Ethical & Compliance Considerations in the Cross-Border Context

Global Implications of the Attorney-Client Privilege

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Scope of the U.S. Attorney-Client Privilege

Privilege Issues – Elements

Attorney-client privilege: protects only the essence of confidential communications actually had by the client and attorney and only extends to information given for the purpose of obtaining legal representation. A privileged communication cannot be discovered if 4 elements are met:

- the holder of the privilege is or sought to become a client;
- the person to whom the communication was made is an attorney and is acting as an attorney at the time of the communication;
- the communication related to facts of which the client informed the attorney in confidence; and
- the communication was for the purpose of obtaining legal advice or assistance.
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – Privilege is not a Cloak

– The underlying information is not protected if it is available from another source (i.e., is purely factual information). Therefore, it is important to remember that information cannot be placed under an evidentiary “cloak” of protection simply because it is communicated to an attorney.

– However, if a lawyer takes data provided by the Client and puts it in an order that is of strategic importance to the litigation, that could be protected by the broader work product doctrine.
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – The *Upjohn* Principle


Communications between in-house or outside counsel and lower-level employee may be protected if:

- The communications are made to corporate counsel
- The communications are made at the direction of corporate superiors to secure legal advice from counsel
- The information communicated is not available from upper management
- The information communicated concerns matters within the scope of the employee’s duties
- The employees are made aware that they are being questioned in order for the corporation to secure legal advice

Applies in federal cases using federal law, and most states except: Alaska, Hawaii, Illinois and Maine
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – The Control Group Test

- Pre-*Upjohn* test for privilege
- Currently used to distinguish those who can direct lower-level employees to secure legal advice for purposes of *Upjohn*
- Still used by Alaska, Hawaii, Illinois and Maine

Control group:
- Upper management decision-makers
- Employees in a position of control or who have a substantial role in determining what action the corporation should take in response to legal advice or who is “an authorized member of a body or group which has authority”
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – When 3rd Parties Destroy the Privilege

– If a third party is not the “functional equivalent” of an employee of the client, or facilitating the provision of legal advice, the inclusion of that third-party on the communication destroys the privilege.

– This often comes up with Auditors, who will ask the legal department or even business-side employees to provide extensive case descriptions, or predictions about the outcome of a case.

– These types of communications are not privileged. And the transmission of any information that was privileged to the Auditor will destroy the privilege with respect to that information. This includes oral communications with Auditors.

– Similarly if a business-side employee forwards a privileged communication to any third party, that will destroy the privilege regarding that communication.
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – What to tell your clients

– Within the company: don’t distribute any attorney-client privileged information to anyone who does not need to know the information.

– Outside the company:
  • As a general rule, **never** forward privileged information to a third party. The two exceptions to the general rule that third parties destroy the privilege are complex, and so as a rule it is safer never to forward to third parties unless absolutely necessary to carry out the legal advice.
  • Also, instead or forwarding, revise the e-mail to protect privileged information.
  • Finally, never say anything to an Auditor that would not be put in a 10-K.
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – In-house Counsel

  - Only *legal* communications by in-house counsel are protected by attorney-client privilege
  - “An attorney’s involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction.”

- Ask: Is the primary purpose of the communication to obtain legal or business advice?
Scope of the U.S. Attorney-Client Privilege

Privilege Issues – In-house Counsel

To preserve privilege for communications with in-house counsel:

- Refrain from mixing business discussions with legal advice
- Keep e-mail chains separate, so counsel is not on an e-mail also circulated to non-legal personnel
- Counsel should not circulate communications to non-legal personnel unless apprising them of legal advice
- Be clear that the communication involves legal advice
- Consider common e-mail signature for legal department: “Communications from the Legal Department must be reviewed for privilege before production.”
  - Removes suggestion that all communications with counsel are privileged
  - Allows for legal department communications to be searched and collected electronically from other documents during discovery production
Attorney-Client Privilege Around the World
General comments about the attorney-client privilege at the international level

• Nearly all countries recognize some form of attorney-client privilege – though not always by name
• In common law countries like England (U.K.) the “privilege” is normally based on case law
• In civil law countries like France the “privilege” is typically embodied in statutes
• Even former communist countries are increasingly recognizing confidentiality between attorneys and clients
What Constitutes a “Communication” in the International Context?

• Difference from U.S.: non-application of the privilege to confidential legal documents in the client’s possession, versus in counsel’s possession

  • For example, in civil law jurisdictions such as France or Germany, confidential documents in the attorney’s possession are protected, but confidential legal documents in the client’s possession are not protected from seizure or discovery by regulators
What Is the Meaning of “Confidential” in the International Context?

• In most countries, “confidential” has the same meaning as in the U.S.

• But in some jurisdictions (China) governmental policy may require in-house counsel to reveal information that would be considered confidential in the U.S.
Who Are “Privileged Persons” in the International Context?

• Foreign jurisdictions differ from U.S. in how they treat in-house counsel

• Common law countries, e.g., England, Australia, Hong Kong, generally view in-house counsel as “privileged persons,” provided they belong to the applicable bar association
Who Are “Privileged Persons” in the International Context? (cont’d)

• Other countries, e.g., France, Italy, Austria, do not view in-house counsel as “privileged persons.” The theory behind this distinction is that in-house counsel are not independent enough from their corporate employers to render independent professional judgment. (Civil law countries also reject most of the U.S. exclusionary rules re evidence.)
Who Are “Privileged Persons” in the International Context? (cont’d)

• But consider: limited discovery in judicial proceedings makes in-house counsel communications discoverable only rarely in some jurisdictions. (European civil law countries have little discovery and thus less need for sophisticated privilege rules.)
• This may change as discovery becomes more widely available.
What Means “For the Purposes of Seeking Legal Advice” in the International Context?

• The degree to which a communication must contain or concern legal advice in order to be protected from disclosure varies between jurisdictions

• Similar to the U.S., the less the communication concerns legal advice, the less likely it will be protected under the privilege
Privilege in China

- Attorney-client privilege not a recognized principle under the laws of the People’s Republic of China
- But Law of Attorneys and PRC Code of Ethics for Attorneys require attorneys to keep confidential documents and communications with a qualified lawyer (and state secrets)
- Attorneys can be forced to testify, or lose license or go to jail
- In-house counsel are viewed differently than outside qualified lawyers and have lesser confidentiality obligations and protections
- Foreign lawyers in China are not differentiated
- Law may be becoming more receptive of A-C privilege
- Hong Kong is separate and follows common-law privilege rules
Privilege in England

• “Legal advice privilege” analogous to U.S. A-C privilege
  – confidential communications between attorney and client whose dominant purpose is seeking or providing legal advice (litigation or otherwise)
  – case law has limited privilege to cover only communications between attorney and small group of persons in company actually charged with instructing attorneys (Three Rivers (No. 5): case akin to control group test)

• Also, “litigation privilege” analogous to U.S. work product protection
  – confidential communications between attorney and client or attorney and third party whose dominant purpose is to be used in connection with actual or contemplated litigation

• Applies to in-house counsel
  – covers only legal work, not compliance or business administration work
  – but not for investigations (subject to Akzo Nobel decision)

• Privilege in Australia, Canada and Hong Kong very similar
Privilege in the European Union

• Special rules for enforcement of the European prohibition of cartels and prevention of dominant market position (EU competition law proceedings)

• **No privilege for in-house counsel**
  – Case C-155/79, AM&S Europe Ltd. v. Commission, 1982 E.C.R. 1575

• **Rationale:** in-house lawyers lack independence and are subject to the instructions and interests of their company
Privilege in France

- Law recognizes a “professional privilege” for confidential information/communications
- No attorney-client privilege for in-house counsel
- In-house counsel (juristes d’entreprise) have confidentiality obligations but only based on employee-employer relationship
  - *can* be trumped by demands of governmental and investigatory bodies
- Outside counsel (avocats) have an obligation of absolute professional secrecy and generally cannot disclose information provided by clients
  - *cannot* be trumped by demands of governmental and investigatory bodies
- But generally no U.S.-style discovery in France …
  - except in criminal issues (where prosecuting authorities have investigation powers, and counsel can be called to testify against company)
  - in civil cases, parties are free to disclose whatever information they choose to support their claims; a party can request that specific evidence be disclosed, but courts cannot order disclosure if other party refuses
Privilege in Mexico

• Concept of attorney-client privilege is not well developed

• But various laws require attorneys to keep client matters confidential
  – General Law for Professionals – provides that all professionals, including attorneys, must keep confidential any communication with their clients
  – Federal Criminal Code – contains potential penalties (including imprisonment) for attorneys who disclose confidential client information
  – Mexican Industrial Property Law – protects confidentiality of company’s trade secrets and proprietary information (intellectual property)

• **No independent attorney-client privilege for in-house counsel, per se**

• Court generally will uphold party’s (including in-house counsel’s) refusal to produce documents containing, or to provide testimony regarding, confidential client matters

• If judicial authority orders production of confidential information, in-house counsel relieved of confidentiality obligations
Takeaways—Do’s

1. Understand the law in the applicable jurisdictions
2. Understand who/what is the client and who holds the privilege
3. In investigations – consider use of US counsel in communications in order to ensure US privilege law applies
4. Confirm admitted status of in-house counsel where applicable
5. Train your in-house colleagues
6. Consider use of secure data base for storage of privileged documents, with limited access rights
7. Use legal counsel to engage third parties and document that services are to assist counsel in rendering legal advice
Takeaways—Do’s (cont.)

8. Use legends:
   - “Request for facts so that legal advice can be given”
   - “For the purpose of receiving legal advice”

9. Describe the legal considerations which are involved in the subject matter

10. Be aware of the presence of unprivileged persons

11. Watch the distribution list -- need to know basis

12. Include confidentiality messages on e-mails and faxes

13. Limit storage of records in locations where the privilege does not exist or is limited in comparison to U.S.

14. Designate note taker(s) for sensitive discussions with in house counsel not protected by privilege
Takeaways—Don’ts

1. Don’t be US centric when operating internationally
2. Don’t assume internationally that any privilege extends to non-legal “conduits;” don’t assume privilege is the same as in the U.S.
3. Don’t write it if you don’t have to
4. Don’t mix law and business in the same writing
5. Don’t funnel all information through in-house counsel
6. Don’t store privileged documents in locations where rights are limited or nonexistent
Takeaways—Handbook

– Use this as a guide to determine what the attorney-client privilege law is in jurisdictions around the world.