ICLG

The International Comparative Legal Guide to:

Business Crime 2014

4th Edition

A practical cross-border insight into business crime

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The Shrinking Scope of Privilege in Multi-Jurisdictional Investigations

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Gary DiBianco

1. Introduction

The proliferation of multi-jurisdictional corporate investigations has brought into sharp focus the varying levels of protection afforded to legal advice and communications between a company and its counsel. While Anglo-American concepts of privilege tend to afford broad protection for communications with internal and external counsel in furtherance of legal advice, other legal regimes' systems provide lower levels of protection. Given that legal communications have increasingly became viewed as relevant evidence in regulatory investigations, a failure to appreciate variations among privilege protections can truly be a trap for the unwary.

This chapter explores two crucial aspects of privilege protection: the scope of communications protected; and rules governing waiver of privilege. The article concludes with discussion of practical steps that can be taken in corporate investigations to protect a company's ability to communicate candidly with its counsel to seek legal advice in the context of corporate investigations.

2. Scope of Protection

United Kingdom: Legal Professional Privilege

Legal professional privilege ("LPP") is based on the concept that clients should be able to be open and candid with legal advisors, without concern for disclosure in a manner that may be detrimental to the client. Under English law, LPP is considered an absolute right that cannot be abrogated subject to other interests. Two groups of communications are protected within LPP: advice privilege and litigation privilege. Under English law, protection for privileged communications extends both to external counsel (solicitors and barristers) and in-house lawyers.

For a communication to be covered under advice privilege, the communication must be between a lawyer and client, it must be confidential, and it must be for the purpose of seeking or providing legal advice. The communication must be in a legal context, involving the lawyer's skills and directly related to the performance of the lawyer's duties [Passmore on Privilege 2nd edition 2006].

Litigation privilege is wider than advice privilege and protects confidential communications made during or reasonably in anticipation of litigation, between a lawyer and client, lawyer and agent, or lawyer and third party. To be protected, the communications must be for the sole or dominant purpose of litigation, in the context of seeking or giving advice, obtaining evidence for litigation, or obtaining information leading to evidence for litigation.

Although LPP protects advice a lawyer provides to a client on avoiding committing a crime or that proposed actions could lead to criminal liability, [*Bullivant v. Att-Gen of Victoria* [1901] AC 196; [*Butler v. Board of Trade* [1971] Ch 680], LPP does not cover communications that form part of a criminal or fraudulent act. Nor does LPP apply to communications that are in furtherance of advice with the intention of carrying out an offence [*R v. Cox & Railton* (1884) 14 QBD 153].

United States: Attorney-Client and Work Product Privileges

In the US, legal privilege is similarly divided into two protections, the attorney-client privilege and the attorney work product privilege. The attorney-client privilege is analogous to the UK advice privilege, and protects communications, between client and attorney, in confidence, for purposes of seeking, obtaining or providing legal advice. The attorney-client privilege does not protect the underlying facts communicated; it protects only the communications themselves. An attorney's "mere presence" does not create the privilege, and thus bringing an attorney into correspondence dealing with business issues unrelated to the giving of legal advice would not render a communication privileged. As in the UK, US attorney-client privilege does not protect communications made for the purpose of committing a crime or fraud.

The US attorney-work product privilege is analogous to the UK litigation privilege, and protects material prepared by an attorney during or in anticipation of litigation. As in the UK, this may include communications with and materials prepared by attorney's agents and consultants. The work-product privilege is further categorised into opinion work product, containing attorneys' mental impressions, legal theories, strategies, and tactics; and fact work product. Opinion work product has nearly absolute protection from disclosure and the privilege cannot be overridden; fact work product generally is protected from disclosure absent a showing by an adverse party of need and the inability to otherwise obtain the information.

European Continental Systems

European continental systems generally follow an administrative view of privilege that is based on specific law and regulation, rather than on the fundamental right of a client to consult unimpeded with counsel. Many European continental systems allow privilege to be claimed only where counsel providing advice is admitted to the bar association and is independent of the entity to which counsel is providing advice. Accordingly, some continental systems do not

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extend privilege to in-house counsel. For example, the legal privilege under German law is narrower in its scope than Anglo-American law's attorney-client privilege, and the German legal privilege applies only to lawyers admitted to a German Bar Association. Moreover, the prevailing view in German courts is that legal privilege does not apply to a company's internal counsel, because internal counsel lack independence from the company as a result of their employment relationship with the company.

Akzo Nobel

The European Court of Justice's ("ECJ") 2010 decision in the Akzo Nobel competition investigation [*Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* (Case C-550/07 P), 14.09.2010] follows the continental view of privilege and highlights the difficulties of protecting legal advice from disclosure in a multi-jurisdictional investigation.

The facts underling the *Akzo Nobel* case go back to February 2003, when European Commission Competition officials assisted by representatives of the UK Office of Fair Trading carried out an inspection at the premises of Akcros Chemicals Ltd. (Akcros), a UK subsidiary of Akzo. During the inspection, the Commission officials took copies of several documents, including emails exchanged between Akcros' general manager and Akzo's in-house coordinator for competition law. At the time, the in-house competition counsel was enrolled as an Advocate of the Netherlands Bar and was employed by Akzo on a permanent basis as a member of its legal department.

Akzo asserted that the emails were covered by legal professional privilege; a claim which the Commission rejected. On initial appeal, the European Court of First Instance ("ECFI") in September 2007 held that communications between companies and their in-house lawyers were not protected by legal advice privilege because in-house lawyers are not "independent (structurally, hierarchically and functionally)". [*Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* (Rs. T-125/03 and T-253/03, Slg. 2007, II-03523).]

In September 2010, the ECJ upheld the 2007 decision by the ECFI [*Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* (Rs. T-125/03 and T-253/03, Slg. 2007, II-03523)]. In addition to finding that communications between companies and their in-house lawyers were not protected by legal professional privilege, the decisions also made clear that only internal documents prepared exclusively and with the sole purpose of obtaining external legal advice and the directly related correspondence were privileged. That is, merely discussing a document generated by in-house lawyers with external lawyers will not render the communication privileged.

In affirming finding the communications unprotected by legal professional privilege, the ECJ rejected a number of arguments put forth by Akzo Nobel and national bar associations, including that national law in several jurisdictions had evolved to protect communications with internal counsel and that the status of a communication as privileged should not depend on whether the communication is later sought by a national competition authority or sought by the European Commission. The ECJ decision therefore has been viewed as inflexible and has prompted corporate entities to plan conservatively, by assuming that even where a national authority would recognise the privileged nature of communications with internal counsel, the Commission would view those same communications as non-privileged.

Belgacom

In March 2013, the Brussels Court of Appeal broke with the reasoning in *Akzo Nobel* in *Belgacom v. Auditorate of the BCA*, Case 2011/MR/3, Brussels Court of Appeal. There, the Court of Appeal recognised protection for legal advice rendered by in-house counsel in the context of an investigation by the Belgian Competition Authority.

The case arose following a raid of Belgacom's premises by the Belgian Competition Authority in 2010, during which the Competition Authority seized communications that included legal advice provided by Belgacom's in-house counsel. In challenging the seizure, Belgacom and the Belgian Institute for Company Lawyers ("IJE/IBJ") argued that the *Akzo* ruling was not applicable to investigations carried out by national competition authorities, and that in-house counsel legal advice was protected from seizure by Belgian statutory law and/or Articles 6 and 8 ECHR (protecting the right to a fair trial and the right to privacy, respectively), even when national authorities are applying EU law.

The Court of Appeal affirmed that national law applied to a situation when a national authority carries an inspection at the request of the EU Commission, although not when it merely assists EU officials during an inspection carried out by the Commission. Following from the choice of law question, the Court of Appeal held that under Belgian law, advice provided by in-house counsel was privileged. The court affirmed that legal advice includes communications in between the business persons and company counsel in furtherance of legal advice, as well as covering final legal opinions provided by in-house counsel.

In reaching its conclusions, the Court emphasised that in-house counsel fulfil a task of general interest, which is to "ensure a correct application of the law by companies". In furtherance of that task, which results in the provision of legal advice, communications with in-house counsel deserve protection. In view of the task of general interest fulfilled by in-house counsel, denying a protection equivalent to legal privilege to their legal advice would amount to a disproportionate interference with the right to privacy benefiting companies pursuant to Art. 8 ECHR. The Court of Appeal expressly rejected the applicability of the 2010 *Akzo* ruling in national competition proceedings.

3. Type of Communications Protected

A relatively recent legislative change in German law illustrates the importance of considering what type of communications will be subject to privilege, in addition to the above-discussed issue of whether those communications are with internal counsel or external counsel. Prior to February 2011, it was unclear under German law whether work product relating to an internal investigation of a corporate entity was protected from seizure by authorities. This was because unlike the Anglo-American attorney-client privilege, which provides the same standard of protection in all types of proceedings (criminal, administrative or civil), the level of protection in Germany varies by nature of proceeding; different forums have differing regulations on the scope of the legal privilege. Prior to February 2011, investigative work product was protected from seizure by authorities only where there was potential criminal liability for the subject of the investigation. However, German law generally does not provide for criminal liability of corporations; liability generally is imposed under administrative provisions. Thus, in a proceeding where criminal liability could not be imposed, communications with counsel were not protected from seizure based on privilege. As a result of legislation that entered into force on 1 February 2011, the German Code of Criminal Procedure governing privilege, sec. 160a, para. 1, now applies to all external counsel, not only counsel who are designated as defence counsel in an investigation in which criminal liability can be imposed. Accordingly, investigation material in the custody of

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external counsel representing a company in connection with an investigation, even if only administrative liability could be imposed, are now protected from search and seizure. It should be emphasised, however, that this protection applies only to external counsel; materials on the premises of the corporate entity, even if in the files of its in-house counsel, could be subject to seizure except in very limited circumstances.

4. "Selective" Waiver

A separate issue frequently arises in investigations when a corporation perceives a benefit in sharing information gathered by its counsel with external regulators. Such cooperation is expressly encouraged by prosecutorial guidance in the United States, and UK regulators have conveyed that in seeking to resolve investigations of corporate misconduct, they would take into account a company's willingness to disclose internal investigation findings. In other jurisdictions, a company may receive amnesty for disclosure to authorities, or could have disclosure obligations. However, a company that shares otherwise privileged internal investigation findings with regulators likely will want to preserve privilege as to other external parties, such as private litigants.

Courts in the United Kingdom have recognised the possibility that privilege may be waived for a specified and limited purpose without entirely vitiating the privilege. In the United States, however, case law has evolved such that companies generally should be cautious of the ability to sustain a claim of "selective waiver".

United Kingdom

In general, if privileged information is disclosed to a third party in circumstances where that information can no longer be said to be confidential, then the privilege will be lost. However, the English Courts have addressed situations where a privileged communication has been deliberately disclosed to a governmental authority without any intention on the part of the disclosing party to waive privilege over the communication as to other litigants.

In particular in *British Coal Cooperation v. Dennis Rye Ltd* (No. 2) (C.A.) [1988] 1.W.L.R. 1113, the plaintiff had investigated overcharging by one of its suppliers with a view to taking legal proceedings against it. Copies of privileged reports and other material which resulted from its investigation were made available to the police who were also investigating the defendants' conduct. A criminal prosecution followed in the course of which some of the privileged material made available by British Coal was disclosed by the police to the defendants. When the criminal proceedings concluded, British Coal instituted civil proceedings against the defendants and applied for the return of all its privileged materials held by the defendants. The Court of Appeal held that because British Coal made the documents available to the police for a limited purpose only, namely to assist in the conduct of a criminal investigation, the action could not be construed as a waiver of any rights available to it in the civil action. Because existing case law does not provide a definitive rule as to the operation of a "selective waiver" doctrine in the UK, disclosure of privileged communications should ideally be undertaken pursuant to agreed terms that clearly express the intended limits of the disclosure.

United States

In the United States, the doctrine of selective waiver of privilege similarly is intended to permit a party to maintain an assertion of privilege over specific materials with respect to a third party even though the specific privileged materials have been voluntarily produced for a limited purpose in another proceeding, often to a government agency in the context of a regulatory or criminal investigation. Under this theory, the waiver would only be effective for the specified purpose for which the privileged materials were produced to the government agency, and would not waive the privilege with respect to subsequent litigation. There is considerable inconsistency between the US federal circuit courts on the selective waiver doctrine. The first and only federal circuit to adopt fully the selective waiver doctrine is the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (*en banc*). Other circuit courts considering the selective waiver doctrine either have rejected the broad formulation articulated by the Eighth Circuit or adopted intermediate positions that permit selective waiver only under certain circumstances.

In *Diversified Industries*, the Eighth Circuit considered whether a defendant company's prior disclosure of attorney-client privileged materials to the US Securities and Exchange Commission ("SEC") constituted a waiver of the privilege. The Eighth Circuit held that the materials remained privileged as to a plaintiff in a related civil proceeding despite the defendant's surrender of those materials to the SEC. The Eighth Circuit explained that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders". *Id.* at 611. The defendant company and the SEC had not entered into a confidentiality agreement.

The Second Circuit's decision in *In re Steinhardt Partners*, 9 F.3d 230 (2d Cir. 1993) illustrates the intermediate position on selective waiver. In a civil class action, defendants had refused to produce a memorandum prepared by their attorneys that was previously submitted to the SEC. *Id.* at 232. The Second Circuit held that the defendants waived any work-product protection when they produced the materials to the SEC. *Id.* at 235. However, the court expressly "decline[d] to adopt a per se rule that all voluntary disclosures to the government waive work product protection," instructing lower courts to consider the issue on a case-by-case basis. *Id.* at 236. Importantly, the court found that "[e]stablishing a rigid rule would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials". *Id*.

The Third Circuit's position is exemplary of those US federal courts that have rejected the doctrine of selective waiver. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991). After an extended analysis of the "celebrated and controversial selective waiver theory fashioned by the Eighth Circuit" in Diversified Industries, the Third Circuit held that "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose". *Id.* at 1425. The court also rejected the argument that the defendant's confidentiality agreement with the Department of Justice ("DOJ") precluded waiver, noting that under traditional waiver doctrine, a voluntary disclosure to a third party waives the privilege even if the third party agrees not to disclose the communications to anyone else. *Id.* at 1427.

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5. Practical Steps

Every situation has particular nuances and a privilege analysis must be reasoned and on a case-by-case basis. A chief concern with privilege issues is the retroactive effect of seizure or waiver: communications that are created with an understanding that they will be protected from disclosure are later seized or determined not to be protected. Accordingly, in planning how advice will be given in an investigation, it is prudent to take an initially conservative view of what will be protected from disclosure, and exercise care in the creation and communication of core attorney opinions and analysis.

Given that investigations frequently involve ongoing strategic legal advice, as well as historical legal advice on the underlying issues, it is important to segregate communications regarding present advice from those involving past advice. If such segregation is maintained, a company would have the option to disclose historical legal advice (if such disclosure would benefit the company's position in relation to external regulators) while preserving privilege as to ongoing advice.

Because information gathered during employee interviews is frequently sought by external regulators, it is important to establish and follow a protocol for conducting employee interviews and memorialising the content of those interviews that takes into account: (a) local privilege rules; (b) headquarters privilege rules; and (c) privilege rules in jurisdictions in which regulatory investigations or litigation are likely.

Finally, in advance of creating interim or final reports on investigative findings, a company and its counsel should carefully consider who will receive such reports and the form that such reports will take. Factual reporting may be subject to a lower level of privilege protection than strategic legal advice, so it may be advantageous to have factual and legal issues segregated from one another, so that even if factual information is disclosed (either voluntarily or compelled), the company could maintain an argument that the legal advice remains privileged. When reporting to external regulators, a company and its counsel should carefully review submissions to regulatory bodies with an understanding that the submissions are likely to be shared among regulators and could be accessible to private litigants.

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