Chapter IV:
Preserving Legal Privilege

The United States

Summary

Key Privileges:

— Attorney-Client: Protects communications with a lawyer or attorney's representative for the purposes of obtaining legal advice.

— Work Product Doctrine: Protects work product of lawyers or those acting on their behalf when prepared in reasonable anticipation of litigation.

— Other privileges or confidentiality protections may apply to self-critical analysis, bank examination, law enforcement requests, and other materials.

Protecting the Privileges:

— Voluntary disclosure of privileged materials is generally construed as a waiver of privilege.

— The waiver may extend to all privileged materials concerning the same subject matter.

— The waiver will generally not be limited to a specific party or even to specific documents, as most U.S. jurisdictions do not recognize "selective waiver."

— Other statutes or rules may prevent waiver of privilege even where it is voluntarily disclosed.

— Inadvertent disclosure of privileged materials will generally not waive the privilege as long as the disclosing party (i) took reasonable steps to prevent the disclosure, and (ii) took prompt action to rectify the error.

Introduction

U.S. law recognizes a number of legal privileges and other confidentiality doctrines that can shield documents and communications from disclosure. The most common privileges are the attorney-client privilege and the work product doctrine. These privileges protect communications with clients and the work product of lawyers prepared in reasonable anticipation of litigation. Other lesser-known privileges may protect certain other types of materials. For example, certain jurisdictions protect self-critical analysis (internal investigations) from disclosure, whether or not they involve lawyers.[1] In other circumstances, it may be possible to withhold materials from production on the basis of privileges that belong to others. The bank examination privilege, for example, entitles bank regulators—such as the CFPB, any federal banking agency, any state bank supervisor, or any foreign banking authority—to object to the disclosure of information concerning their past or ongoing bank examinations.[2]

In certain circumstances, these privileges can attach to sensitive information compiled and analyzed in the course of an internal investigation into potential wrongdoing, initiated either by the company itself, or in response to a government inquiry. Absent an exception or waiver, a company cannot be compelled to disclose privileged information or documents to most government authorities, civil plaintiffs, or any others.[3]

PRACTICE TIP:
PRIVILEGES ARE NOT ABSOLUTE

Privileges are not absolute shields. They are often narrowly construed by the courts. Be sure to follow proper procedures for preserving privilege.

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[1] *See, e.g., Tice v. Am. Airlines, Inc.*, 192 F.R.D. 270 (N.D. Ill. 2000) (applying the federal common law of the self-critical analysis privilege); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (holding that, under federal law, a hospital had a qualified privilege to doctors' critical analyses of medical care to a decedent because disclosure would deter improvements in patient treatment).

[2] *See also* Chapter II: Responding to Requests from Authorities.

[3] In certain exceptional circumstances, such as during regulatory bank examinations, it may not be possible to withhold privileged materials, but the law may afford other protections, such as providing that the production of such material does not constitute a waiver.

Privileges must be protected or they can be waived. Thus, companies must take care during the course of internal investigations and in responding to governmental requests for information:

— To manage investigations with an eye towards maintaining legal privilege over the materials.

— Not to waive any legal privileges that may apply, except where such waiver may work to the company's advantage.

In certain circumstances, a company may choose to disclose the results of its investigation and facts learned during the investigation to the government. Such disclosure of information learned by counsel in a privileged setting in the course of an investigation can result in a waiver of the privilege as to third parties. The benefits of providing investigative findings can include: (i) demonstrating cooperation in the hopes of getting credit in the context of resolving a government investigation; (ii) being able to frame the investigative facts and provide the appropriate context; (iii) in the instance in which the investigative results including findings of wrongdoing, being able to get a speedy resolution and provide the appropriate information to all external constituencies; and (iv) providing criminal and regulatory authorities with exculpatory evidence collected during an investigation. Thus—and while U.S. prosecutors and regulators generally have policies against *requiring* companies to waive privileges in an investigation in order to obtain cooperation credit—sharing information obtained in an investigation may nonetheless be in the company's interest and benefit the company's posture with the government.

Ultimately, however, a company responding to government inquiries needs to make sure that any disclosure of information that may result in a waiver is an informed one, not something foisted upon it because it was not sufficiently vigilant to maintain its privileges during the course of that investigation.

PRACTICE TIP:
THE RISKS OF PROVIDING PRIVILEGED INVESTIGATIVE INFORMATION TO THE GOVERNMENT

Providing investigative information to the government, particularly voluntarily, creates a number of potential risks.

— The provision of information may result in a waiver as to third parties, including investigation by a different regulator or a subsequent civil litigation.

— The company may find it difficult, if not impossible, to cabin its waiver. In other words, it is difficult to waive a privilege for some purposes but retain the privilege for other purposes.

— Likewise, in most jurisdictions, the waiver of privilege with respect to certain privileged materials may be construed as waiver of privilege with respect to all materials concerning the same subject matter.

What law will apply?

In the cross-border context, it is important to assess what substantive law of privilege may govern a dispute. In the United States, each state and the federal government has their own privilege law. Foreign jurisdictions will also have their own privilege rules, some of which will be explored later in this chapter.

Where more than one substantive law may apply, and where the outcome of the dispute would differ depending on the law that is applied,[4] courts typically conduct a choice-of-law analysis. While courts in different jurisdictions may approach the issue using slightly different tests, under the typical analysis a court will "defer[] to the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum."[5] This analysis primarily focuses on (i) where the communication took place; (ii) where the attorney and where the client are located; (iii) where the attorney-client relationship was entered into or where it was centered when the communication took place; and (iv) where

[4] *See Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006) (Alito, J.) ("According to conflicts of laws principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a 'false conflict,' and the Court should avoid the choice-of-law question.").

[5] *Astra Aktiebolag v. Andrx Pharm., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002); Restatement (Second) of Conflict of Laws § 139 (1971).

the proceeding is pending.[6] Applying this rule, at least one court has held that communications made in a foreign forum without privilege protections will be admitted in the United States, even if they otherwise would have been protected were U.S. law applied.[7] Moreover, state courts generally favor admissibility and, absent some special reason, will apply the less restrictive rule between the forum state and the state with the most significant relationship with the communication.[8]

CASE STUDY:
ASTRA AKTIEBOLAG V. ANDRX PHARMACEUTICALS
UNDERSTAND THE RELEVANT FOREIGN LAW

In some circumstances, even when foreign law does not recognize a privilege, there may be an argument that a communication is protected from disclosure for other reasons. For example, in *Astra*, even though Korean law applied and did not recognize attorney-client privilege, the U.S. court nonetheless prohibited disclosure because Korean law would not permit disclosure of the document under its limited civil discovery rules. Thus, the *Astra* Court found that requiring disclosures—although not prohibited by local law—"would violate principles of comity and would offend the public policy of this forum."[9]

What are the privileges?

There are two core legal privileges in the United States:

— ***Attorney-client privilege***, for communications between clients seeking and receiving legal advice and their attorneys.

— ***Work product doctrine***, for documents prepared by or for a client in reasonable anticipation of litigation or other legal proceedings.

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[6] *Astra*, 208 F.R.D. at 98.

[7] *See In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 76 (S.D.N.Y. 2006) (rejecting privilege claims under Swiss law, which, unlike U.S. law, does not create privilege for communications with in-house counsel), *aff'd in relevant part*, 239 F.R.D. 351, 356-59 (S.D.N.Y. 2006); *cf. Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 66-67 (S.D.N.Y. 2010) (applying U.S. privilege law even to communications made in Italy, because the communications concerned U.S. litigation over U.S.registered trademarks).

[8] *See, e.g., Major v. Commonwealth*, 275 S.W.3d 706, 714 (Ky. 2009) (citing Restatement (Second) of Conflict of Laws § 139 (1988)); *People v. Allen*, 784 N.E.2d 393, 395-96 (Il. App. Ct. 2003) (applying less restrictive rule); *Kos v. State*, 15 S.W.3d 633, 638-40 (Tex. App. 2000) (same); *State v. Eldrenkamp*, 541 N.W.2d 877, 881 82 (Iowa 1995) (same).

[9] *Astra*, 208 F.R.D. at 102.

There are a number of other privileges and protective doctrines—including common interest privilege, self-critical analysis privilege, and bank examination privilege—that can also shield company documents from production to governmental authorities or civil litigants. Those will be addressed, as relevant, below.

Attorney-Client Privilege

The attorney client privilege protects certain communications between attorneys and their clients from compelled disclosure. It is intended to promote open communications between attorneys and their clients.[10]

ELEMENTS: ATTORNEY-CLIENT PRIVILEGE

To be privileged, communications must be:

— Between a client and her attorney.[11]

— Intended to be, and were, kept confidential.

— Made for the purpose of obtaining or providing legal assistance.[12]

[10] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[11] Note that the "general rule under United States law is that only communications between a represented party and that party's licensed attorneys are subject to attorney-client privilege." *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260, 265 (S.D.N.Y. 2013); *see also A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, No. 97 Civ. 4978(LMM)(HB), 2002 WL 31385824, at *4 (S.D.N.Y. Oct. 21, 2002), *supplemented sub nom. A.I.A. Holdings v. Lehman Bros., Inc.*, No. 97 Civ. 4978 (LMM)(HB), 2002 WL 31556382 (S.D.N.Y. Nov. 15, 2002) ("[T]he attorney must actually be admitted to the bar of a state or federal court [except]. . . . in the absence of an excusable mistake of fact.") (internal quotations omitted). However, if a client has a "reasonable belief" that an individual is a licensed attorney—for example, if that individual held herself out as an attorney or performed acts suggesting she is an attorney—communications between the client and the non-licensed attorney may be found to be protected by the attorney-client privilege. *See Anwar*, 982 F. Supp. 2d at 265; *see also Gucci Am., Inc. v. Guess?, Inc.*, No. 09 Civ. 4373 (SAS), 2011 WL 9375, at *5 (S.D.N.Y. Jan. 3, 2011) (holding that the well-established "reasonable belief" exception applies to both individuals and corporations alike).

[12] *See Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 207 (2d Cir. 2012).

Who controls the attorney-client privilege?

The attorney-client privilege belongs to—and must be asserted by—the client.[13] Attorneys and their agents cannot disclose information subject to the privilege without client permission.[14] On the other hand, where a client consents to disclosure of privileged information or communications, there is no independent basis on which the attorney can object to disclosure.[15] Within companies, where the privilege belongs to the company and not to its individual employees, the decision whether to permit disclosure generally lies with officers and directors.[16]

How does the attorney-client privilege apply in the corporate context?

Because the client in this context is an entity, and not any one individual, corporations and their attorneys must be careful to ensure that communications with various employees will benefit from the protections of the attorney-client privilege. Communications with different agents and employees of the corporation are subject to different privilege rules.

Outside counsel. The attorney-client privilege originated in circumstances surrounding communications with outside counsel. As such, communications with outside counsel for the purpose of obtaining legal advice are generally protected so long as they otherwise meet the elements of privilege.[17]

Agents of counsel. Sometimes companies and counsel will determine that it is necessary to retain third-parties in order to assist with specialized aspects of an internal investigation. For example, counsel may hire a forensic accountant to examine the company's books and records, or an expert, such as an engineer, to determine compliance with government regulations. Communications involving clients and these agents of counsel can also be privileged if they are carrying out

[13] *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997).

[14] *See Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998).

[15] *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967) ("an attorney [cannot] invoke the privilege for his own benefit when his client desires to waive it").

[16] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985); *United States v. Wells Fargo Bank N.A.*, No. 12 Civ. 7527 (JMF), 2015 WL 3999074, at *2 (S.D.N.Y. June 30, 2015) (holding that, where an employee does not have the authority to waive a corporation's privilege, the invocation of an advice-of-counsel defense by that employee does not cause a waiver of the corporation's privilege).

[17] *See Gucci Am.*, 271 F.R.D. at 71.

their work at the direction of legal counsel.[18] However, it is important to ensure that the agents are performing functions fundamental to the provision of legal advice.[19] It is also important to ensure that counsel are overseeing and directing work done by their non-attorney agents and it is helpful if the agents are actually retained by counsel even if the company is paying the costs and fees of the agents. In contrast, if the agent is not employed for the specific purpose of assisting counsel in providing legal advice, the attorney-client privilege may not extend to communications with the agent.[20]

CASE STUDY:
IN RE GRAND JURY SUBPOENAS
RETENTION OF PUBLIC RELATIONS AGENTS

Often, in the midst of a crisis, a party will retain a public relations firm to help manage the situation.[21] For example, in *In re Grand Jury Subpoenas,* when the U.S. Attorney's Office for the Southern District of New York brought charges in a high profile, sealed case against a target, the target of the investigation hired a public relations firm to "affect[] the media-conveyed message that reached the prosecutors and regulators responsible for charging decisions in the investigations concerning [the] [t]arget."[22] In finding the communications among the public relations firm, the target, and the target's counsel to be protected by the attorney-client privilege, the court held that: "(i) confidential communications (ii) between lawyers and public relations consultants (iii) hired by the lawyers to assist them in dealing with the media in cases such as this (iv) that are made for the purpose of giving or receiving advice (v) directed at handling the client's legal problems are protected by the attorney-client privilege."[23] The court further noted that an important factor is whether the lawyer or the client hired the outside public relations firm; only if the lawyer hires the outside public relations firm does the attorney client privilege apply.

[18] *See United States v. Kovel*, 296 F.2d 918, 920-23 (2d Cir. 1961) (client communications with non-lawyer accountant employee of law firm considered privileged); *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 325-30 (S.D.N.Y. 2003) (client communications with public relations firm hired by law firm considered privileged); *Gucci Am.* 271 F.R.D. at 71 (communications with investigators working for counsel privileged).

[19] *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002) ("'The communication, however, must be made 'for the purpose of obtaining legal advice from the lawyer.' ' If what is sought is not legal advice but only [other] service. . .or if the advice sought is the [non-lawyer's] rather than the lawyer's, no privilege exists.'"); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002) (communications with accountant were not privileged where accountant provided his or her own additional advice about the client's situation); *Kovel*, 296 F.2d at 922.

[20] *See Cavallaro*, 284 F.3d at 240.

[21] *See* Chapter VIII: Public Relations & Message Management.

[22] *In re Grand Jury Subpoenas*, 265 F. Supp. 2d at 323-24.

[23] *Id*. at 331.

In-house counsel. In the United States, the attorney-client privilege applies with equal force to communications between the corporate client and in-house counsel.[24] However, for the privilege to attach, communications with in-house attorneys must be for the purpose of obtaining or providing legal advice. Thus, because business communications do not become privileged simply because an attorney is included in them, analyzing privileged communications involving in-house lawyers who wear dual hats may be complicated. Even then, in-house counsels' communications may not be privileged in all jurisdictions outside of the United States.[25]

CASE STUDY:
FOREIGN LAW MAY NOT PROTECT COMMUNICATIONS WITH IN-HOUSE COUNSEL

Corporations must be cognizant of whether communications that would normally be privileged in a U.S. action may not be treated as such because they occurred outside of the U.S. For example, in *Wultz v. Bank of China Ltd.*, the court found that there was no privilege because "there are cognizable distinctions between a 'lawyer' and an 'in-house counsel' in Chinese law."[26] Further, "[b]ecause Chinese law does not recognize the attorney-client privilege or the workproduct doctrine, BOC must produce those items listed on its privilege log which are governed by Chinese privilege law."[27]

Corporate employees. Communications between counsel and employees of the company are protected in certain circumstances, but the privilege is not absolute. The leading case on this topic is *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court stated that communications between legal counsel and employees are protected from disclosure to third parties when:

— The information is necessary to supply the basis for the requested legal advice.

— The information concerns a matter within the scope of the employee's duties.

[24] *Upjohn*, 449 U.S. at 392-94.

[25] *See, e.g., Rivastigmine*, 237 F.R.D. at 76 (describing how Swiss law does not privilege communications with in-house counsel).

[26] *See Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 495 (S.D.N.Y. 2013), *on reconsideration in part*, No. 11 Civ. 1266 (SAS), 2013 WL 6098484 (S.D.N.Y. Nov. 20, 2013).

[27] *Id.* at 493.

— The employee is aware that they were being questioned to secure legal advice for the company.[28]

Given these principles, company counsel should take care to interview employees who have knowledge necessary to an investigation. In addition, distribution of privileged documents should be limited to employees in a "need to know" position in order to not violate the "confidential" element of the attorneyclient privilege.[29] And, when interviewing employees, make sure that they know they are being interviewed to secure legal advice for the company and that the company considers the interview to be confidential and to be subject to the company's attorney-client privilege.

PRACTICE TIP:
UPJOHN, THE "CORPORATE MIRANDA" WARNING

Employees should be given a so-called *Upjohn* warning (also known as "corporate Miranda") informing them that: (i) the interviewing attorney is counsel for the company, not the employee; (ii) the company alone can choose to assert or waive the privilege, with no warning to the employee; and (iii) the employee should keep the conversation confidential in order to preserve the privilege. In addition to ensuring that the attorney-client privilege is not broken by the interviewee's disclosure of the conversation, the *Upjohn* warning also prevents formation of an individual attorney-client relationship between the lawyer and the interviewee, through which the interviewee could preclude the company from disclosing the discussion.[30]

Counsel need not always be present during a privileged communication for privilege to attach. For example, if counsel requests that a group of employees (e.g., the human resources department) gather facts in anticipation of litigation, communications among the employees regarding that request may be privileged even if counsel is not actually present.[31] Note, however, that outside of this limited exception employees should not discuss an ongoing investigation without counsel present.

[28] *Upjohn*, 449 U.S. at 394-95.

[29] *FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002).

[30] *See United States v. Stein*, 463 F. Supp. 2d 459, 461-62 (S.D.N.Y. 2006).

[31] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) ("[C]ommunications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."); *Voelker v. Deutsche Bank*, No. 11 Civ. 6362 (VEC), 2014 WL 4473351, at *1-2 (S.D.N.Y. Sept. 11, 2014).

Former employees. There is less consensus under U.S. law on whether communications with former employees are privileged. In the majority view, communications with former employees will be protected so long as they otherwise meet the *Upjohn* factors described above, and are once again given appropriate warnings as to the fact that counsel represents the company, not the employee.[32] Other courts, however, have held that such conversations are not privileged.[33] Thus, companies should give consideration to whether their respective jurisdictions allow for privilege in such circumstances or whether the other privileges discussed in this chapter would pertain to the relevant communications.

Third parties. Other than agents of counsel (as described above), the presence of a third party generally breaks the attorney-client privilege. However, there is an exception for third parties who are aiding the communication (e.g., a translator).[34]

Limitations of the attorney-client privilege in the corporate context

In general, the attorney-client privilege is construed narrowly.[35] Thus, it is important that companies keep in mind that certain categories of information are not protected by the attorney-client privilege.

Facts. The communication of facts *within* a privileged communication is protected. However, the privilege does not prevent compelled disclosure of the underlying facts.[36] Thus, "[t]he client cannot be compelled to answer the question, 'What did you say or write to the attorney?,' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[37]

Business advice. The privilege *does not* extend to communications for the purposes of obtaining business, as opposed to legal, advice.[38] There are no "magic words" that

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[32] *See, eg., In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997); *U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40-41 (D. Conn. 1999).

[33] *See, eg., Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 304-05 (E.D. Mich. 2000).

[34] *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

[35] *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) ("[W]e construe [the privilege] narrowly to serve its purposes" because it obstructs the "right to every man's evidence").

[36] *Upjohn*, 449 U.S. at 395.

[37] *Id*. at 396 (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

[38] *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

make a communication one for legal purposes, as opposed to business purposes.[39] Instead, courts will look to "whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice."[40] Moreover, as discussed above, merely copying an attorney on a business communication or labeling a document "privileged" does not make it privileged.

Crime-Fraud Exception. Courts will apply a crime-fraud exception to pierce a privileged communication when "the client communication or attorney work product in question was *itself* in furtherance of the crime or fraud . . . and probable cause to believe that the particular communication with counsel or attorney work product was *intended* in some way to facilitate or to conceal the criminal activity."[41] If these elements are met, the attorney-client privilege will not protect any "client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct."[42]

"Without prejudice" submissions to a regulator. U.S. courts have held that a broad settlement negotiation privilege, sometimes called a "without prejudice" privilege, is not necessary to achieve settlement. Therefore, U.S. courts do not recognize such a privilege, instead relying on Federal Rule of Evidence 408 (which prohibits certain uses of settlement offers against a party, as described below) to balance the policy favoring settlements against discovery rules.[43] The U.S. rule differs from many other jurisdictions, which recognize a "without prejudice" privilege that prevents compelled disclosure of communications with a regulator.[44] The specific contours of the "without prejudice" privilege differ among jurisdictions and are discussed later in this chapter.

Settlement discussions. In civil cases, conduct or statements made during compromise negotiations are not admissible to prove or disprove the validity or amount

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[39] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014).

[40] *In re Cty. of Erie*, 473 F.3d at 419.

[41] *In re Grand Jury Subpoenas Dated Mar. 2, 2015*, 628 F. App'x 13, 14 (2d Cir. 2015) (internal quotations omitted)(emphasis in original).

[42] *Id*.

[43] *In re MSTG Inc.*, 675 F.3d 1337, 1345 (Fed. Cir. 2012); *Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, No. C-05-3148 (JCS), 2007 WL 963975, at *5 (N.D. Cal. Mar. 30, 2007) ("[W]hile there is a public policy of promoting settlement [of] disputes outside the judicial process, it [is] far from clear that a federal settlement privilege would result in increased likelihood of settlements so substantial that it would justify an exception to the production of evidence in support of the truth-finding process.").

[44] *E.g., Unilever Plc. v. The Proctor & Gamble Co.* [2000] 1 W.L.R. 2436 (Ir.); *Sable Offshore Energy Inc. v. Ameron Int'l Corp.* [2013] 2 S.C.R. 623 ¶ 19 (Can.) (quoting *Dos Santos Estate v. Sun Life Assurance Co. of Canada* (2005), 207 B.C.A.C. 54 ¶ 20 (Can.)).

of a disputed claim.[45] However, these statements are not protected from disclosure and are admissible for these purposes when offered in a criminal case or during negotiations with regulators.[46] Moreover, these statements can also be used to prove "a witness's bias or prejudice, negat[e] a contention of undue delay, or [to] prov[e] an effort to obstruct a criminal investigation or prosecution" in all criminal and civil contexts (including during negotiations with regulators).[47]

Self-incriminating statements. Clients can assert the Fifth Amendment privilege against self-incrimination in both criminal and civil contexts.[48] In criminal contexts, jurors are not permitted to use a defendant's refusal to testify to infer guilt or innocence.[49] However, in civil contexts, jurors may be permitted to infer guilt if a defendant invokes the privilege.[50] Corporations, in any event, cannot invoke the Fifth Amendment.[51]

Work Product Doctrine.

What is the work product doctrine?

The work product doctrine prevents compelled disclosure of materials created in the anticipation of litigation. The federal rule governing this doctrine states:

Ordinarily, a party may not discover documents and tangible items that are prepared, by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent), in anticipation of litigation or for trial.[52]

However, the work product doctrine provides only a qualified immunity from disclosure and, as with the attorney-client privilege, that immunity can be lost if not

[45] Fed. R. Evid. 408(a).

[46] Fed. R. Evid. 408(a)(2).

[47] Fed. R. Evid. 408(b).

[48] U.S. Const. amend. V; *Lefkowitz v. Turley*, 414 U. S. 70, 77 (1973) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)) (holding that the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.").

[49] *Griffin v. California*, 380 U.S. 609, 615 (1965).

[50] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (holding "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

[51] *See* Chapter III: Conducting an Internal Investigation, and Chapter VI: Employee Rights and Privileges.

[52] Fed. R. Civ. P. 26(b)(3).

carefully maintained. Courts differentiate between "opinion work product" and "fact work product." The former—which includes documents containing opinions and judgments of counsel on a matter, as opposed to bare facts or abstract discussions of legal theories—is virtually undiscoverable.[53] "Fact work product," by contrast, is discoverable if a party can "show[] that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[54]

ELEMENTS:
THE WORK PRODUCT DOCTRINE

In determining whether to apply the privilege, courts look to:

— Whether materials were prepared "because of" the prospect of litigation, rather than in the ordinary course of business.

— Whether they represent opinion work product.

— If they do not, whether plaintiffs can establish a substantial need for the documents.[55]

Because the work product doctrine applies only to documents created in anticipation of litigation, it generally does not protect pre-existing records that were, or would have been, created in substantially similar form absent anticipated litigation.[56] Courts, however, do apply work product protections to the "selection and compilation" of particular documents, even where the documents themselves are not protected, because the selection process itself could reveal an attorney's opinions and mental impressions.[57] Courts have emphasized that this is a "narrow" exception, and the burden rests on the party asserting the work product privilege to persuade

[53] *See Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992); Fed. R. Civ. P. 26(b)(3) (a party cannot obtain "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation").

[54] Fed. R. Civ. P. 26(b)(3).

[55] *See, e.g., Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 (EDL), 2011 WL 866993, at *6-7 (N.D. Cal. Mar. 11, 2011); Fed. R. Civ. P. 26(b)(3).

[56] *In re Grand Jury Subpoenas Dated Mar. 19, 2002 and Aug. 2, 2002*, 318 F.3d 379, 384-85 (2d Cir. 2003).

[57] *Sporck v. Peil*, 759 F.2d 312, 316-17 (3d Cir. 1985).

the court that counsel's opinions will be revealed through the disclosure of the compilation of documents.[58]

Does the work product doctrine apply to governmental inquiries and internal investigations?

As discussed above, for the work-product doctrine to apply, material must have been prepared in anticipation of litigation. Moreover, the privilege will not shield documents created under "a generalized fear of litigation."[59] Thus, the question arises as to whether the work product doctrine applies to material prepared in response to a governmental investigation prior to, and which may or may not actually result in, litigation. In general, the threat of criminal or regulatory liability will sufficiently establish the threat of "litigation" required to bring a document within the work product doctrine.[60] Thus:

— An **internal investigation prompted by a government** subpoena or inquiry, or in anticipation of such subpoena or inquiry, gives rise to work product protection.[61]

— Even documents created as part of an **internal investigation initiated by the company** itself, without a regulatory inquiry, receives the same protections so long as the same threat of litigation is present. In other words, the person who created the documents "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable."[62]

[58] *Compare id*. at 316 (finding that documents selected to prepare a witness for deposition "could not help but reveal important aspects of [counsel's] understanding of the case"), *with In re Grand Jury Subpoenas*, 318 F.3d at 386-87 (finding that counsel had not shown with sufficient specificity that disclosure of selection of documents would reveal counsel's strategic thinking).

[59] *Lewis v. Wells Fargo & Co.*, 266 F.R.D. 433, 440-41 (N.D. Cal. 2010).

[60] *See Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 214-16 (E.D. Pa. 2008); *see also Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1261 (3d Cir. 1993).

[61] *See United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 136-37 (D.D.C. 2012).

[62] *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

PRACTICE TIP: PREPARING A DOCUMENT IN ANTICIPATION OF LITIGATION

A document is prepared in anticipation of litigation if "it can fairly be said that the 'document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]'"[63] Litigation does not need to be the primary or only motive behind the document's creation. For example, the document can also be used for ordinary business purposes such as assisting in making a business decision influenced by the likely outcome of a potential litigation.[64] In order to better ensure a finding of privilege, however, the document should be labeled as attorney work product, and the involvement of the litigator who is anticipating litigation should be noted in the timekeeping files.[65]

CASE STUDY: WHEN AN INTERNAL AUDIT IS NOT PROTECTED

In the *ISS Marine* case, the court grappled with a scenario in which "the person preparing [an] [a]udit [r]eport was both acting as an investigator into a specific allegation of wrongdoing and was also arguably trying to protect the company from the possibility of future litigation."[66] The court, in finding that the work product privilege did not apply, reasoned that the company "would have conducted this internal investigation 'in the ordinary course of business' irrespective of the prospect of litigation" and, therefore, the work product doctrine did not apply. The court came to this conclusion, in part, because the investigation that lead to the audit report "was conducted by a non-attorney who never communicated with outside counsel."[67]

[63] *In re Grand Jury Subpoena (Mark Torf/ Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004) (alteration in original) (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)).

[64] *Id.*; *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010); *see also Adlman*, 134 F.3d at 1198.

[65] *Cf. Local 851 of Int'l Bhd. of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 132 (E.D.N.Y. 1998) (noting that waiver of attorney-client privilege had occurred because counsel "did not take reasonable precautions to avoid disclosure," including "[m]ost notably, defendants' counsel failed to label the Letter as confidential").

[66] *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 136 (D.D.C. 2012).

[67] *Id.* at 137-38.

Other Privilege Doctrines

Common interest privilege

One important exception to the rule that sharing a privileged document with a third party results in a waiver of the privilege is the "common interest privilege" doctrine. Under this doctrine, the act of sharing an otherwise privileged communication with counsel for another party on a matter of common legal interest does not result in a waiver of the privilege if the parties agree for those communications to be kept confidential and they share a common interest. For example, if one (or many) plaintiff(s) is suing multiple defendants for similar actions based on the same core events, and the defendants want to pursue a similar, joint defense, they may seek to enter into a common interest agreement. The "common interest" must be a *legal* interest, not a *business* or commercial interest.[68] The legal interest does not need to involve actual litigation.[69]

ELEMENTS:
THE COMMON INTEREST PRIVILEGE

- The underlying communication must itself be privileged.
- The parties share a common interest.
- The disclosing party had a reasonable expectation of confidentiality.
- The "disclosure. . .must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted."[70]

While there must be a "common interest" for the doctrine to apply, parties' interests do not have to be aligned on every issue in order for the common interest privilege to apply so long as the exchange of information is with regard to the matter the parties do have in common.[71] Further, the fact that clients with common interests

[68] *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 964-65 (N.D. Ill. 2010).

[69] *United States v. United Techs. Corp.*, 979 F. Supp. 108, 112 (D. Conn. 1997) (exchanges among five aerospace companies that formed a consortium to break General Electric's dominance in the small-engine market and shared interest in minimizing tax liability).

[70] *OXY Res. Cal. LLC v. Superior Court*, 115 Cal. App. 4th 874, 891 (Cal. Ct. App. 2004) *modified* Mar. 4, 2004; Restatement (Third) of the Law Governing Lawyers § 76 (2000).

[71] Restatement (Third) of the Law Governing Lawyers § 76 (2000).

also have interests that conflict—perhaps sharply—does not necessarily mean that communications on matters of common interest are non-privileged.[72]

In order to help ensure a court will respect the common interest privilege, a company should consider whether to enter into a written common interest agreement. The decision whether to document the common interest agreement in writing is frequently a complicated one that requires consideration of a number of different issues. However, while a written agreement is not mandatory in order to maintain the common interest privilege, a common interest agreement can:

— Define the scope of the interest.

— Evidence that the parties share a common interest.

— Evidence the company's reasonable expectation of confidentiality.

— Specify how the agreement is to end and what happens with the privileged communications once the agreement ends.

— Document that the existence of the common interest agreement does not create an attorney-client relationship among all the parties to the agreement.

[72] *Eisenberg v. Gagnon*, 766 F.2d 770, 787-88 (3d Cir. 1985).

PRACTICE TIP:
MAINTAINING THE COMMON INTEREST PRIVILEGE

- Ensure all parties operate under a reasonable expectation of confidentiality through an explicit understanding among all parties that the communications are confidential.
- Delineate the scope of the privilege at the outset.
- Mark communications as confidential and subject to common interest privilege.
- Though not required, consider whether to memorialize the common understanding in an written agreement.
- Keep records that indicate the sharing of ideas about the matter is "reasonably necessary for the accomplishment of the purpose for which the attorney disclosing was consulted."[73]

Self-critical analysis privilege

Some courts have recognized a possible privilege relevant to audits or internal investigations, a so-called self-critical analysis privilege.[74] In order to obtain the benefit of this privilege, "[i] the information must result from a critical self-analysis undertaken by the party seeking protection; [ii] the public must have a strong interest in preserving the free flow of the type of information sought; [iii] the information must be of the type whose flow would be curtailed if discovery were allowed."[75] This privilege, however, is not recognized in every jurisdiction.[76]

The bank examination privilege

The bank examination privilege is largely codified in 12 U.S.C. § 1828(x). This privilege belongs to a bank regulator, such as the Consumer Financial Protection Bureau ("CFPB"), Office of the Comptroller of the Currency ("OCC"), Federal Reserve Bank ("Fed"), and the Federal Deposit Insurance Corporation ("FDIC"). When invoked, the regulator may refuse to produce information a company has

[73] *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 981 (Cal. Ct. App. 2009); Restatement (Third) of the Law Governing Lawyers § 76 (2000); *Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1113 (Mass. 2007).

[74] *See, e.g., Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970).

[75] *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

[76] *See, e.g., Ovesen v. Mitsubishi Heavy Indus. of Am. Inc.*, No. 04 Civ. 2849(JGK)(FM), 2009 WL 195853, at *2 (S.D.N.Y. Jan. 23, 2009) (collecting cases) ("Although some federal courts have recognized a self-critical analysis privilege, its continuing viability is an open question.").

given it in the course of a supervisory or regulatory process.[77] Because this privilege belongs to the regulator, only the regulator can waive privilege.

Waiver of Privileges

Companies must scrupulously protect against disclosure of their privileged materials in order to avoid inadvertently waiving applicable privileges and permitting compelled disclosure to others.

Accidental disclosure

Companies must guard against accidental disclosure of privileged materials. Although accidental disclosure can sometimes lead to waiver, particularly if the company has not taken (and documented) sufficient steps to guard against inadvertent disclosure, companies can take steps to prevent this harsh outcome. The Federal Rules of Evidence also protect truly inadvertent disclosures of otherwise privileged materials to government agencies. Pursuant to FRE 502(b), an inadvertent disclosure of information "in a federal proceeding or to a federal office or agency" will not operate as a waiver where:

— The disclosure was inadvertent.

— The holder of the privilege took reasonable steps to prevent disclosure.

— The holder promptly took steps to rectify the error.[78]

However, any accidental disclosure presents a risk that a court will find waiver, and companies should, therefore, institute procedures to ensure that inadvertent production is either avoided altogether or minimized by prompt discovery and correction of inadvertently produced documents. One of the most effective ways of doing this is entering into a "claw-back" agreement with the other party, which allows either party to claw back—i.e., demand the return of—documents that have been inadvertently disclosed. The parties should include, as part of the agreement,

[77] 12 U.S.C. § 1828(x) (2018).

[78] *See Bayliss v. N.J. State Police*, 622 F. App'x 182, 186 (3d Cir. 2015).

an explicit statement that inadvertent disclosure is not a waiver. In addition, if a document has been inadvertently disclosed, the company should take immediate steps to retrieve it and should document those steps—in part to demonstrate that it is zealously guarding the privilege.

PRACTICE TIP:
AVOIDING WAIVER OF INADVERTENTLY DISCLOSED INFORMATION

Although the procedures set out in FRE 502(b) provide a mechanism for attempting to prevent an inadvertent disclosure from becoming a waiver, the best way to ensure no waiver is to prevent the inadvertent disclosure. Companies should, therefore:

- Establish good document review protocols in advance of producing documents.
- Mark relevant documents as "Privileged and Confidential."
- Enter into a claw-back agreement.
- Establish a procedure to seek the immediate return of documents that were inadvertently produced.

Purposeful disclosure

There are circumstances under which a company may wish to voluntarily disclose otherwise privileged information to a government authority during the course of an investigation. A company may choose to make such disclosures, for example: (i) to assert an advice of counsel defense;[79] (ii) to provide the government with exculpatory facts; or (iii) to obtain credit for cooperating with the government's investigation.[80] However, companies should understand the risks associated with voluntary disclosure of otherwise privileged materials.

U.S. courts generally do not recognize a party's ability to selectively waive privilege. In most instances, "a party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense

[79] The defense of advice of counsel can be used to defeat an element of a claim (*e.g.*, intent) or establish an element of a defense (*e.g.*, good faith) based on reliance on counsel's advice of the legality of the underlying conduct. *See, e.g., United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). However, to assert it, the company must waive privilege and disclose the underlying advice. *Id.*; *In re Cty. of Erie*, 546 F.3d 222, 228 (2d Cir. 2008).

[80] *See* Chapter VII: Public Relations & Message Management.

and then shield the underlying communications from scrutiny by the opposing party."[81] Companies seeking to disclose part of a privileged communication for advantageous purposes should, therefore, beware that a court may well require the disclosure of the entire communication, or of other privileged communications relevant to understanding the legal advice sought or received not only with respect to the immediate governmental inquiry, but for all purposes later on, including any follow-on civil litigation.

PRACTICE TIP: CONFIDENTIALITY AGREEMENTS WITH GOVERNMENTAL AUTHORITIES—ARE THEY WORTHWHILE?

Companies may decide to enter into confidentiality agreements with government authorities in advance of producing possibly-privileged materials seeking to maintain privilege by making it clear that the company's production of any privileged documents to the government is not intended as a general waiver of privilege over those, or other, documents.

Confidentiality agreements are hardly a perfect solution, however. Not only does the weight of federal case law suggests that such agreements not only fail to automatically protect privilege in follow-on civil litigation, but courts also frequently require the production to private parties of the materials produced to the government even where a confidentiality agreement was in place.[82]

However, entering into a confidentiality agreement is most likely a worthwhile endeavor nonetheless because a company may later be able to argue that its waiver was, at most, limited to those documents it actually produced to the government, as opposed to a broader waiver of all privileged materials concerning the relevant subject matter.[83]

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[81] *In re Grand Jury Proceedings*, 219 F.3d 175, 182–83 (2d Cir. 2000). Only the Eighth Circuit has embraced the "selective disclosure" theory, under which a litigant can disclose materials to the government but not waive the privilege as to civil litigants. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc). Every other circuit to consider this issue has rejected the Eighth Circuit's theory. *See, e.g., In re Pac. Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (collecting cases).

[82] *In re Pac. Pictures Corp.*, 679 F.3d at 1128-29; *but see In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (suggesting in dicta that confidentiality agreement with SEC may preserve work-product privilege).

[83] *See In re Mut. Funds Inv. Litig.*, 251 F.R.D. 185, 188 (D. Md. 2008) (waiver limited to material actually disclosed).

Steps to preserve privilege during government investigations

There are a number of practical steps that companies should consider in order to avoid waiving any legal privileges they may otherwise be entitled to assert in a U.S. investigation or in a related legal proceeding.

PRACTICE TIP:
CHECKLIST FOR PRESERVING PRIVILEGE DURING GOVERNMENT INVESTIGATIONS

- Get attorneys involved early.
- Limit distribution of materials to those who "need to know."
- Set out clear areas of responsibility.
- Mark documents as "confidential" and "privileged" when they are distributed, so they can easily be identified during productions.
- Thoroughly review documents for privilege before producing to the government.
- Give appropriate *Upjohn* warnings informing the interviewee of the company position that privilege applies and that the interview should be kept confidential, before employee interviews.
- Observe appropriate note-taking practices during interviews.
- Make it clear early and often that you are not waiving your privileges.
- Enter into a confidentiality and claw-back agreement with governmental authorities.

Getting started

Responding to large-scale requests from regulators requires organization. Clear reporting lines and areas of responsibility can go a long way toward minimizing the risks that (i) documents are inadvertently produced, or (ii) information is not treated in a way necessary to maintain confidentiality.

Involve counsel early

It is important to involve attorneys early because an investigation undertaken solely by management may not be subject to privilege protections.[84] If a company is to maintain that a document is created in anticipation of litigation, it is useful that a litigator be involved in the creation of the document.

Consider applicable law

Particularly in cross-border investigations, the substantive privilege law of the multiple jurisdictions involved in the investigation may differ. Companies should take stock of the relevant law that could apply, and also consider how a court may resolve a choice-of-law analysis if presented with a privilege dispute.[85]

Involving Employees and Officers

In addition, it is important from the outset to think about who should be involved in the investigation. Because maintaining the confidentiality of advice received is critical to maintaining the privilege, companies conducting an investigation or responding to government inquiries should keep people involved on a "need to know" basis and, generally, should keep the circle of those involved with, or who have knowledge of, the investigation as small as possible. Thus, only include those whose duties require them to be involved and senior level officers. In addition, impress upon all employees involved, both current and former, the need to maintain confidentiality, and ensure that those involved know what role they are to play in the investigation and how to avoid divulging privileged materials. Note that, if former employees must be involved, communications between them and counsel may not be privileged, so consider arranging for individual counsel for those individuals and entering into a common interest privilege agreement.

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[84] *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d Cir. 1979) ("To the extent that an internal corporate investigation is made by management itself, there is no attorney-client privilege.").

[85] *See, e.g., Astra Aktiebolag v. ANDRX Pharms., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002); *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69, 76 (S.D.N.Y. 2006) (rejecting privilege claims under Swiss law, which, unlike U.S. law, does not create privilege for communications with in-house counsel), *aff'd in relevant part*, 239 F.R.D. 351, 356-59 (S.D.N.Y. 2006); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 69-70 (S.D.N.Y. 2010).

Dealing with documents

Maintain confidentiality.

Mark every page of a privileged document "Privileged & Confidential." Failure to mark documents as privileged may make it more difficult to make a privilege claim later on.[86] Note, however, that simply marking a document as "Confidential" or "Privileged" does not in and of itself protect a document from disclosure if it is not subject to an otherwise valid privilege assertion.[87] But failure to mark a page as privileged and confidential can result in a waiver if that page is lost or misplaced and ends up in the hands of a third party.[88]

Prepare privilege logs.

In the United States, a company facing a governmental inquiry may well be required to articulate any claimed privilege and to describe the nature of any withheld documents in a way that will enable the agency or other relevant parties to assess the claim.[89] Thus, when withholding documents in a discovery request (from the government or otherwise), companies should create privilege logs. These logs should list the withheld documents and carefully document the rationale for withholding production on the basis of privilege.

Make a FOIA Confidentiality Request.

The Freedom of Information Act ("FOIA") generally gives the public the ability to access information in the federal government's possession. When producing documents or other information to a governmental agency, companies should request confidential treatment under FOIA in order to avoid disclosure. To do so, the company should submit a letter requesting confidential treatment of the materials

[86] *See, e.g., J.N. v. S. W. Sch. Dist.*, 55 F. Supp. 3d 589, 600 (M.D. Pa. 2014) ("The email in question does not bear indicia of those precautions, such as a 'privileged' or 'confidential' label.").

[87] *See In re Google Inc.*, 462 F. App'x 975, 979 (Fed. Cir. 2012) (email marked "confidential" not privileged "in light of the remainder of the email").

[88] Note, however, that if an adversary receives a document that is plainly privileged, the adversary is required to promptly return the inadvertently disclosed document. *See, e.g., Stinson v. City of New York*, No. 10 CIV. 4228 RWS, 2014 WL 5090031, at *4 (S.D.N.Y. Oct. 10, 2014) ("[T]he Association of the Bar of the City of New York has found that while lawyers are ethically bound to return or destroy inadvertently disclosed documents, the non-disclosing lawyer is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains information not intended for the non-disclosing lawyer."); *see also* Model Rules of Prof'l Conduct r. 4.4(b) (Am. Bar Ass'n 2018). ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.").

[89] This is a requirement of the Federal Rules of Civil Procedure and of many administrative agency subpoenas. *See, e.g.*, Sec. Exch. Comm'n, Enforcement Manual § 3.2.7.4 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf. (directing Division of Enforcement staff to obtain privilege logs during investigations).

pursuant to the applicable law, as well as ensuring that any such requests comply with the regulations and practices of the relevant agencies.[90]

PRACTICE TIP:
CONDUCTING INTERVIEWS

- Limit attendance to attorneys, note takers, or agents or investigators of attorneys acting at their direction.
- Assign a single note taker.
- Consider addressing any notes taken to a client as an attorney-client communication.
- Administer the *Upjohn* warnings at the beginning of each interview, confirm that the witness understands the warning, and offer to answer any questions.
- Ensure that the administration of the *Upjohn* warning and the witness's understanding of that warning are memorialized in the interview memorandum.
- Where the memorandum includes both facts and mental impressions that should be made clear on the face of the memorandum.

Interviews

In addition to collecting documents, interviewing employees is an important part of any internal investigation. However, as discussed above, companies must ensure that such interviews do not result in a privilege waiver. Employee interviews should be undertaken by an attorney or an agent of an attorney acting at the attorney's direction in order to ensure that what is said in the interview remains privileged. This practice extends to notetaking during interviews. Moreover, purely factual recitations of an interview—set out, for example, in an interview memorandum—are accorded lesser protection under the work product doctrine than opinion work product. Thus, standard practice is for an attorney's notes to be memorialized in a formal memorandum that, in addition to describing the facts as the witnesses perceived them, sets out the attorney's mental impressions and opinions of the interview. In addition, it is good idea to have a single note taker, who will then turn those notes

[90] *See, e.g.*, 17 C.F.R. § 200.83 (2018) (Securities and Exchange Commission); 17 C.F.R. § 145.9 (2018) (Commodity Futures Trading Commission).

into an interview memorandum that includes mental impressions, legal theories, and advice. This serves both: (i) to avoid having conflicting notes in the event that the attorneys' notes are ever required to be produced to a regulator or in litigation; and (ii) to make it easier to convert the notes into an interview memorandum setting out the attorney's mental impressions of the interview. In addition, it is frequently helpful to set out a protocol regarding whether handwritten notes of an interview will be reduced to a written memorandum and what to do with the notes after the written memorandum is completed and to follow that protocol consistently.

PRACTICE TIP:
COMMUNICATING WITH GOVERNMENT AGENCIES

When dealing with the government, the company should endeavor to:

- Affirmatively note, in writing if possible, that it does not intend to waive privilege.
- Avail itself of all statutory protections from waiver of privilege.
- Consider entering into a confidentiality agreement with the regulator.
- Consider entering into a claw-back agreement with the regulator.
- Seek immediate claw-back in the event of an inadvertent production.
- If considering a waiver, define an agreed-upon scope with the regulator in writing.
- Consider providing summaries in oral—not written—presentations in order to prevent other parties from obtaining the written summary provided to the regulator and limit disclosures and presentations to factual material.
- When addressing partially privileged documents, consider redaction vs. withholding.
- Send a FOIA confidentiality request to the regulator, which may shield the communications from FOIA requests.

Communicating with the Regulator

When communicating with a relevant authority, companies should take care to make it clear that they do not intend to waive privilege in communications unless—and until—they choose to do so. Thus, in addition to the above, there are a number of steps that companies can take to best protect their privileges in communications with regulators.

England and Wales[91]

Summary

Key Privileges:

— ***Legal Advice Privilege:*** Protects the substance of confidential lawyer-client communications made for the purposes of the giving or obtaining of legal advice.

— ***Litigation Privilege:*** Protects the substance of confidential documents created where litigation is in reasonable contemplation and where the documents are for the dominant purpose of such litigation.

— ***Working Papers Privilege:*** Protects documents which, if disclosed, would betray the trend of the legal advice being given by a lawyer.

Key Practice Points:

— In English proceedings, English privilege law will be applied to determine whether a document is privileged. Documents which are not privileged under English law, but which may be privileged under a foreign law, will likely be subject to disclosure in English proceedings.

— All lawyer-client communications should be marked "Privileged and Confidential." This label does not create privilege (and its absence will not, by itself, cause a loss of privilege), but will help to subsequently identify and evidence privileged material.

— Generally, advice provided by an in-house lawyer may enjoy a privilege under English law. However, communications with in-house legal counsel in the context of a European Commission investigation will usually not be privileged. In these circumstances, in order to preserve privilege, external counsel should be retained.

[91] For ease of reference, the English and Welsh jurisdiction is referred to in this section as "English" jurisdiction.

- Only those individuals who have been given responsibility for coordinating the organization's communications with its lawyers will be considered part of the "client" for the purposes of legal advice privilege. Therefore, communications between lawyers and employees who are not responsible for coordinating the organization's communications with legal advisers (irrespective of their seniority) will not be privileged.
- Where there is a current or prospective English nexus to a dispute or investigation, organizations should seek to identify, and record in writing, those individuals who will form part of the "client" group. To avoid uncertainty as to the position of in-house lawyers, where possible, in-house lawyers should not be included within the "client" group designated to be responsible for coordinating the organization's communications with lawyers.
- In the absence of adversarial litigation, records of internal investigation interviews will not be privileged unless the interviewee is within the "client" group.
- Documents recording communications between lawyers and individuals outside the "client" group will only be privileged where they are created for the dominant purpose of adversarial litigation. It is not sufficient that the relevant litigation is one of multiple purposes for which a document is created.
- It should be assumed that regulatory or criminal investigations where the investigating authority has not made formal allegations may not constitute adversarial litigation and that, in that circumstance, litigation privilege will not apply.
- Where adversarial litigation is in reasonable prospect, the organization should contemporaneously record that fact (whether in board minutes or otherwise). Equally, where a document has been prepared for the dominant purpose of adversarial litigation, this should be recorded in the body of the document. These statements will not create privilege (and their absence will not, by itself, cause a loss of privilege), but will help identify and evidence privileged material.
- In some circumstances, a limited waiver of privilege is recognized under English law, where privileged material is confidentially disclosed to a third party for specified purposes on the express or implied terms that privilege is not waived in the material.

Key Differences Between English and U.S. Privileges

While English privilege law shares many characteristics with its U.S. counterpart, there are certain distinguishing characteristics of English legal privilege law that may not instinctively be familiar to practitioners in other jurisdictions.

PRACTICE TIP:

English Privilege	U.S. Privilege
— Narrow conception of the "client" which usually will not encompass all employees within an organization.	— The "client" group will generally encompass all employees within an organization.
— Where adversarial litigation is not in reasonable prospect, communications with third parties are usually not covered by privilege.	— Privilege can apply to communications with third parties where the purpose is to assist the lawyer in providing legal advice.
— A recognized concept of a limited waiver of privilege.	— Limited waiver of privilege not recognized in many jurisdictions.
— Criminal and regulatory investigations are generally not considered "adversarial" until allegations or charges are formally levied.	— Criminal or regulatory investigations generally engage privilege.

Choice of Law

The English courts apply the *lex fori* to determine whether a communication is privileged.[92] As a result, in proceedings in the English courts, English law will be applied to determine privilege issues.[93]

Although in English civil proceedings, the court retains discretion to allow a party to resist disclosing a document (which is not otherwise protected from disclosure on privilege or other grounds) where disclosure would damage the public interest,[94] the fact that a document is privileged under a foreign law is unlikely in and of itself to result in the court exercising that discretion, particularly where there is a current or prospective English nexus to a dispute.[95]

Legal Advice Privilege

ELEMENTS: LEGAL ADVICE PRIVILEGE

To be covered by legal advice privilege, communications must be:

— Confidential.

— Made between a lawyer and a client.

— Made for the purposes of giving or receiving legal advice.

Lawyer-Client Communications

As a general matter, all lawyer-client communications should be marked "Privileged and Confidential." This label does not create privilege, but will help to subsequently identify privileged material and can be useful in preserving privilege in the event of an inadvertent disclosure.

[92] Thanki, "The Law of Privilege" (2d ed.) at 4.84, as affirmed in The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)

[93] *Lawrence v Campbell* [1859] 4 Drew 485.

[94] Civil Procedure Rules, 31.19(1).

[95] *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

Lawyers

A "lawyer" means a qualified solicitor or barrister.[96] Communications with overseas lawye rs may also be privileged.[97]

Save in the case of investigations by the European Commission (where external counsel should be retained and instructed),[98] legal advice privilege may also attach to communications involving qualified in-house lawyers. Communications between parties and non-legally qualified personnel (e.g. clerks, trainees, secretaries, or paralegals) will likewise attract privilege provided that, at the time of the communication, the individual is acting under the supervision of a qualified lawyer.[99]

Clients

English law adopts a narrow definition of what constitutes a "client" for the purposes of legal advice privilege.

Three Rivers 5 remains the governing authority on the formulation of the "client" for the purposes of legal advice privilege.[100] Its effect is that only those individuals who have been given responsibility for coordinating the organization's communications with its lawyers will be considered part of the "client" for the purposes of legal advice privilege, and communications between lawyers and those employees outside this group (irrespective of their seniority) will not be privileged.

The decision has caused significant difficulties for organizations in the context of internal investigations, including through narrow interpretations of what constitutes the "client group."

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[96] *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1.

[97] Bankim Thanki, *The Law of Privilege* (3rd Ed. 2018) at 2.37.

[98] *In Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission* (Case C-550/07 P), the Court of the Justice of the European Union held that legal professional privilege does not apply to communications between a company and its in-house lawyers in the context of EU antitrust investigations.

[99] *Taylor v. Forster* (1825) 2 C&P 195; *Wheeler v. Le Marchant* (1881) 17 Ch D 675.

[100] The principle was affirmed in *The RBS Rights Issue Litig.* [2016] EWHC 3161 (Ch) and *Serious Fraud Office v. Eurasian Nat. Resources Corp. Ltd.* [2017] EWHC 1017 (QB).

CASE STUDY:
THREE RIVERS COUNCIL V. BANK OF ENGLAND ("THREE RIVERS 5")[101]
WHO IS THE "CLIENT"?

Following the collapse of Bank of Credit and Commerce International ("BCCI") in 1991, an inquiry was established to investigate the supervision of BCCI and to review the actions taken by the U.K. government. The so-called "Bingham Inquiry" published its report in 1992, and the liquidators of BCCI subsequently issued proceedings against the Bank of England ("BoE") for losses caused by the collapse.

The plaintiffs sought from the BoE documents prepared by BoE employees which were provided to its external counsel for the purposes of preparing the BoE's submissions to the Bingham Inquiry. The BoE claimed that these documents were covered by legal advice privilege.

The English Court of Appeal held that, for the purposes of assessing legal advice privilege, the "client" did *not* encompass all employees of the BoE, but was confined to a particular group of individuals (the "Bingham Inquiry Unit" or BIU) who had been given responsibility for coordinating the BoE's communications with the BoE's lawyers. Any employees not forming part of the BIU (including even, hypothetically, the Governor of the BoE himself) were considered to be third parties, whose communications would *not* themselves be covered by legal advice privilege.

Where there is a current or prospective English nexus to a dispute or investigation, organizations should seek to identify, and record in writing, those individuals who will form part of the "client" group. To avoid uncertainty as to the position of in-house lawyers, where possible, in-house lawyers should not be included within the "client" group.[102]

[101] *Three Rivers DC v. Bank of England* [2003] EWCA Civ. 474.

[102] *See also* § 3(b): Giving or Obtaining Legal Advice.

CASE STUDY:
THE RBS RIGHTS ISSUE LITIGATION[103]
LEGAL ADVICE PRIVILEGE IN INTERNAL INVESTIGATIONS

The defendant's shareholders sought to recover investment losses on the basis that the defendant's prospectus for a 2008 rights issue was inaccurate and incomplete. The shareholders sought disclosure of notes from interviews conducted by the defendant's lawyers with current and former employees during two internal investigations. The defendant resisted the application, amongst other grounds, because the interview notes were covered by legal advice privilege, given that the interviewees were authorized to communicate in confidence with the defendant's lawyers.

The English High Court rejected this argument, holding that, based on *Three Rivers 5*, the employee interviewees did not form part of the "client" group for the purposes of legal advice privilege, and therefore the interviews (and the notes recording them) were not privileged. The fact that the notes were not disputed to be privileged under U.S. law did not change this analysis.

Communications

In addition to communications between a lawyer and client, legal advice privilege may cover drafts of such communications.[104] In addition, in some circumstances, privilege may be retained where records of privileged legal advice are confidentially disseminated throughout an organization[105] or outside an organization,[106] although the permissible limits of such communications are difficult to define. For prudence, outside the context of adversarial litigation (as to which, see discussion below), it should generally be assumed that communications between an organization's lawyers and individuals outside the "client" group, or material that is disseminated to employees outside of the "client" group, will not be privileged. Organizations should therefore strictly limit the circulation of privileged information with employees outside the "client" group to where it is strictly necessary, and should do so expressly pursuant to a limited waiver of privilege (also discussed below).

[103] The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch).

[104] *Three Rivers DC v. Bank of England* [2003] EWCA Civ 474.

[105] *Bank of Nova Scotia v. Hellenic Mut. War Risks Assoc. (Bermuda) Ltd. (The "Good Luck")* [1992] 2 Lloyd's Rep 540.

[106] *USP Strategies Plc v. London Gen. Holdings Ltd.* [2004] EWHC 373 (Ch).

Giving or Obtaining Legal Advice

Legal advice includes "advice as to what should prudently and sensibly be done in the relevant legal context."[107] To determine whether the advice was given in the "relevant legal context," the court will consider whether the advice sought or received relates to the "rights, liabilities, obligations or remedies" of the client under private or public law.[108]

Although the English courts have generally interpreted the "relevant legal context" test widely, difficulties can arise where advice is given to an organization by their in-house lawyer where that lawyer also holds another position within the organization. In such circumstances, English Courts will decide whether the individual was giving advice in their capacity as a lawyer or in some other business capacity.[109] To avoid uncertainties, in matters where a lawyer may be asked to give both business and legal advice, that lawyer should, where possible, not provide legal advice to the organization.

Litigation Privilege

ELEMENTS: LITIGATION PRIVILEGE

To be covered by litigation privilege, communications must be:

— Confidential.

— Made at a time when adversarial litigation was in reasonable prospect.

— Made for the dominant purpose of such proceedings.

[107] *Balabel v. Air India* [1988] 1 Ch 317.

[108] *Three Rivers DC and others v. Governor and Co. of the Bank of Eng.* [2004] UKHL 48.

[109] *Blackpool Corp. v. Locker* [1948] 1 KB 349.

Adversarial Litigation

Whether or not proceedings are sufficiently "adversarial" will depend on the circumstances. Litigation or arbitral proceedings (whether domestic or overseas) will be sufficiently adversarial to attract litigation privilege.[110]

The status of regulatory or criminal investigations is uncertain and will depend on the facts. In *Tesco Stores Limited v Office of Fair Trading*,[111] the Competition Appeal Tribunal held that notes of third-party witness interviews conducted by a company's lawyers were subject to litigation privilege as, by the time the interviews took place, the Office of Fair Trading had issued two Statements of Objection formally alleging breaches of U.K. competition legislation, and proceedings were therefore "sufficiently adversarial" to engage litigation privilege. Although the case arose in the context of a U.K. competition investigation, it is prudent to assume that the principle that an investigation by a U.K. public authority does not become "adversarial" unless and until the authority communicates formal allegations against the entity under investigation will apply generally to regulatory or criminal investigations. For instance, the High Court in *Serious Fraud Office v ENRC*[112] held that, on the facts, the criminal investigation by the Serious Fraud Office into the defendant company was not adversarial litigation for these purposes.

Reasonable Prospect

For litigation privilege to apply, adversarial litigation must be in reasonable prospect. The English Court of Appeal has opined that "a general apprehension of future litigation" or "a distinct possibility that sooner or later someone might make a claim" were not sufficient to engage litigation privilege.[113]

[110] Bankim Thanki, The Law of Privilege (3rd Ed. 2018) at 3.61 – 3.63.

[111] *Tesco Stores Ltd. v. Office of Fair Trading* [2012] CAT 6.

[112] *Serious Fraud Office (SFO) v. Eurasian Nat. Resources Corp. Ltd.* [2017] EWHC 1017 (QB).

[113] *United States of America v. Philip Morris Inc. and others* [2004] EWCA Civ 330.

The English case law on when litigation is in "reasonable prospect" is not easy to reconcile, and contradictory principles can be observed. Where adversarial litigation involving the organization is in reasonable prospect (for instance, because proceedings involving the organization have been threatened), this should be contemporaneously recorded (for instance, through a legal opinion or in committee or board minutes). This will not guarantee that litigation privilege will cover communications with third parties created for the dominant purpose of that litigation will be privileged, but will help to establish the organization's state of mind at the time of the creation of the document.

Dominant Purpose

Notwithstanding that adversarial litigation was in reasonable prospect at the time of a communication, litigation privilege will not apply unless the communication was made for the "dominant purpose" of that litigation. In the regulatory/criminal investigations context, the English High Court has held that documents created for the purpose of *avoiding* an investigation are not created for the dominant purpose of adversarial litigation.

CASE STUDY:
SERIOUS FRAUD OFFICE V. ENRC[114]

The English High Court held that the principal purpose of documents created during an internal investigation was to establish the accuracy of allegations made by a whistleblower, and to decide on any consequential action. In addition, the court opined that, even if the sole purpose of the preparation of the documents in question was for contemplated criminal proceedings, "avoidance of a criminal investigation cannot be equated with the conduct of a defense to a criminal prosecution."

The ENRC decision is subject to an appeal which was heard in July 2018. Judgment is awaited.

[114] *Serious Fraud Office (SFO) v. Eurasian Nat. Resources Corp. Ltd.* [2017] EWHC 1017 (QB).

As with the case law on whether litigation is in reasonable prospect, it is difficult to reconcile the contrasting approaches taken to date in the case law on "dominant purpose."[115] For example, courts have found, in some cases, a number of equally prominent but distinct "dual purposes" to a communication, with the result that litigation privilege will not apply to those communications.[116] On the other hand, however, courts have likewise been prepared to find that dual purposes were, in reality, components of a single, overarching purpose relating to the litigation.[117] Where a communication between a lawyer, or a member of the client group, and a third party, has been created for the dominant purpose of adversarial litigation, this fact should, so far as possible, be recorded contemporaneously in the document (including expressly identifying the extant or contemplated litigation for which the document is being created). This will not create privilege in and of itself, but will help to identify privileged material and document the contemporaneous understanding of its privileged nature.

Working Papers Privilege

English legal privilege also extends to a lawyer's working papers. The justification for affording privilege protection to these materials has been said to be that their disclosure would be "giving [the party requesting disclosure] a clue as to the advice which had been given by the [lawyer] and giving them the benefit of the professional opinion which had been formed by the [lawyer.]"[118] The English Court of Appeal has elaborated on this justification, observing that "where the selection of documents which a [lawyer] has copied or assembled betrays the trend of the advice which he is giving the client the documents are privileged."[119]

[115] *Bilta (UK) Ltd. (in Liquidation) & Others v. (1) Royal Bank of Scotland Plc (2) Mercuria Energy Europe Trading Ltd.* [2017] EWHC 3535 (Ch).

[116] *Waugh v. Railways Board* [1980] AC 521 (HL) (in which it was held that the defendant could not show that anticipated litigation was the dominant purpose of the commissioning a report into the causes of a locomotive collision, but rather report was prepared for the "dual purposes" of ensuring safety on the railways and for obtaining legal advice on liability).

[117] *Re Highgrade Traders Ltd.* [1984] BCLC 151 (CA) (in which the Court of Appeal held that, although reports into the causes of a fire were held to be created for a "duality of purpose" (namely, to ascertain the causes of the incident and to obtain advice from lawyers), these purposes were "inseparable," with the result that litigation privilege would apply).

[118] *Lyell v. Kennedy* (No 3) (1884) 27 Ch D 1.

[119] *Ventouris v. Mountain* [1991] 1WLR 607.

Working papers privilege will not cover records taken by lawyers of information which itself would not otherwise covered by privilege.[120] Thus, to validly assert working papers privilege, there must be demonstrated some attribute of, or addition to, information which distinguishes the working papers from verbatim transcripts, or which reveals the trend of legal advice being given.[121] The fact that a "train of enquiry" (for example, the factual exchanges or information gathering processes which, although might provide the basis of the legal advice, do not reveal the trend of that advice) is revealed is not sufficient to give rise to working papers privilege.

CASE STUDY:
STAX CLAIMANTS V. BANK OF NOVA SCOTIA[122]

The English High Court contrasted a note which "records the substance of a conversation" (which would not be privileged) with a note which also records "the note-taker's own thoughts and comments on what he is recording with a view to advising his client" (which, the court said, almost certainly would be privileged).

Loss of Privilege

Waiver of Privilege

As with U.S. law, there are a number of contexts in which a company may inadvertently waive privilege. The general principle under English law is that a disclosure of privileged information to a third party constitutes a waiver of privilege as against the third party.[123] If disclosure to the third party (or third parties) results, additionally, in a loss of confidentiality in the material, then privilege may be lost in the material entirely.[124]

Moreover, where a party waives privilege over material, it may also be deemed to have waived privilege over other documents related to that issue where a failure to

[120] *Prop. All. Grp v. RBS* (No 3) [2015] EWHC 3341 (Ch).

[121] *The RBS Rights Issue Litigation* [2016].

[122] [2007] EWHC 1153 (Ch).

[123] *Mohammed v. Ministry of Defence* [2013] EWHC 4478 (QB).

[124] *Goldstone v. Williams, Deacon & Co.* (1899) 1 Ch 47.

disclose such documents means that the court and/or other parties would be given an incomplete picture of a particular issue. [125] This is known as the "cherry-picking" rule, and its effect is that, where a party discloses material related to an issue such that privilege is waived over that material, privilege is deemed to have been waived over all of the material relevant to the issue (a so-called "collateral waiver"). It should be noted that, for a collateral waiver to be engaged, a degree of reliance must be placed on the disclosed material by the disclosing party, for instance, by making use of the disclosed material in court.

Where privileged material is inadvertently disclosed, the party in receipt of the inadvertently disclosed material may utilize it in English proceedings only with the permission of the court,[126] although whether the court in fact restrains the use of such material is dependent on the circumstances. Urgent legal advice should be sought where privileged material has been inadvertently disclosed.

Limiting the Waiver of Privilege

In some circumstances, a limited waiver of privilege is recognized under English law, where privileged material is confidentially disclosed to a third party for specified purposes on the express or implied terms that privilege is not waived in the material.[127] Although, where material is shared on the basis of a limited waiver of privilege, residual privilege is retained by the disclosing party against the rest of the world, privilege is nevertheless waived as against the receiving party.

In the criminal or regulatory investigations context, it is not uncommon for organizations to seek to disclose material to U.K. authorities (whether voluntarily or under compulsion) pursuant to a limited waiver of privilege in an attempt to preserve privilege against third parties. The success of such a strategy will depend on the circumstances and, in some cases, for example, where the authority to whom the material has been disclosed is subject to onward disclosure obligations (for instance, to a defendant in contested proceedings), the authority may not be permitted (or

[125] *Nea Karteria Mar. Co. v. Atlantic & Great Lakes Steamship Corp.* (No 2) [1981] Com LR 138.

[126] Civil Procedure Rule 31.20.

[127] *USP Strategies v. London Gen. Holdings* [2004] EWHC 373 (Ch).

prepared) to agree to the terms of a limited waiver where the terms of such a limited waiver conflict with other disclosure requirements.

To the extent that material subsequently enters the public domain (for instance, in a criminal trial against a third party), confidentiality (and therefore privilege) will be lost notwithstanding any attempt to limit the waiver of privilege.

Where a document is being shared with a third party on the basis of a limited waiver of privilege, it should be recorded in writing that the document is being provided confidentially and on a limited waiver of privilege basis. This will not of itself ensure that the waiver of privilege is limited to the party receiving the document, it but will help to identify material over which privilege is retained.

France

Summary

Key issues:

— Under French law, legal privilege does not cover in-house counsel.

— Professional secrecy protects communications between an attorney and her client, but not correspondence with third-parties.

Protecting the Privilege:

— Professional secrecy is absolute in France; it cannot be waived, even upon the client's instructions.

— The protection of legal opinions and supporting documents is guaranteed by the professional secrecy of attorneys. Sensitive advice should be issued by external counsel who are members of a French Bar.

— The best way to shield sensitive content from disclosure is to keep it only at the offices of outside counsel.

Professional Duty of Secrecy

In France, the obligation of professional secrecy of attorneys ("*avocats*") covers both advice provided by counsel and any information, either written or oral, that was obtained in the course of the client's representation.[128] The secrecy covers: (i) communications between a client, and his or her attorney, (ii) correspondence between an attorney and his or her colleagues regarding representation of a client, with the exception of "official" correspondence, (iii) notes of meetings between attorney and client; and more generally, (iv) all related documents.[129] Only documents that are labelled "official" communications between lawyers are not covered by the professional secrecy.[130] Professional secrecy applies to civil matters as well as criminal investigations.[131] A breach of the duty of professional secrecy by an attorney is a criminal offense,[132] and it also constitutes professional misconduct.[133]

Exceptions to Professional Secrecy

Under French law, an attorney may reveal information otherwise protected by professional secrecy only to the extent that the disclosure is strictly necessary for the attorney's own defense before a jurisdiction.[134]

French law does not provide for an exception to professional secrecy akin to the crime-fraud exception under U.S. law.[135] Nonetheless, attorneys have an affirmative duty to report a suspicious transaction regarding possible money laundering activities and related criminal offenses by their clients whenever the reporting attorney knows, suspects, or has good reason to suspect, that a transaction or attempted transaction

[128] French Supreme Court, Civ. 1ère, 7 June 1983, n° 82-14469. In light of the limited disclosure obligations in French litigation, the notion of legal privilege is not recognized *per se* under French law. Judges have a discretionary power to order the production of a document, but only if it has been demonstrated that the requested document exists, is in the possession of the person from whom it has been requested, and is useful and essential to the action. Document discovery is thus extremely rare in French litigation, particularly because of the requirement that the requesting party specifically identify the document requested.

[129] Law 71-1130 of Dec. 31, 1971, Art. 66.5.

[130] Règlement Intérieur National de la profession d'avocat, Art. 2.2.

[131] *See* Law 71-1130 of Dec. 31, 1971, Art. 66.5; Code De Procédure Pénal (Criminal Procedure Code) C. Pr. Pén., art. 432.

[132] C. Pr. Pén, art. 226-13.

[133] Règlement Intérieur National de la profession d'avocat, art. 2.

[134] Decree n°2005-790 of 12 July 2005, art. 4 ; Règlement Intérieur National de la profession d'avocat, art. 2.1. Also *see* French Supreme Court, Crim., 29 May 1989, n° 87-82073.

[135] C. Pr. Pén. art. 434-1, which prohibits the concealment of felonies or misdemeanors, is not applicable to attorneys.

(i) is based on an offense that is punishable by more than one year's imprisonment, or (ii) is connected to terror financing.[136]

In addition, if the documents exchanged between the attorney and his client are covered by professional secrecy, an investigating magistrate cannot seize them[137] unless they are likely to demonstrate the attorney's participation in a criminal offense[138].

Professional secrecy protects communications between the attorney and his client but not correspondence with third-parties, which can be subject to wiretapping or seizure in the context of criminal investigations.[139] For example, the French Supreme Court held that professional secrecy does not extend to communications exchanged between the attorney and his client's certified public accountant.[140]

Waiver of Professional Secrecy

In France, professional secrecy cannot be waived. Attorneys may not disclose confidential information to any third party, even if authorized or requested by clients.[141] The client himself may, however, waive the benefit of professional secrecy by making public, for instance, a letter he sent to his lawyer.[142]

[136] French Monetary and Financial Code, art. L561-15, al. 1. This duty also extends to tax fraud when at least one objective criteria is present, as defined by decree. *See ibid.*, art. L. 561-15, al. 2 and D. 561-32-1. Also *see* Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The report must be made to the president of the Bar ("*Bâtonnier*") exclusively.

[137] French Supreme Court, Com. 7 June 2011, n°10-18108.

[138] C. Pr. Pén., art. 56-1.

[139] French Supreme Court, Civ. 1ère, 10 Sept. 2014, n°13-22400 (in the context of communications between an attorney and a witness); French Supreme Court, Civ. 1ère, 31 Jan. 2008, n°06-14303 (exchanges between a party and his opponent's attorney).

[140] French Supreme Court, Com., 4 Nov. 2014, n° 13-20322.

[141] French Supreme Court, Civ. 1ère, 6 Apr. 2004, n°00-19245.

[142] French Supreme Court, Com., 6 June 2001, n° 98-18577.

In-house Counsel

In France, in-house lawyers ("*juristes d'entreprise*") have a different status from attorneys ("*avocats*"). Notably, in-house counsel do not bear a duty of professional secrecy and their communications are not covered by legal privilege.[143] In-house counsel who are not admitted to a French Bar cannot refuse to produce documents or give testimony.

[143] French Supreme Court, Civ. 1ère, 3 Nov. 2016, n° 15-20.495.

Germany

Summary

Key issues:

— Under German law, legal privilege does not attach to certain documents, but is instead closely connected with the attorney's right to refuse testimony.

— In-house counsel may refuse to give testimony only if their position and status within the company is comparable to that of an external attorney. This requires not only that the in-house counsel be admitted to the bar as a fully-qualified attorney, but also that the counsel's position in the hierarchy of the company grants a certain degree of independence.

Protecting the Privileges:

— All documents sought to be shielded from disclosure should be stored exclusively with counsel.

— The client's confidential files should be kept in the offices of their external counsel.

Professional Duty of Secrecy

Under German law, attorneys must maintain secrecy over any information they learn in the exercise of their profession, irrespective of its specific content. Likewise, the source of the information—whether counsel learned it from the client or from a third person—is irrelevant. As a consequence of this duty of secrecy, an attorney may, and is in fact obliged, to refuse to testify in court (civil as well as criminal cases) with regard to such information and to refuse to produce any documents that contain such information.[144] An attorney who breaches this duty can face criminal sanctions.[145] However, the testimony will still be admissible as evidence.

Attorneys can only be released from their duty of secrecy by their client.[146] The release can be granted expressly or by implication, for example by naming the attorney as a witness.

In addition to a release by the client, there are two main exceptions to the duty of secrecy. First, counsel may reveal information about their clients if they are themselves party to a dispute; [147] however, they may not reveal more than is necessary to support their case. Second, if the attorney learns that somebody is planning to commit a felony, an attorney is not only released from the duty of secrecy, but is obliged to report this to the relevant authorities and can face criminal charges for failure to do so.[148] However, the statute only lists particularly grievous felonies,[149] and for a duty to report, a person has to have valid reasons ("credible information") to believe that the crime will be committed. Lawyers are exempt from liability insofar as they learned about a planned felony in the exercise of their profession if they made an earnest effort to dissuade the potential perpetrator from committing the crime, or to avert the result, provided the felony in question does not fall within the categories of murder, genocide, crimes against humanity, war crimes, abduction, hostage taking, or an attack on air or maritime traffic by a terrorist organization.[150]

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[144] Zivilprozessordnung (ZPO) [Code of Civil Procedure],§ 383(1) no. 6, Strafprozessordung (StPO) [Code of Criminal Procedure] § 53(1)1 no. 3.

[145] § 203(1) no. 3, § 204 StPO (Germany).

[146] If the client is a corporation, by its representative.

[147] For example, in disputes over the attorney's fees or in defense against claims for malpractice by the client.

[148] § 138 StPO (Germany). This duty exists for all citizens, and lawyers are not exempt.

[149] § 138 StPO (Germany).

[150] § 139(3) StPO (Germany).

Protection of Documents

Since privilege in the German sense is attached to the right to refuse testimony, attorney-client communications and other documents are only protected insofar as they are in the possession of a person entitled to refuse testimony (usually the attorney).[151] In general, aside from the attorney and his employees (see below), this applies to people who maintain a personal relationship with one of the lawsuit's parties (familial privilege), people who are under a duty of secrecy by virtue of their profession (professional privilege), or people who work as a public servant (public servants' privilege). Privilege may also arise out of the subject matter in question (subject matter privilege).[152] Documents in the possession of the client, whether prepared by an attorney or not, are generally not protected (again, however, it is important to note that the German civil process does not have extensive discovery or disclosure proceedings; this is therefore mainly relevant in the context of criminal investigations).[153] Likewise, while a lawyer may refuse to give testimony about information obtained from third parties, the third parties have no such right. This issue can become particularly relevant in the context of internal investigations: information obtained from interviewing employees in the course of internal investigations may be protected insofar as it is in the possession of the (external) attorney, who can refuse to disclose notes or give testimony; it can, however, be obtained from the interviewed employees.[154]

[151] The right to refuse testimony also applies to other persons who are under a duty of professional secrecy, such as doctors, as well as to clergymen, spouses, and relatives.

[152] David Greenwald and Marc Russenberger, *Privilege and Confidentiality: An International Handbook* 144 § 7.22 (2d ed. 2012).

[153] *See* generally, in criminal proceedings, however, communications between an attorney and client may not be seized even when in the possession of the client.

[154] In 2010, the Regional Court of Hamburg decided that an attorney's notes of interviews conducted with employees in the course of internal investigations are not protected, even if in the possession of the attorney (decision of Oct. 15, 2010, 608 Qs 18/10). However, following a legislative amendment, the Regional Court of Mannheim ruled in 2012 that all documents prepared in the course of internal investigations are protected as long as they are in the possession of an attorney (decision of July 3, 2012, 24 Qs 1/12). The Regional Court of Brunswick later held that documents from internal investigations created in preparation of the corporation's defense are protected regardless of whether they are in possession of the lawyer or the company (decision of July 21, 2015, 6 Qs 116/15). Since this topic is still under dispute, it is advisable to store any sensitive documents solely with the attorney.

CASE STUDY: RAID ON VOLKSWAGEN'S EXTERNAL COUNSEL

Recently, the Federal Constitutional Court, the highest constitutional court in Germany, found that seizure of documents relating to an investigation at external counsel's law offices did not violate the German constitution. Specifically, the Federal Constitutional Court held that Volkswagen AG, which was not the target of the particular investigation in question, had no recognized legal interest (*Rechtsschutzbedürfnis*) to assert a violation of the constitutional protection of the home against searches because the search was not conducted at VW's offices but at the law firm's premises. With respect to VW's constitutional right to informational self-determination (*Recht auf informationelle Selbstbestimmung*), which protects against extensive collection, storage, use, and processing of personal data, the Federal Constitutional Court acknowledged that the seizure of documents and their review could potentially impair VW's freedom of economic activities because a subsequent trial might reveal business and trade secrets to the general public or damage VW's reputation, but the seizure of documents was nonetheless deemed justified under constitutional law.

In particular, the Federal Constitutional Court found that documents exchanged between an individual or a company on the one hand and the defense lawyer on the other hand are only protected against seizure in cases in which the client, based on objective criteria, can reasonably be expected to become the subject of an investigation. The mere possibility or fear that criminal or administrative investigations against the client will be initiated is not sufficient. Since Audi AG, the target of this particular investigation, was not the client of the law firm, and VW was not targeted in the Munich investigation, the seizure of documents at the office of VW's law firm was deemed lawful. The Court confirmed that constitutional law does not protect a parent company from seizure of its documents on the grounds that its subsidiary is the target of an investigation. The Federal Constitutional Court noted, however, that the seized documents must not be used in an investigation directed against VW. According to the Federal Constitutional Court, constitutional law does not require reading statutory protections against seizure under the attorney-client privilege broadly, specifically because the public interest, in the effectiveness of law enforcement, acts as a counterweight.

In-house Counsel

Legal privilege applies only partially to in-house counsel. In-house counsel enjoys the right to refuse to testify only if their position and status within the company is comparable to that of an external attorney. This requires not only that the in-house counsel be admitted to the bar as a fully-qualified attorney, but also that the counsel's position in the hierarchy of the company grants a certain degree of independence. In addition, the right to refuse testimony can only be invoked insofar as the communications refer to legal advice as opposed to business advice, management tasks, or administrative tasks.

In-house counsel who are not admitted to the bar cannot refuse to produce documents or give testimony, as they are not formally attorneys. Even if they are admitted to the bar, the right to refuse to testify can only be invoked if in-house counsel is acting as independent counsel, not in its capacity as an employee.

Agents of Counsel

Personnel assisting an attorney (e.g., secretaries, law clerks, paralegals etc.) are also under a duty of secrecy and may therefore refuse testimony.[155] It is unclear whether this privilege extends to independent external service providers (e.g., detectives, expert witnesses).[156] The main criterion in this context is whether the external service providers can be regarded as assistants of the attorney in the case in question. As a rule of thumb, the more the attorney oversees, directs, and controls the work done by external agents, the more likely they will be regarded as falling within the legal privilege.

[155] This principle has recently been codified, *see* § 53a StPO (Germany) (right of professional assistants to refuse testimony); § 97(3) StPO (Germany) (protection from seizure extends to professional assistants); and § 203 StGB [Penal Code] (Germany) (disclosing information to professional assistants not a criminal offence).

[156] As opposed to court-appointed experts (who do not have the right to refuse testimony), whether expert witnesses appointed by one party enjoy this right is disputed. In this context, expert witnesses who are engaged by the attorney to facilitate the attorney's work likely fall within the attorney's right to refuse testimony.

Italy

Summary

Key issues:

— Legal privilege ("*Segreto professionale*") protects the confidentiality of attorneyclient communications and work product by lawyers.

— Legal privilege protects attorneys and their offices; clients may not themselves invoke privilege protection.

— Under Italian law, in-house counsel does not enjoy privilege rights.

Protecting the Privileges:

— Critical or material advice or memoranda should be issued by external counsel who are members of the Italian bar.

— Client's confidential files should be kept in the offices of external counsel.

— Correspondence should be marked with headers or footers signaling the existence of a legal privilege.

Professionals Entitled to Claim Legal Privilege

Italian legal privilege applies only to "qualified professionals" as defined in Article 200 CPP.[157] Qualified professional's include attorneys ("*avvocati*") who are members of the Italian bar. Italian legal privilege protects attorneys and their offices. Clients themselves may not invoke privilege to prevent search or seizure of correspondence or documents sent to or received from the attorney.[158] Pursuant to Article 200 Codes of Criminal and Civil Procedure ("CPP" and "CPC"), Italian attorneys have the right to abstain from testimony regarding any information acquired in connection with their activities. The privilege must be specifically invoked by the lawyer called as a witness, and it is subject to scrutiny by the court.[159]

Attorneys who are ordered to submit to a court client documents in their possession may refuse to do so on the grounds that such documents are confidential and relate to the attorney-client relationship. Similarly, inspections at the office of the defense counsel ("*difensore*") are permitted only where: (i) the attorney or those who work in his/her office are being prosecuted, (ii) the inspection is likely to uncover traces or other material evidence of the crime, or (iii) it is necessary to search for items or individuals identified in advance. In addition, attorneys also have the duty not to disclose the confidential subject matter of their professional services. Pursuant to Article 622 Criminal Code ("CP"), the violation of this duty can lead to criminal sanctions if the disclosure damages the client or a third party.[160]

[157] The scope of Art. 200 Cp.p. is narrow, and the list of professionals cannot be extended to include other similar professionals because, by virtue of Art. 200(1)(d) Cp.p., the right to claim professional secrecy can only be established by law. *See* Paolo Tonini, Manuale Di Procedura Penale, Giuffrè (2014) p. 297-98.

[158] While clients may not invoke privilege to prevent the search or seizure of correspondence or documents sent to or received from the attorney, this does not necessarily mean that any potentially privileged document in the client's possession must be disclosed, as documents may still be protected from seizure by the attorney if the attorney is present and objects to seizure.

[159] *See* Art. 200 C.p.p. ("1.The professionals listed below shall not be compelled to testify in court with respect to the confidential information they have knowledge of due to their [...] office or profession, unless they have a duty to report it to the judicial authorities:[...] (b) attorneys, private investigators, expert witnesses and notaries.").

[160] *See* Art. 622 C.p.p. ("anyone disclosing confidential information he or she acquired knowledge of due to his or her [...] profession, without cause or to gain profit for him or herself or for others, is punished, if such disclosure causes damage.").

Issues of Privilege Relating to Evidence in Italian Civil Litigation

In Italian civil litigation, issues of privilege relating to evidence and discovery may arise with regard to:

— Orders for production of documents (Article 210 CPC);

— Orders for inspection of persons or things (Article 118 CPC); and

— Right to refrain from giving testimony (Article 249 CPC).

Pursuant to Articles 118 and 210 CPC, upon request of a party to the proceeding, the court may order the other party or a third party to produce a document or other evidence, to consent to a physical search, or to consent to an inspection of an object in their possession if: (i) it is necessary to ascertain the facts of the case, and (ii) the enforcement thereof does not result in a breach of one of the duties of secrecy set forth by Articles 200 and 201 of the CPP.[161] Article 249 CPC also provides that the provisions of the Code of Criminal Procedure applicable to the hearing of witnesses (including art. 200 CPP) also apply to the civil proceedings. As a result of the interplay among Articles 210, 118, and 249 CPC and 200 CPP, a party to a proceeding or a third party called to testify or ordered to produce a specific document, or consent to an inspection, may refuse to do so on the basis of privilege.

Only minimal discovery is allowed under Italian law. Italian courts do not grant requests for the production of categories of documents or "any and all" documents relating to a defined legal relationship or other specific topic or request. Instead, Italian courts will grant discovery requests only for individual documents that are relevant and material to a dispute.[162] In addition, if a party fails to produce a

[161] Pursuant to Art. 118 at ¶¶ 2, 3, if the requested party refuses to comply with an order of inspection without cause, the court may draw adverse inferences against that party pursuant to Art. 116(2) C.p.c or order that the third party pay a fine ranging from Euro 250.00 to Euro 1,500.00.

[162] Supreme Court, judgment No. 3260 of Apr. 16, 1997; Supreme Court, judgment No. 26943 of December 12, 2007. The Supreme Court has recently affirmed that the order for document production is an evidentiary tool of last resort, which may be used only to obtain evidence that may not be obtained elsewhere. Supreme Court, judgment No. 4375 of Feb. 23, 2010.

document requested by the court, the court's recourse is limited to an inference that such document is adverse to the interests of that party.[163]

Legal Privilege Rights Under the Lawyer's Code of Ethics

In Italy, legal privilege is also protected by the Lawyer's Code of Ethics,[164] which imposes on lawyers a duty to respect professional secrecy. Applicable provisions stipulate, in relevant part, that a lawyer shall assure the rigorous observance of privilege and the utmost discretion regarding information received as part of the representation and any legal advice provided to the client.[165] However, a lawyer is allowed to disregard the duty of confidentiality in specific cases, such as when the disclosure of information would prevent the commission of a crime.[166]

Where an attorney violates his or her duty to respect professional secrecy, the National Legal Council[167] may issue pecuniary and disciplinary sanctions, including suspending the attorney from the exercise of the legal profession for one to three years.[168]

Legal Privilege for In-house Counsel

In 2012, Law 247/2012 regulating the legal profession in Italy (the "New Professional Law") came into effect, allowing in-house counsel to be also members of the Italian bar for the first time.[169] However, the New Professional Law does not explicitly grant legal privilege rights to purely inhouse counsel. Absent such an explicit provision,

[163] Claudio Consolo, Codice di Procedura Civile, Wolters Kluwer (2013) p. 2441.

[164] The Lawyer's Code of Ethics was approved by the National Legal Council on January 31, 2014.

[165] Art. 13 LCE. *See also* Art. 51 LCE at ¶ 1, pursuant to which, if a lawyer becomes a witness, he shall "refrain, unless in exceptional cases, from testifying as person of interest or witness about circumstances of which he has obtained information in the course of his professional activity or which are related to any representation in which he has been engaged."

[166] Art. 28 LCE at ¶ 4.

[167] The National Legal Council is a public institution which carries out, *inter alia*, administrative and disciplinary activities relating to the legal profession. It is established under the auspices of the Minister for Justice and consists of lawyers elected by their fellow members, with one representative for each appeals court district.

[168] Art. 28 LCE at ¶ 5. *See also* Art. 51 LCE at ¶ 4 ("The breach of duties under the previous sub-sections [*i.e.*, lawyer becoming a witness] entails the disciplinary sanction of censure.").

[169] The New Professional Law allows attorneys to work for an employer—either an individual person or a company—in the exclusive interest of such employer and under an employment contract, as long as the lawyer provides legal advice only on out-of-court transactions. Prior to its introduction in-house counsel did not enjoy any of the legal privilege rights that are applicable to members of the bar on the premise that they were employees of the company for which they work and could not be members of the Italian bar.

companies are well-advised to proceed on the understanding that inhouse counsel likely do not enjoy privilege rights.[170]

Waiver of Legal Privilege

Italian law does not expressly contemplate the waiver of legal privilege. However, absent specific provisions and case law, the existence of a waiver can be derived from Articles 622 and 50 C p. 253.[171] In practice, an attorney may implicitly or explicitly waive his or her right to legal privilege in several ways. For example, the privilege may be waived when the attorney: (i) does not claim the privilege at the time of the documents' request or seizure; (ii) voluntarily submits the documents to the court; or (iii) consents to the documents being seized.

Maximizing Protection of Confidentiality

In order to maximize the scope of privilege under Italian law, it is important to bear in mind some practical advice.

When seeking legal advice, it is advisable: (i) to enlist the assistance of external counsel who are members of the Italian bar; (ii) to issue powers-of-attorney or letters of appointment designating as counsel one or more external counsel; and (iii) to keep confidential files at the external counsel's offices. In documents prepared by external counsel, privileged correspondence should be marked with headers or footers signaling the existence of a legal privilege. Documents prepared by the client should clearly state that they were prepared in anticipation of an attorney-client communication for the purpose of obtaining a legal advice.

[170] *See* TAR Latium, judgment No. 7467 of Sept. 9, 2012. At the European level, this interpretation has been endorsed by the European Court of Justice in the judgment no. C-550/07 (*Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*). However, scholars have argued that under article 6 of the European Convention on Human Rights, privilege also constitutes a fundamental personal right of the client that, consequently, is legally enforceable before the court. *See* Taru Spronken, Jan. Fermon, *Protection of Attorney-Client Privilege in Europe*, No. 2 Penn State International Law Review, Vol. 27, at 444.

[171] Art. 622 C.p. punishes anyone who discloses confidential information without cause or to gain a profit. Art. 50 C.p. provides that an individual infringing a right with the consent of the person entitled to dispose of such right does not commit a criminal offense.

Brazil[172]

Summary

Key issues:

— Legal privilege is a duty imposed upon lawyers, legal interns, and foreign law consultants. Clients may waive the privilege, but lawyers have an independent right not to testify in any lawsuit in which the attorney is or was a counsel, or in any lawsuit concerning any fact related to any current or former client.

— Legal privilege protects all information received by lawyers when representing their clients before judicial authorities, when performing any consultancy, or advisory activities, or when practicing as legal officers.

— Brazilian law makes no distinction between external and in-house counsel.

Protecting the Privileges:

— Records of communications between the client and lawyers cannot be admitted as evidence in court. However, the protection granted to the lawyers' workplace, work materials, and communications cannot act as a shield to criminal activities.

— Regardless of the clients' waiver, under civil and criminal procedures, even if authorized or requested by their clients, lawyers still have the right to refuse to testify on certain matters subject to privilege.

— Brazilian law does not provide for any specific rule about partial waivers. However, unless reasonably justified, the undue disclosure of confidential information obtained as a result of professional activities is considered a crime.

[172] Cleary Gottlieb does not practice Brazilian law, and the summary below is our high-level understanding of the current rules and practices in the country based on our experience and discussions with Brazilian counsel. It is not intended to provide, and should not be relied on as, legal advice. Readers should seek legal advice from Brazilian counsel on these matters.

The Privileges

Under Brazilian law, the attorney-client privilege is a right granted to both lawyers and clients and is a duty with which lawyers must comply. Lawyers must keep confidential all information obtained as a result of their legal practice.[173] This duty is owed not only by lawyers admitted to practice in Brazil, but also by interns who practice law under the supervision of attorneys,[174] and by foreign law consultants and foreign law consultancy firms registered before the Brazilian Bar Association (*Ordem dos Advogados do Brasil*).[175]

The duty of confidentiality applies to all information received by lawyers when representing their clients before judicial authorities, when performing any consultancy or advisory activities, or when practicing as legal officers.[176] Moreover, lawyers are bound by the duty of confidentiality when acting as mediators or arbitrators.[177]

Who controls the attorney-client privilege?

The attorney-client privilege belongs to both client and attorney. Brazilian law assumes that all communications and information exchanged between attorneys and their clients are confidential, regardless of any request by clients.[178] Unless an exception applies, such as those described below, any disclosure of information subject to privilege requires client's consent. Accordingly, to the extent information is protected by professional secrecy, lawyers cannot be compelled to testify about them in any civil, criminal, administrative, or arbitration proceedings.[179]

Brazilian law grants attorneys the right to refuse to testify in any lawsuit in which the attorney is or was a counsel, or in any lawsuit concerning any fact related to

[173] Brazilian Bar Association Ethics Code, art. 35.

[174] Federal Law no. 8,906/1994, art. 3, caput, and §3.

[175] Federal Board of the Brazilian Bar Association, Resolution no. 01/2010, art. 6 and art. 8.

[176] Brazilian Bar Association Ethics Code, art. 35, and Federal Law no. 8,906/1994, art. 1.

[177] Brazilian Bar Association Ethics Code, art. 36, §2.

[178] Brazilian Bar Association Ethics Code, art. 36.

[179] *See* C.P.P. (Brazilian Code of Civil Procedure), art. 448, II, and C.P.C. (Brazilian Code of Criminal Procedure), art. 207, and Brazilian Bar Association Ethics Code, art. 38. *See also*, e.g., Brazilian Supreme Court (Supremo Tribunal Federal - S.T.F.) (highest court of appeals on constitutional matters), HC no. 71039 /RJ, Relator: Min. Paulo Brossard, Tribunal Pleno, 7.4.1994, Diário da Justiça (D.J.), 6.12.1996, 48,708 (holding that witnesses subject to professional secrecy rules cannot be compelled to testify about information protected by those rules in any civil, criminal, or administrative procedures, nor in any testimony before parliamentary committees).

any current or former client, even if authorized or requested by such person, or in any lawsuit concerning facts subject to privilege.[180]

What information is protected under the attorney-client privilege?

The attorney-client privilege attaches to all information obtained by attorneys when performing legal activities.[181] Every communication between attorneys and clients is presumed to be confidential, regardless of any warning or request by either party.[182] This protection covers all written, electronic, or telephonic communications, as well as all information contained in attorneys' work materials and devices.[183]

Considering that all information gathered during the performance of legal activities is protected under the attorney-client privilege, Brazilian law does not make any distinction about the timing or specific purpose of the information disclosed by clients to their lawyers. In this regard, it is important to note that, even though Brazilian law does not provide for any protection similar to the U.S. work product doctrine, Brazilian civil procedure rules also do not provide for pre-trial discovery like that in the United States, and thus such work product protection is not as relevant.

However, the protection referred to above is granted only to the extent information is related to legal services provided by the attorney. Consequently, communications or information unrelated to legal activities, even if provided to a lawyer acting in other capacity, are not subject to privilege.[184]

Under what circumstances is the attorney-client privilege applicable?

Under Brazilian law, attorneys may not disclose confidential information to any third party except if authorized by clients.[185]

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[180] Federal Law no. 8,906/1994, art. 7, XIX.

[181] Brazilian Bar Association Ethics Code, art. 35, and Federal Law no. 8,906/1994, art. 1.

[182] Brazilian Bar Association Ethics Code, art. 36.

[183] Federal Law no. 8,906/1994, art. 7, II.

[184] *See, e.g.*, Superior Court of Justice (Superior Tribunal de Justiça - S.T.J.) (highest court of appeals on all non-constitutional matters), Resp no. 1113734/SP (2009/0073629-9), Relator: Min. OG Fernandes, 6a Turma, 28.9.2010, Diário da Justiça Eletrônico (D.J.e.), 6.12.2010 (holding that, by recording an informal conversation between herself and an in-house counsel of the opposing party, one party did not violate any attorney-client privilege).

[185] Brazilian Bar Association Ethics Code, art. 35.

Special rules apply when attorneys are subpoenaed and called to testify in court. Pursuant to Brazilian civil and criminal procedure, lawyers cannot be compelled to testify about any information subject to privilege.[186] Moreover, even when privilege is waived by the client, attorneys still have the right to refuse to testify about any fact related to matters on which they worked or to any current or former client.[187] The attorney who refuses to testify has the discretion to determine whether the information is subject to privilege.[188]

Brazilian law grants lawyers a right to the sanctity of their work place, as well as a right to the confidentiality of any written, electronic, or telephonic communications between clients and lawyers, to the extent they are related to the exercise of the legal profession.[189] As a consequence, searches of lawyers' work materials and within their work places are not allowed.

How does the attorney-client privilege apply in the corporate context?

Outside and in-house counsel

With respect to the attorney-client privilege, Brazilian law makes no distinction between outside and in-house counsel.

Agents of counsel

Brazilian law does not address whether the confidentiality rules and the attorney-client privilege extend to agents who assist lawyers in the representation of clients. Still, if these agents are bound to professional secrecy rules imposed by their own profession (e.g., accountants, psychologists, and medical doctors), such rules apply regardless of the attorney-client privilege and are sufficient to prevent such professionals from being compelled to testify in civil and criminal procedures.[190]

[186] *See* C.P.C., art. 448, II, C.P.P., art. 207, and Brazilian Bar Association Ethics Code, art. 38. *See also, e.g.*, S.T.J., RHC no. 3946/DF (1994/0029831-5), Relator: Min. Adhemar Maciel, 6a Turma, 13.12.1994, D.J. 1.7.1996, 24,097 (holding that, if called as a witness, an attorney should appear in court, listen to the questions made by the court or by the opposing party, and then refuse to answer based on professional secrecy rules).

[187] Federal Law no. 8,906/1994, art. 7, XIX.

[188] *See, e.g.*, S.T.J., AgRg na APn no. 206/RJ (2001/0194801-5), Relator: Min. Cesar Asfor Rocha, Corte Especial, 10.4.2013, D.J., 4.8.2003, 202 (holding that it is up to the attorney to identify the information subject to privilege).

[189] Constituição Federal [C.F.] [Constitution], art. 133 (Braz.); Federal Law no. 8,906/1994, art. 7, II.

[190] *See* C.P.C., art. 448, II; C.P.P., art. 207.

What are the limitations to the attorney-client privilege?

Attorney-client privilege is not absolute under Brazilian law. Clients are entitled to waive their own privilege by disclosing or authorizing the disclosure of confidential information, and lawyers are not bound by professional secrecy rules when there is a severe threat to the attorney's life or honor, or when disclosure is necessary for the attorney's own defense.[191]

Additionally, the protection granted to the lawyers' workplace, work materials, and communications cannot act as a shield to criminal activities. Therefore, if there is evidence of crimes committed by lawyers, Brazilian law allows searches within their workplaces and seizure of their work materials. In this case, a search depends on a judicial warrant, must be witnessed by a representative of the Brazilian Bar Association, and is limited to the evidence pertaining to the attorney's involvement in criminal activities.[192]

When lawyers are involved in criminal activities and lose the protection that attaches to their work place and materials, searches may not comprise any document or object that belongs to the lawyer's clients (unless a specific client is involved in the same criminal activities as those of the lawyer).[193]

Likewise, if a search is conducted at the client's premises, it is also understood that any correspondence between client and lawyer cannot be seized or used as evidence (unless the lawyer has also been directly involved in the criminal activity). Generally, if there is evidence that a crime was committed by the client, a seizure of documents held by the client's attorney is nonetheless not allowed, unless such documents are considered to be *corpus delicti*, the foundation or material substance of a crime.[194]

A significant debate exists about whether records, interceptions, and wiretaps of communications between clients and their attorneys should be allowed as evidence during investigations of criminal activities involving the client. On one hand, the Brazilian Supreme Court (*Supremo Tribunal Federal*) has held that, as a general

[191] Brazilian Bar Association Ethics Code, art. 37.

[192] Federal Law no. 8,906/1994, art. 7, §6.

[193] Federal Law no. 8,906/1994, art. 7, §7.

[194] C.P.P., art. 243, §2.

rule, records of communications between the defendant and third parties can be admitted as evidence even if such communications were recorded by the defendant without the consent, or even without the awareness of the third parties involved. However, the Supreme Court also clarified that this rule does not apply to communications protected by professional secrecy rules, including those related to the attorney-client privilege.[195]

On the other hand, both the Brazilian Supreme Court (*Supremo Tribunal Federal*) and the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*) have recently held that there is no violation of the attorney-client privilege when wiretapping is carried out pursuant to Federal Law no. 9,296 of 1996, in circumstances where the client is the subject of the investigation, and interceptions are accidental[196] or there is evidence that, by rendering legal services, the attorney is also involved in criminal activities.[197] The Brazilian Bar Association disagrees with this view, and has recently decided to challenge the above mentioned decisions. A resolution has not yet been reached.[198]

[195] *See* S.T.F., Inq 4483/DF, Relator: Min. Edson Fachin, 30.8.2017, D.J.e., 12.9.2017 (holding that, in the context where defendants presented as evidence audio devices containing conversations recorded between them and third parties, and public prosecutors were later able to recover conversations that were deleted from the same devices before they were presented as evidence, conversations between such defendants and their attorneys should not be admitted as evidence).

[196] *See, e.g.*, S.T.J., AgRg no AREsp no. 457.522/SC (2014/0001937-6), Relator: Min. Rogerio Schietti Cruz, 6a Turma, 10.11.2015, D.J.e., 25.11.2015 (holding that the attorney-client privilege was not violated when a conversation between the spouse of the client and the attorney was intercepted during a lawful wiretapping procedure); S.T.J., REsp no. 1257058/RS (2011/0124761-0), Relator: Min. Mauro Campbell Marques, 2a Turma, 18.8.2015, D.J.e., 28.8.2015 (holding that there was no violation to attorney-client privilege as a result of a wiretapping procedure that accidentally caught a conversation with the client and her attorney, with no intention to investigate the lawyer's professional activities); S.T.J., RHC no. 26.704/RJ (2009/0169881-9), Relator: Min. Marco Aurélio Bellizze, 5a Turma, 17.11.2011, D.J.e., 6.2.2012 (holding that there was no violation to the attorney-client privilege by an incidental interception of a conversation between client and her lawyers during a wiretapping procedure).

[197] *See, e.g.*, S.T.J., RHC no. 51487/SP (2014/0231266-0), Relator: Min. Leopoldo de Arruda Raposo, 5a Turma, 23.6.2005, D.J.e., 24.9.2015 (holding that an attorney's telephone communications may be intercepted if there is evidence that she is involved in criminal activities); S.T.J., HC no. 210351/PR (2011/0141397-2), Relatora: Min. Marilza Maynard, 6a Turma, 19.8.2004, D.J.e., 1.9.2014 (holding that telephone communications between clients and lawyers may be intercepted if there is evidence that they are both involved in criminal activities as co-conspirators); S.T.F., HC no. 9609/MT, Relatora: Min. Ellen Gracie, 2a Turma, 17.11.2009, D.J.e. 232, 10.12.2009 (holding that telephone communications between clients and lawyers may be intercepted if there is evidence that the attorney is involved in criminal activities related to her legal activities); S.T.F., HC no. 106225/SP, Relator: Min. Marco Aurélio, 1a Turma, 7.2.2012, D.J.e 59, 21.3.2012 (holding that the attorney-client privilege cannot be used as a shield for criminal activities and that any information about criminal activities found in telephone communications lawfully intercepted may be used as evidence in criminal procedures).

[198] *See* Federal Board of the Brazilian Bar Association (Conselho Pleno do Conselho Federal da OAB), Proposição no. 49.0000.2017.005674-8/COP, 19.9.2017, D.O.U. de 21.9.2017, Seção 1: 183 (suggesting that the Brazilian Bar Association questions the Brazilian Supreme Court about the clients' rights to communicate in private and share confidential information with their attorneys).

Waivers of Privilege

Brazilian law asserts that clients are entitled to voluntarily waive their own privilege whether by disclosing confidential information to third parties or authorizing attorneys to do so. For instance, there is no violation of the attorney-client privilege when the client records their own conversation with their attorney and then uses it as evidence in future litigation (regardless of whether the attorney was aware that she was being recorded).[199]

Regardless of the clients' waiver, under civil and criminal procedures, even if authorized or requested by their clients, lawyers still have the right to refuse to testify on certain matters subject to privilege. Brazilian law does not provide for any specific rule about partial waivers, and there is no guidance on how lawyers should protect inadvertently disclosed confidential information. Notwithstanding the above, unless reasonably justified, the undue disclosure of confidential information obtained as a result of professional activities is considered a crime.[200] Such disclosure is also subject to discipline by the Brazilian Bar Association.[201]

[199] *See, e.g.*, S.T.J., RHC no. 48397/RJ (014/0125193-6), Relator: Min. Nefi Cordeiro, 6a Turma, 6.9.2016, D.J.e., 16.9.2016 (holding that conversations recorded by one of the persons taking part therein can be used as evidence in criminal procedures and do not violate attorney-client privileges).

[200] C.P., art. 154.

[201] Federal Law no. 8,906/1994, art. 34, VII.