

ACC CLE

Slides 1-12 Ana / Intro. & ACP/Work Product in the US

Questions:

Often non-lawyers will assume that they can simply add a lawyer to a communication and that somehow magically turns it privileged. We all know that is not the case.

1. Internal team members continue an email chain and then add in-house counsel. Thoughts on how to handle?
2. What does your in-house team do to educate non-lawyers on what is and is not considered privileged?
3. Is this an area in which we need to be more involved in “policing” the assumptions of privilege?

Slides 13-22 Ana / Introduction to *Azko* and Privilege Issues Abroad

As the world gets increasingly smaller, an increasing number of litigation cases touch on foreign countries – whether it be the location of discovery, satellite litigation, or foreign enforcement actions.

In-house and outside counsel are therefore having to become more sensitive to the privileged nature of communications with employees world-wide.

As we saw in the *Azko* decision, in many parts of the world—particularly in civil law countries—there is skepticism of the application of the privilege to communications b/w in-house counsel and their employees.

1. So let me start with the basic question, am I right? Are in-house counsel in the United States generally paying more attention to this issue or this still something that we need more awareness about?
2. What about your in-house counsel colleagues abroad. Do they bring these issues to your attention? I sometimes worry there is a disconnect. U.S. counsel take for granted that in-house communications are privileged. Foreign counsel take for granted that their communications are subject to discovery because of narrow discovery rules abroad.

Slides 23 / Communications into the US from foreign counsel

[Some courts have held that foreign attorneys who are not licensed to practice in the United States can still invoke the attorney–client privilege. For example, in *Renfield Corp v E Remy Martin & Co SA.*, 98 F.R.D. 442, 444 (D. Del. 1982), the court held that the privilege protects communications with French in-house counsel because, although they are not

licensed in the United States, they are the “functional” equivalent of US attorneys and are able to give legal advice. Other courts have held that communications with foreign counsel are only privileged where parties have a reasonable expectation of confidentiality under the relevant foreign laws. For example, *see Louis Vuitton Malletier v Dooney & Bourke*, No. 04 Civ 5316 (RMB)(MHD), 2006 WL 3476735 (S.D.N.Y. Nov 30, 2006).]

Slides 24-25 Ana / Who is the client

1. The Volkswagen decision in Germany certainly sent shockwaves through compliance departments. For those of you that deal with internal investigations, how do you ensure that engagement letters provide for the right entity? Do you rely on outside counsel for that?

Slides 26-29 Ana / Examples of different privilege laws

1. I've given some examples here of different privilege laws. Are there other countries' privilege laws that you have had to deal with on a regular basis?
2. China has essentially no privilege protection. Would that impact your willingness to work in the country?
3. **Open it up: How does this impact communications with in-house counsel in China?**

Slides 29-39 Ana / Choice of law

Slide 40 Ana / Tips 1

Okay, so clearly we have a complex issue to deal with. At the same time, we can't stop communications abroad.

1. What steps have you taken to protect the privilege while making sure things don't ground to a halt?
2. Are in-house counsel just going to have to accept the risk that some communications that would otherwise be privileged will not be held to be privileged?

Slide 41 Ana / Tips 2

1. Have you tried any of these before?
2. If so, how useful?