Cross-Border Attorney-Client Privilege Issues

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Agenda

- Overview of privilege in the US
  - Cross-state issues
- Overview of privilege outside US
  - Asia
  - Europe
- EU Court of Justice decision in *Akzo Nobel*
- American courts addressing cross-border privilege issues
- Lessons learned – Maximizing the privilege
Types of Privilege - US

- Attorney-Client Privilege
- Attorney Work Product Doctrine
- Ethical Duty of Confidentiality
- Self-Critical Analysis Privilege
- Common Interest / Joint Defense
- Subject Matter Rules (e.g., Fifth Amendment; Spousal; Doctor-Patient; Priest-Penitent; Executive; Deliberative Process; State Secrets; Law Enforcement; Peer Review)
Attorney-Client Privilege – US (Long)


- (1) asserted holder of the privilege is or sought to become a client;
- (2) person to whom the communication was made
  - (a) is a member of the bar of a court, or his subordinate, and
  - (b) in connection with this communication is acting as a lawyer;
- (3) communication relates to a fact of which the attorney was informed
  - (a) by his client
  - (b) without the presence of strangers
  - (c) for purpose of securing primarily either
    - (i) opinion of law, (ii) legal service, or (iii) assistance in some proceeding, and
  - (d) not for the purpose of committing a crime or tort; and
- (4) the privilege has been
  - (a) claimed, and
  - (b) not waived by the client.
Communication between attorney and client in confidence for purpose of seeking or rendering legal advice
Attorney-Client Privilege (Upjohn) - US


- Two Leading Tests
  - **Subject Matter**: For the purpose of securing legal advice for the corporation.
  - **Control Group**: Communications to employees “whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority.” *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

- Privilege applies to communications with in-house counsel.
“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent.” Fed. R. Civ. P. 26(b)(3)(A)

The opposing party can overcome the protection by showing “substantial need.” Fed. R. Civ. P. 26(b)(3)(A)(ii)

Greater protection for attorney opinions or mental impressions

Applies to work product created by, or at direction of, in-house counsel (Upjohn)
Cautionary note:

– Courts have held duty to preserve documents when attorney asserts work product protection over such documents

  
  • August 1, 2008 - Document sent
  
  • February 2008 - Argued that documents created then were work product
  
  • Court: if litigation was reasonably foreseeable for the purposes of asserting work product protection "it was reasonably foreseeable for all purposes." (Emphasis added)
“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”
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Unauthorized Practice of Law ("UPL") - US

*Mode Rule 5.5(a), Unauthorized Practice Of Law:* “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”

GUCCI
UPL - US

- Moss admitted CA in 1992, goes inactive in September 1996
- Does non-legal work for PWC and McKesson
- Gucci first hires Moss to work in NJ in 2002
- Promoted to in-house counsel in 2003
- Promoted to director of legal services in 2005
- Promoted to vice president, director of legal and real estate in 2005
- Gucci discovers problem in December 2009
- CA license “re-activated” in February 2010
- Gucci fired Moss in March 2010
Were Moss’s communications privileged?

From Magistrate’s opinion, after 4 briefs and 10 affidavits, argument over tests:

– Supreme Court Standard 503, 56 FRD 183, 236 (1972): Is attorney “a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.”

Is inactive member unauthorized?

– What about geographic issue?

Gucci could not “reasonably believe” he was authorized:

– “The record is devoid of evidence that, during Moss’s eight years of employment with the company, Gucci made any effort to ascertain his qualifications as an attorney.”
USDJ Scheindlin rejected Mag. opinion. Starts with United Shoe, “as leading case setting forth the standard for the invocation of the attorney-client privilege.”

California law about requirements of being “an active member of the State Bar” ambiguous and Moss’s belief he was permitted to provide advice “not unreasonable.”

Moss was still “a member of the bar of a court” and “Gucci should not be penalized because its attorney … may not have been ‘authorized to practice law’ based on his ‘inactive’ status as a member of the California bar.”

Rejected Mag. conclusion that Gucci was required to conduct more diligence, as it had a “reasonable belief.”

–Knew he had a law degree
–Handled functions of a lawyer

-Paid CA Bar Membership
-Gucci considered him atty
Privilege Outside the US

- Many countries do not recognize official concept of an “attorney-client” privilege
  - Often mandatory disclosure of specific documents, not broad requests by parties
  - Usually no general obligation to disclose documents that may adversely affect a lawyer’s case
- Although may not have defined privilege, many recognize professional secrecy and confidentiality of correspondence between client and lawyers
- Many foreign jurisdictions do not extend privileges to in-house counsel
  - Varying legal culture and limited numbers of in-house attorneys
Privilege - Asia

- HONG KONG:
  - English case law authority
  - “A solicitor has a duty to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship, and must not divulge such information unless disclosure is expressly or impliedly authorized by the client or required by law or unless the client has expressly or impliedly waived the duty.” (Solicitor’s Guide to Professional Conduct, S8.01)
  - In-house counsel’s communications enjoy privilege same as private lawyers
Privilege - Asia

- SINGAPORE:
  - “No advocate or solicitor shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.” (Evidence Act, S128)
  - Not clear on in-house counsel, but traditionally follows English common law
Privilege - Asia

**CHINA:**
- No attorney-client privilege
  - Foreign attorney-client privilege may not be recognized
- Statutory ethical duty of confidentiality for “clients' private information” and trade secrets, or if client requests, BUT...
  - if a client's activities would jeopardize national and public security, or if a client's actions could cause someone serious personal or property damage, then a lawyer must inform government authorities of those activities, AND…. 
CHINA (cont.)

“I volunteer to become a practicing lawyer of the People’s Republic of China and promise to faithfully perform the sacred duties of a socialist…; to be faithful to the motherland and the people; to uphold the leadership of the Chinese Communist Party and the socialist system; to safeguard the dignity of the constitution and the law; to practice on behalf of the people; to be diligent, professional honest, and corruption-free; to protect the legitimate rights and interests of clients, the correct implementation of the law, and social fairness and justice; and diligently strive for the cause of socialism…!”

• Oath to PRC for newly admitted lawyers
• Swear allegiance to Communist party
• Hierarchy?
Privilege - EU

- All member states in the European Union recognize some form of attorney-client privilege
  - Application and scope vary among 27 member states
  - Legal Professional Privilege (“LPP”)
- Often no civil procedure equivalent to documentary discovery or disclosure
- In-house counsel definitions/rules vary
  - Legal professional registered with bar
  - Legal professional not registered
  - Other rules governing in-house counsel
Privilege - EU

- Majority of EU countries recognize confidentiality obligations between a lawyer and client but do not recognize privilege for in-house counsel. These include:
  - Italy
  - Austria
  - Belgium
  - Finland
  - France
  - Greece
  - Sweden
Some member states do recognize the privilege for inside counsel:

- Germany
- UK
- Netherlands
- Denmark
- Spain
- Portugal

Romania, Greece and Denmark do not distinguish between inside and outside counsel.

Germany, Netherlands, Portugal and Sweden recognize a limited privilege for inside counsel.
EU – AM&S Europe

- EU has its own standards for privilege for cases involving the European Commission
  - European Court of Justice attempted to establish uniform application of principles of EU privilege  
  - Held that confidentiality of written communications between lawyers and clients are covered by LPP *if*:  
    - 1) communication is made for the purpose and interests in the “client’s rights of defense” *and*,  
    - 2) exchange must emanate from “independent lawyers.”
EU – AM&S Europe

AM&S court also implied that the EU does not recognize privilege for attorneys outside of the EU member states:

• The privilege is only protected for a lawyer “entitled to practice his profession in one of the member states” but that “such protection may not be extended beyond these limits.”

• What does this mean for US?
European Court of Justice affirmed determination that company cannot secure confidentiality protection of communications between in-house lawyer and employees. Case C-550/07-P, Akzo Chemicals Ltd v. European Commission (September 14, 2010).

–Did not matter that communications were in preparation for litigation against the company

Court applied the holding in AM&S to determine scope of privilege for EU investigations.
EU - Akzo Nobel

- Facts:
  - EU raid of UK premises of Akzo Nobel in 2003
  - Documents seized included emails between in-house counsel and General Manager
    - In-house lawyer was member of Netherlands Bar
  - Company claimed emails were covered by LPP
  - Commission argued that LPP did not apply because under AM&S, communications must both:
    - a) be made for the purposes of exercising a company’s rights of defense, and
    - b) emanate from independent lawyers
The lower court (Court of First Instance of the European Committees) rejected LPP claim for correspondence with Akzo’s in-house lawyers

Akzo appealed to the European Court of Justice
   –Supported by various bodies representing the interests of legal counsel (e.g., ACC, International Bar Association, European Company Lawyers Associate)
   –British, Dutch and Irish governments
EU - Akzo Nobel

- Holding:
  - Court affirmed Commission’s argument, stating no reason to extend LPP to in-house lawyers and company personnel communications.
  - Applying AM&S rule (communications must emanate from “independent lawyers”), Court reasoned that in-house lawyer cannot be “independent” due to employment relationship:
    “An in house lawyer, despite his enrollment with a Bar or Law Society and the ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client.” (Paragraph 43)
The case does not change or create new law, it merely reaffirms principles laid out in **AM&S**

Court made clear ruling does not affect attorney-client privilege under national law

– *E.g.*, if investigation was conducted under a national competition authority, and not the European Commission, the emails may have been protected by LPP

– However, broad interpretation of EU law indicates that it may apply the same rule beyond competition investigations, to any seizure of documents by European Commission

Many foreign jurisdictions do not recognize privilege for in-house attorneys
For companies subject to scrutiny by EU, communications with in-house counsel may be seized and used as evidence in EU court

  - Applying AM&S, court determined memos not privileged
  - Relied on memos in concluding that John Deere intentionally violated European anti-trust statutes

Under these principles, if documents are created by U.S. in-house counsel, sent to executives in Europe, then seized in EU investigation, may not be privileged
Since U.S. attorney-client privilege is based on assumption that client has a reasonable expectation of confidentiality, litigants may argue that U.S. companies have no reasonable expectation of confidentiality in communications to and from in-house counsel shared with company personnel in Europe because they are subject to seizure by the European Commission.

Akzo Nobel rejected arguments by American intervenors expressing concern about protecting privilege for U.S. in-house lawyers.
EU – Akzo Nobel: Implications

- Akzo Nobel did not resolve issue of whether non-EU external lawyers would be afforded privilege in the course of EU proceedings.

- The Advocate General argued that the EU should not recognize other privileges under EU law:
  - “The [American Corporate Counsel Association] submits that EU law must extend the protection afforded by legal professional privilege even to communications with in-house lawyers who are members of a Bar or Law Society in a third country. . . . That claim must be rejected.”
    (Advocate General Opinion ¶ 189)
EU – Akzo Nobel: Implications

- Different treatment under national laws v. EU law creates potential waiver issues:
  - A party may produce documents to EU officials and then risk waiver under U.S. law
- Different treatment may encourage strategic behavior by authorities of nations where a document would otherwise be privileged
- EU authorities may disclose privileged documents to U.S. or other authorities
In international disputes, where alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, courts defer to the law of the country that has the “predominant” or the “most direct and compelling interest.” *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992).

– Court notes difficulty in applying foreign country’s privilege rules within US discovery
– Comity requires consideration of context

Courts will usually apply the laws of the country in which the privileged communication took place.
US Courts Addressing Foreign Privilege Claims

  - district court held that if a protection privilege was recognized under either foreign or domestic law, parties were entitled to invoke it
  - court held that French in-house counsel’s advice to defendant company was privileged
  - Reasoning was based on a “functional equivalence” test that looked to the training, skill, and certification of the attorneys in the foreign country
    - Did not matter that the French in-house counsel was not member of the bar
US Courts Addressing Foreign Privilege Claims

- Flip side - documents may not be privileged, even if they would be under U.S. law:
  - *Malletier v. Dooney & Bourk, Inc.*, 2006 WL 3476735, at *17 (S.D.N.Y. Nov. 30, 2006): no privilege because communications of French in-house counsel were not privileged under French law, and thus, parties engaged in communications had no expectation that they would be confidential
  - *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69 (S.D.N.Y. 2006), aff’d in part, remanded in part, 239 F.R.D. 351 (S.D.N.Y. 2006): court applied Swiss law and found that communications between Swiss patent agent, his clients, and Swiss in-house counsel were not privileged
Steps to Maximize Privilege Protection

- Familiarize yourself with privilege laws in relevant jurisdiction
- Limit privileged information sent from U.S. in-house counsel to foreign offices
- Limit foreign offices’ access to U.S. legal department files and servers
- Seal and segregate privileged documents
- Involve local outside counsel early
- When circulating external legal advice, do not make any additions or amendments to it and limit any summary of the advice so that it retains LLP.
- Pick up the phone!