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IN THIS ISSUE

This article examines the application of the attorney-client privilege in the context of international law departments. U.S. in-house counsel will find the guidance helpful as they interact with colleagues in countries with privilege laws unique from the U.S. system.

Privilege Issues for In-House Lawyers—Foreign and Domestic—in U.S. Litigation

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For all of the rules, statutes, and common-law decisions adopting and applying the attorney–client privilege, the privilege's application in the corporate setting remains an enigma. And adding in-house lawyers into the privilege mix only increases its perplexity. American law acknowledges the protections of an in-house attorney–client privilege, but "what is unclear is exactly how far this protection extends regarding the corporation's employees and agents." *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129, 1141 (Md. Ct. App. 1998).

The privilege protection for corporate-employee communications becomes even more suspect within multinational corporations with foreign-based in-house attorneys. Choice of law and other challenging issues arise when employees communicate with foreign in-house lawyers and third parties later challenge those putatively privileged communications in U.S.-based litigation. Courts recognize that "[d]efining the scope of the privilege for in-house counsel is complicated," *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994), and in-house lawyers, whether foreign or domestic, should too.

U.S. Litigation and Foreign In-House Counsel

With the plethora of corporations with operations and lawyers spread among the United States and multiple foreign countries, the question arises how U.S. federal and state courts will assess privilege issues pertaining to communications between a corporation's employees and its foreign-based in-house counsel. And answering this question requires discussion of two concepts: whether the foreign country recognizes an evidentiary privilege for in-house lawyers; and conflicts-of-law rules governing privileges between the United States and the foreign country at issue.

A country-by-country in-house privilege review is beyond the scope of this article, but several foreign countries do not recognize an evidentiary privilege governing communications between a company's non-lawyer employees and its in-house lawyers. The European Union, for example, rejected an in-house counsel privilege in *Akzo Nobel Chem. Ltd. v. European Commission*, 2010 EUR-Lex CELEX LEXIS 62007J0550, P44 (Sept. 14, 2010).

But when does American or foreign law apply? There is an overall dearth of law on this subject, particularly at the state-court level, but federal courts within the Second Circuit provide the most developed law on the subject. These courts apply a "touch base" approach to conflict-of-laws issues that arise from a corporate employee's communications with foreign in-house lawyers.

The touch-base analysis requires a determination as to which country has the most compelling or predominant interest in whether the communication should remain

confidential. *Astra Aktiebolag v. Andrx Pharm., Inc*., 208 F.R.D. 92 (S.D.N.Y. 2002). Federal discovery rules and standards govern communications that "touch base" with the United States while the applicable foreign-law standard governs communications related solely to foreign matters. *Golden Trade, S.r.L v. Lee Apparel Co*., 143 F.R.D. 514 (S.D.N.Y. 1992). Communications relating to U.S. legal proceedings or advice on American law "touch base" with the United States and, therefore, American privilege law applies. *Gucci Am., Inc. v. Guess?, Inc*., 271 F.R.D. 58, 65 (S.D.N.Y. 2010). Whether a communication touches base with the United States is a fact-specific inquiry and requires evidence that the communication "has more than an incidental connection to the United States." *VLT Corp. v. Unitrode Corp*., 194 F.R.D. 8, 16 (D. Mass. 2000).

Communications regarding a foreign legal proceeding or foreign law requires application of foreign privilege law. *Gucci*, 271 F.R.D. at 65; *Anwar v. Fairfield Greenwich Ltd.*, 2013 WL 6043928 (S.D.N.Y. Nov. 8, 2013). If the touch-base analysis dictates that foreign law applies, then United States courts may need expertise to explain the foreign law's privilege-related protections. Even where foreign privilege law applies, courts may not apply that purported privilege unless it is comparable to an evidentiary privilege rather than a lesser confidentiality standard. *Gucci*, 271 at 67.

In sum, there is no privilege for communications between a corporate employee and a foreign in-house attorney if the communication concerns foreign law and that law rejects an in-house counsel privilege or the purported privilege is incongruent with the United States' evidentiary-privilege concept. But the privilege covers an employee's communication with a foreign in-house attorney where it pertains to foreign law or a foreign proceeding and that foreign jurisdiction recognizes a privilege comparable to the United States' attorney–client privilege, or it pertains to American-law issues or proceedings.

Differing Standards for U.S. Corporate Attorney–Client Privilege

Corporations with in-house attorneys based outside the United States will likely endeavor to have American privilege law apply to employee–in-house attorney communications, but application of the corporate attorney–client privilege in U.S. federal and state jurisdictions is far from uniform. States employ different doctrines that govern whether the privilege covers a corporate employee's communications with outside or in-house counsel. Federal courts apply a single doctrine when cases arise under federal-question jurisdiction, but must apply non-uniform state privilege law in diversity-jurisdiction cases. And conflict-of-laws rules affect courts' application of privilege law—a state court may apply another state's privilege law if the putatively privileged communication pertains more to

the other state's interest. In short, even where U.S. privilege law may apply, the corporate lawyer must understand the differences and intricacies of the various aspects of the corporate attorney–client privilege.

When a corporation asserts the attorney–client privilege, some states assess the privilege claim under the so-called "control group" test, which holds that the privilege does not apply to all employees' communications with in-house lawyers, but rather only to communications of those employees within the company's control group. The control group consists of top management persons who have the responsibility of making final decisions, and employees whose advisory role to top management in a particular area is such that management would not make a decision without their advice or opinion. *Sullivan v. Alcatel-Lucent USA, Inc.*, 2013 WL 2637936 (N.D. Ill. June 12, 2013). The control-group test is relatively narrow and leaves unprotected communications between a corporation's lawyers and its non-decision-making employees.

Federal common-law and several states follow the subject-matter test, which provides that "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994). The subject-matter test is more comprehensive than the control-group analysis because it applies to all employees so long as they communicate with the in-house lawyer about matters within the scope of their employment.

In sum, some jurisdictions follow a narrow privilege doctrine for corporate communications, others follow a broader test, and still many other jurisdictions remain undecided on the issue. These various applications create uncertainty for in-house lawyers communicating with employees because they can rarely predict whether the jurisdiction in which a party may challenge those communications will take a broad or restrictive approach.

U.S. Law—Heightened Burden for In-House Lawyers

The lack of a uniform United States privilege doctrine for corporate communications is but one of the privilege uncertainties for in-house lawyers. Courts in the United States generally presume that the privilege protects communications between a corporation's employee and its outside counsel. *U.S. v. Chen*, 99 F.3d 1495 (9th Cir. 1996). These communications are almost certainly made for purposes of outside

counsel providing legal advice to the company, with little risk that the employee sought business advice. Courts do not apply the same presumption when a corporate employee communicates with in-house attorneys. *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002). In fact, many courts, citing in-house counsel's dual business and legal concerns, presume that an employee's communication with an in-house lawyer is more likely business-related than legal-related. *Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382 (N.D. Okla. 2010).

Whether the attorney–client privilege protects from compelled discovery an employee's communication with an in-house attorney depends on whether the communication meets certain threshold privilege requirements. The in-house lawyer must first establish that the document over which she seeks protection is a communication—the privilege only protects communications, not fact-related documents. For example, the privilege likely does not protect minutes from a corporate-committee meeting, but likely protects an employee's communications to in-house counsel about those minutes. *Neuder v. Battelle Pacific Nw. Nat'l Lab.*, 194 F.R.D. 289 (D.D.C. 2000).

Second, in-house counsel must prove that the communication was confidential at the time of its creation, but also that the parties intended for the communication to remain confidential. The intent-to-remain-confidential prong is crucial; the in-house lawyer should implement measures to ensure that a confidential communication remains so by, for example, monitoring its filing location and instructing recipients not to disseminate communication. *Se. Pa. Transp. Auth. v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008).

The third threshold privilege element requires evidence that the employee communicated with in-house counsel for the purpose of the lawyer rendering legal advice to the company. Courts not only essentially apply an adverse presumption that in-house attorney–employee communications are business related, they also impose a "heightened scrutiny" when considering the rendering-legal-advice element. *Kincaid v. Wells Fargo Sec., LLC*, 2012 WL 712111 (N.D. Okla. Mar. 1, 2012). It is therefore incumbent upon the in-house attorney to document and ultimately prove that her employee communications arose for legal purposes.

The reality is that many employee communications occur for a mix of business and legal reasons, and courts must evaluate these dual-purpose communications for their privilege rulings. In this evaluation, courts apply two standards to determine whether these dual–purpose communications receive privilege protection—the "because of" standard and the "primary purpose" standard.

The because-of standard requires in-house lawyers to prove that, under the totality of the circumstances, including the nature of

the document and the factual situation, the document was prepared because of litigation or a legal purpose. Courts borrow this standard from the work–product doctrine, but apply it where communications involve both business and legal advice. *See* In re *CV Therapeutics, Inc. Sec. Litig*., 2006 WL 1699536 (N.D. Cal. June 16, 2006). Under the primary-purpose standard, the privilege protects in-house lawyers' communications involving business and legal advice if the primary purpose of the communication is to obtain or give legal advice. *See U.S. v. ChevronTexaco Corp*., 1996 WL 264769 (N.D. Cal. May 30, 1996).

The "because-of" standard requires a lesser burden of proof, demanding that an in-house lawyer simply show that he or the employee prepared the communication because of legal issues. The fact that the communication included or touched on business concerns will not obviate the privilege in jurisdictions following this standard. The primary-purpose standard, on the other hand, requires a higher burden of proof, focusing on whether each communication was for the primary purpose of rendering legal advice. This test is more exclusive, with courts effectively requiring in-house lawyers to show that the communication's sole purpose was legal-related issues.

United States privilege law is in its early developmental stages regarding which of these dual-purpose standards will emerge as the majority test. For example, the federal court in Nevada, in a thorough opinion, recently evaluated both standards and applied the primary-purpose standard to in-house counsel email communications. Although noting that the because-of standard had supplanted the primary-purpose standard in some jurisdictions, the court found that the Ninth Circuit had not done so. And noting that "merely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney–client privilege," the court reviewed each challenged email to determine whether the primary purpose of its creation was legal-advice related. *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 630 (D. Nev. 2013).

The take-away is that courts apply heightened scrutiny to communications between a corporation's employees and its in-house lawyers. In-house counsel must remain cognizant of this scrutiny at the time of engaging in employee communications, and take precautions to increase the chances that a court reviewing the communications will agree that they were confidential when made and remain so, and their primary purpose was to permit the lawyer to provide legal advice to her company.

Advising and Communicating with Subsidiaries

The question arises whether the corporate attorney–client privilege covers communications between a corporation's in-house lawyer and employees of its subsidiary or affiliate. The general rule is that, assuming the communication satisfies

the threshold requirements discussed above, the privilege covers a company's in-house counsel communications with employees of a sufficiently related company. For example, the Restatement comments that, "when a parent corporation owns a controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary." Restatement (Third) Law Governing Lawyers, §73 cmt. d. And courts consider the corporate client to include not only the company that employs the in-house lawyer, but also the parent, subsidiary, and affiliate corporations, *U.S. v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1979), but only if there is sufficient controlling interest. *Moore v. Medeva Pharm., Inc*., 2003 WL 1856422 (D.N.H. Apr. 9, 2003).

So, what degree of relationship does the privilege require? In-house lawyers should look to the joint-client doctrine and the common-interest doctrine for assistance, and the court's decision in *SCR–Tech LLC v. Evonik Energy Servs., LLC*, 2013 WL 4134602 (N.C. Super. Ct. Aug. 13, 2013), provides guidance. Ebinger, a corporation, owned 37% of SCR–Tech GmbH which, in turn, owned 100% of SCR–Tech LLC. Ebinger, SCR–Tech LLC, and legal counsel engaged in several communications pertaining to negotiations that ultimately led to the sale of SCR–Tech LLC to an unrelated third entity. In subsequent litigation, the defendant moved to compel these communications, claiming that Ebinger was not SCR–Tech LLC's parent for purposes of extending the attorney–client privilege. The court disagreed and invoked joint-client concepts and the common-interest doctrine to support its decision.

The court noted that many lawyers and courts improperly interchange the joint-client doctrine and the common-interest doctrine (or joint-defense doctrine). These concepts are distinct and contain "analytical differences." The joint-client doctrine focuses on client identity and the relationship between two entities. The common-interest doctrine, however, focuses on the common legal interests between two entities regardless of their relationship.

Rather than drawing a bright-line rule that a corporation must own a certain percentage of an affiliated corporate entity before the joint-client doctrine applies, the court looked at the totality of circumstances to determine whether the entities "are sufficiently united such that they may properly be considered joint clients." If the degree of common ownership is sufficient to evidence control of the subject matter of the putatively privileged communications, then the court will apply the joint-client doctrine and consider both entities as one client for privilege purposes. If the circumstances reveal that the relationship does not rise to that level, then the court will look more at the common legal interest between the two entities to determine whether the common-interest doctrine protects the sharing of privileged information.

The *SCR–Tech* court followed what is, in effect, a proportional analysis. The privilege's application will not depend on whether one corporate entity owns or controls a certain percentage of another. Rather, the court will look at the identity of legal interest, including the percentage ownership, to determine whether it should consider both entities as one client for privilege purposes. The greater the ownership interest, the greater likelihood of sustaining the privilege under the joint-client doctrine. The lesser the ownership interest, then the less likelihood that the joint-client doctrine applies.

In-house lawyers should note this proportional analysis and consider entering into a common-interest (or joint-defense) agreement with an affiliated company. Even if a court later rules that the joint-client doctrine does not apply, then the corporate entities can rely upon the common-interest doctrine to protect the sharing of privileged communications.

Interviewing Corporate Employees

Whether employees of the in-house counsel's corporate employer or the corporation's subsidiary, in-house lawyers must communicate with them in ways that will increase the chances that the corporate attorney–client privilege protects those communications from discovery. This mandate, however, is not necessarily easy in the uncertain realm of U.S. privilege law.

Like outside counsel, in-house lawyers represent organizational entities through their constituents, meaning through their officers, directors, employees, and agents. Model Rules of Prof'l Conduct R. 1.13. At the time of any given communication with one of these constituents, the in-house lawyer can hardly predict whether a later adverse party will challenge the putatively privileged communication and, if so, whether the restrictive control-group test or the broader subject-matter test will govern the challenge. In-house lawyers also face the real possibility that a corporate employee believes and communicates as if the lawyer is his personal counsel, thereby creating possible conflict-of-interest issues for the in-house lawyer.

Despite the uncertainty, in-house lawyers can implement steps to increase the chances that the attorney–client privilege will protect their corporate-employee communications from successful privilege challenges. In-house lawyers should instruct the employee that the interview is confidential and conducted for purpose of counsel's rending legal advice to the company, and that the attorney–client privilege protects the discussion. The lawyer should specifically instruct the employee regarding how to communicate with her in the future so that he includes appropriate confidentiality and legal-advice language.

The in-house lawyer should also assess whether corporate Miranda warnings, or Upjohn warnings, are necessary. Many employee conversations do not require a

warning, but if so, counsel should inform the employee that she represents the corporation, not the employee, and that the corporation may, in its sole discretion, choose to waive the privilege and disclose the conversation to third parties, including government-enforcement agencies. If given verbally, counsel should prepare and read the warning from a script to ensure consistency, and then attach the script to counsel's interview notes or summary memorandum. And it is preferable to have more than one lawyer present during the interview to refute any subsequent claim by the employee that counsel failed to provide the warning.

The in-house lawyer should consider asking the employee to sign a written acknowledgement that counsel gave the warning. However, counsel should be mindful that asking an employee to sign an acknowledgement may produce a chilling effect on his willingness to provide candid comments. And if the employee asks whether he "needs a lawyer," counsel should, consistent with ethical rules, respond that he cannot advise him whether to obtain counsel but that he has the right to do so.

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