THE ATTORNEY-CLIENT PRIVILEGE AROUND THE WORLD

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With the increasing globalization of companies’ operations comes a corresponding increase in the use of foreign in-house counsel and employees. Although some countries apply the attorney-client privilege as it is applied in the United States, there are other countries that do not apply the privilege to in-house counsel or that do not recognize a privilege at all. This article will provide a brief overview of foreign privilege issues, including choice of law issues that arise in connection with determining which jurisdiction’s privilege law applies to a specific dispute, the law from several key jurisdictions, and practical pointers for dealing with foreign privilege law. Privilege issues are inherently fact specific, so it is important to research specific issues regarding foreign privilege law as they arise.

I. WHICH JURISDICTION’S PRIVILEGE LAW WILL APPLY?

In any dispute over privileged communications, the first step is to determine what law applies — federal common law or state law, and if state law applies, which state’s law should apply. This choice of law analysis is complicated further by the addition of foreign law.

Federal and state courts take a different approach when answering this question. When applying federal law, federal courts apply the “touch base” doctrine to determine if U.S. or foreign privilege law should apply. Under the “touch base” doctrine, “any communications touching base with the United States will be governed by the federal [privilege] rules. . . .” If the communication at issue relates to matters solely involving a foreign country, then the court likely will apply the foreign privilege law. There are circumstances where a federal court will apply United States privilege law on public policy grounds, even if the communication does not touch base with the United States.

If the action is in state court or a federal court is applying state law, the court likely will analyze which state has the most significant contacts with the communication at issue and apply that state’s law to the privilege dispute. Texas applies “the most significant relationship” test, along with a majority of states. On the other hand, there are a few states who apply the law of the place where the wrong occurred to all issues in the litigation, which would include privilege disputes.

It is also important to remember that laws of confidentiality and secrecy are not the same as the testimonial attorney-client privilege in the United States. The attorney-client privilege protects communications from being disclosed, while confidentiality goes to an attorney’s ethical duties. Communications that an attorney is required to keep confidential under an ethical duty may give way to compelled disclosure by a court. This is in contrast to privileged communications, which are protected from compelled disclosure.

II. SURVEY OF PRIVILEGE AROUND THE WORLD

This section summarizes the attorney-client privilege law, if any, in several key jurisdictions. As described above, the determination of the applicable privilege law can be difficult. Additionally,
even if a foreign country or foreign counsel is involved, United States privilege law may still be the applicable privilege law.

**European Union** – The judicial institution for the European Union (EU), the European Court of Justice (ECJ) recognizes an attorney-client privilege for outside counsel but not for in-house counsel. In the case *AM & S Europe Ltd v. Commission*, the ECJ decided that the attorney-client privilege applied only to communications (1) to or by a lawyer “not bound to the client by a relationship of employment” i.e., not in-house counsel; (2) where the lawyer was licensed to practice by the local bar of a member state; and (3) made for the purpose of the client’s defense in relation to Commission proceedings. The party seeking the protection of the privilege had the burden of showing its applicability. The ECJ reaffirmed its holding that the attorney-client privilege does not apply to in-house counsel in *Akso Nobel Chemicals Ltd. v. Commission*. The court found that its holding was consistent with the legal systems of the twenty-seven Member States of the EU, which generally do not apply the attorney-client privilege to in-house counsel.

**United Kingdom** – The “legal advice privilege” in the United Kingdom applies to confidential communications between the lawyer and client made for the purpose of giving or receiving legal advice. “Client” is more narrowly defined than in the United States and does not include a corporation’s employees. There is a separate litigation privilege that applies to documents and communications created for the dominant purpose of use in, or for obtaining evidence for, or giving or receiving legal advice in connection with litigation.

**Canada** – Under federal Canadian law, the privilege is almost identical to the privilege in the United States. It applies to communications between a solicitor and client or their agents and employees made in order to obtain professional legal advice. Unlike in the US, Canadian courts take a broad view of who the corporate client is and have extended the privilege to all employees regardless of the employee’s level in the corporation.

**China** – The attorney-client privilege is not recognized under Chinese law. However, the Law of Attorneys of the People’s Republic of China and the PRC Code of Ethics do require attorneys to keep confidential trade secrets obtained from clients and the privacy of their clients.

**Japan** – There is not a general attorney-client privilege between bengoshi (lawyers in Japan) or benrishi (patent agents in Japan) and their corporate clients. However, in 1998, Japan amended its Code of Civil Procedure to allow a bengoshi or benrishi the right to refuse to testify on information or produce documents obtained in the exercise of professional duties.

**Brazil** – The attorney-client relationship in Brazil is governed by federal law, bar association regulations, and bar association code of ethics, which all apply to both outside and in-house counsel. Statutory provisions protect the communication between attorney and client, including in-house lawyers. The Brazilian Bar Association Code of Ethics and Discipline provides that the relationship is protected by professional secrecy, which can only be violated in cases of: (1) severe threat to life or honor; (2) when attorney is insulted by client; and (3) in self-defense. The privilege also applies to patent agents, known as agentes da propriedade industrial.
**Australia** – The privilege is known as the “legal professional privilege” or the “client legal privilege.” Some states within Australia have passed statutes governing the privilege and others rely on common law, which means the privilege varies from state to state. Generally, the privilege protects confidential communications between a client and a legal advisor that (1) enable the client to obtain, or the advisor to give, legal advice; or (2) with reference to litigation that is actually taking place or within the contemplation of the client.15

**Hong Kong** – In Hong Kong, the attorney-client privilege is often referred to as the legal advice privilege, and aligns with the privilege as it exists in other jurisdictions based on English common law. Currently, there is no Hong Kong decision on the privilege as it applies to in-house counsel, but Hong Kong courts would probably consider the English common law authorities on the topic. As in the United States, exceptions to the privilege apply, such as communications made in furtherance of a crime or fraud.

**III. PRACTICAL TIPS TO HELP PROTECT FOREIGN COMMUNICATIONS**

Although it is not possible to predict how a court will determine any specific privilege issue, in-house counsel can take certain actions to ensure that privileged communications keep their privileged status. These actions include:

- Identify the potentially applicable jurisdictions and review those jurisdictions’ privilege laws. Provide education to managers and staff in the various jurisdictions on the applicable scope of privilege and the best practices for maintaining privilege.

- Develop internal policies for the treatment of specific communications. For example, if a certain area of the business is likely to be litigated in United States federal court, such as U.S. patents, ensure that the communications “touch base” with the United States.

- When communications with foreign entities and employees take place, utilize outside counsel because foreign courts, or United States courts applying foreign privilege law, are more likely to recognize a privilege over those communications than if only in-house counsel is involved.

- Include choice of law provisions in contracts that provide for which country’s law will govern privilege disputes.

- Engage outside counsel on sensitive matters at an early stage. While the inclusion of outside counsel might not guarantee protection of all communications, it will greatly increase the likelihood of a communication being held to be privileged under foreign privilege law.

**IV. CONCLUSION**

The attorney-client privilege is applied in various iterations, or even not at all, across the country. As companies continue to operate on a global basis, it is important to be aware of how privilege is applied in the foreign jurisdictions in which a company operates. For matters that involve attorneys and employees outside of the United States, in-house counsel should analyze which
jurisdiction’s privilege law will apply to the matter, which communications will be privileged, and whether outside counsel should be engaged to increase the scope of the privilege.

ENDNOTES

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