficient evidence to establish probable cause independent of the information received from the informant, the Government's claim of privilege has been sustained. As an example, in the Scher case, where the defendant's automobile has been searched without a warrant, partly on the basis of an informant's information that bootleg alcohol was being transported, and partly because of the searching officers' own observation that the automobile with its lights out, was being loaded with packages, the court upheld the privilege. [305 U.S. 251] Further discussion relating to protection of informants is contained in 332.23.