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ACC NATIONAL CAPITAL REGION

Multinational Professional Privilege & Ethics

Panelists



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“Dance like no one is watching...

Email and text like it may one day be
read aloud in a deposition.”

Olivia Nuzzi

Roadmap

- Privilege in the United States
- Examples of Privilege Abroad
- Choice of Law Considerations
- Waiver Issues
- Tips for Dealing With Uncertainty
- Examples of Ethics Rules Abroad

Elements of the Attorney-Client Privilege

- To be privileged, a communication must be:
 - between a **lawyer** and **client**, in the **course of a professional relationship**,
 - for purpose of **obtaining legal advice** (if from client), or for purpose of **facilitating legal advice or services** (if from lawyer), and
 - be **confidential**, i.e., not shared with a third party.
 - *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

Limits of the Attorney-Client Privilege

- A-C privilege protects only the contents of the communication
- The **facts themselves** are **not protected**; you cannot “cleanse” bad facts by telling them to your lawyer
- Communications seeking/providing business advice are not privileged
- Existence of attorney-client relationship, fee arrangements, or related facts are not privileged

In-House Counsel

- In-house counsel are treated the same as outside counsel
- But in-house counsel often have a “dual role” – business and legal
- Privilege generally extends to legal advice, but does not extend to business advice
- To determine whether a communication is protected, courts assess whether the communication’s purpose is “business advice” or “legal advice”

In-House Counsel

- But what if the communication involves both purposes?
- The “primary purpose” test prevails
 - This test assesses which purpose is dominant
- See *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007): Document prepared for simultaneous review by non-legal and legal personnel found not to be privileged because it was not prepared primarily to seek legal advice

The Work Product Doctrine

- **Federal Rule of Civil Procedure 26(b)(3)** protects certain materials from discovery by an adverse party.
 - also covered by Federal Rule of Evidence 502(g)(1)
- It covers:
 - documents and tangible things
 - prepared in anticipation of litigation or for trial
 - by or for a party or its representative

The Work Product Doctrine

- Protects only those documents created “in anticipation of litigation”
 - Circuits are split over what “in anticipation of litigation” really means
 - “Because-of test”: The document would not have been prepared “but for” anticipated litigation – 2d, 3d, 4th, 7th, 8th, 9th, D.C. Cir.
 - “Primary-purpose test”: The document was prepared for the “primary purpose” of aiding in possible future litigation – 5th Cir.

The Work Product Doctrine

- Work product protection can be overcome by a showing of:
 - a substantial need of the materials in case preparation, and
 - undue hardship in obtaining the substantial equivalent of the materials by other means
- Nevertheless, core/opinion work product is not discoverable
- Waiver occurs when disclosure increases the likelihood of disclosure to one's adversary

Privilege Outside the United States

- Key Differences
 - Professional secrecy/confidentiality vs. privilege.
 - Privilege may belong to the lawyer, not client (e.g., South Korea).
 - Narrower or judge-run discovery.
 - May not protect communications with in-house counsel.

Attorney-Client Privilege

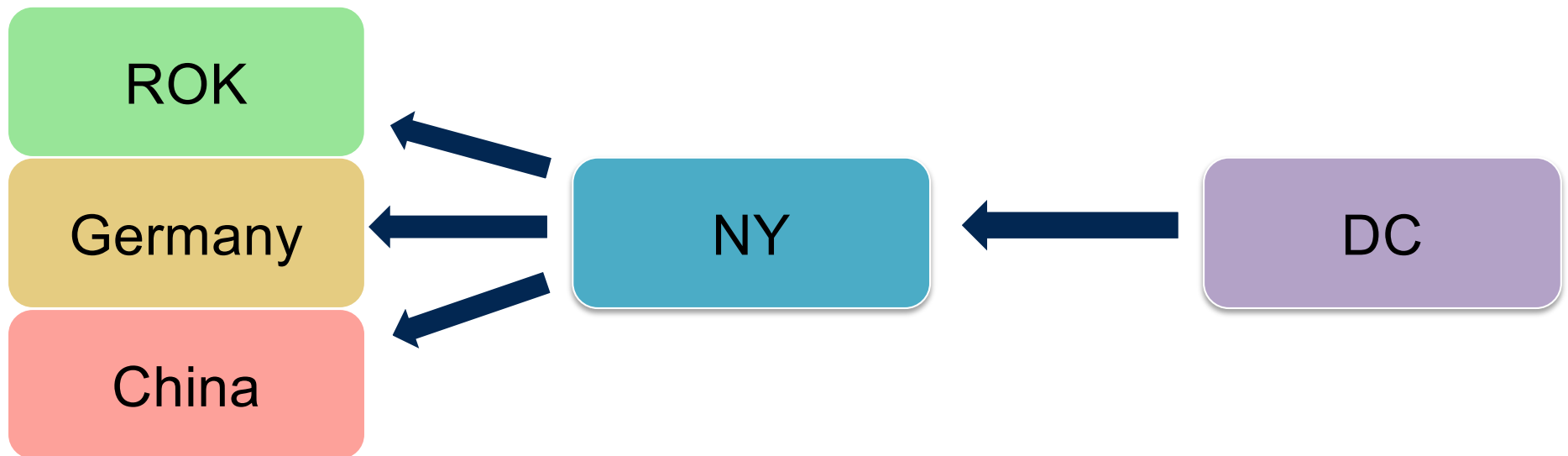
The intricacies of attorney-client privilege are funny. But not "ha-ha" funny. More "psych, you're not protected" funny.



A Hypothetical

Chumhum In-House Counsel

Lockhart Gardner LLP



In-House Counsel

Question:

If Canning forwards the memo to a Chumhum employee, will the attorney-client privilege protect that communication in the employee's country?

Privilege in the EU

“[A]n in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee”

Akzo Nobel Chemicals and Akcros Chemicals v. Commission
2007 E.C.R. II-03523 (2010)

Notes on *Akzo*

- The *Akzo* case involved an investigatory procedure commonly used by the EC: dawn raids.
- Limited to investigations by the European Commission. Otherwise, the law of each EU member country will control on privilege.
- Waiver: Communication between an in-house attorney in the U.S. and a corporate executive in Europe disclosed in European court after a dawn raid might not be privileged because the confidentiality will have been breached.

Outside U.S. Counsel?



“[U]nlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession.”

Advocate General’s Advisory Opinion in *Akzo*, ¶¶

188-90

Should We Also Hire Outside U.S. Counsel for Foreign Matters?

- Yes, if you have any concern that the communications regarding the litigation will one day be at issue in an American proceeding.
- Yes, for any sensitive matter for which you want maximum protection.
- Ideally, U.S. counsel is also member of local foreign bar and/or registered foreign attorney.
- Even if U.S. counsel is not member of local foreign bar, court is likely to weigh involvement of U.S. counsel when conducting the “touching base” analysis.
- U.S. counsel can help coordinate cross-border litigation so that company is speaking with one voice globally.

In re financialright GmbH

- Private plaintiffs in German court sought documents from internal investigation VW documents from Jones Day in SDNY 1782 proceeding.
- Applying “touching base” analysis, court found U.S. privilege law applied.
- Even though Jones Day has a presence in Germany, Jones Day is a U.S.-based law firm and was retained to represent VW vis-à-vis American authorities.
- Court sent parties back to meet-and-confer on privilege questions: initial requests and assertions of privilege too broad.

Privilege in Germany

- German Criminal Code prohibits lawyers from disclosing confidential client information or documents obtained in the course of professional representation absent client consent.
- Privilege does not extend to documents located on the client's premises that are not related to the client's defense of criminal or regulatory offenses.

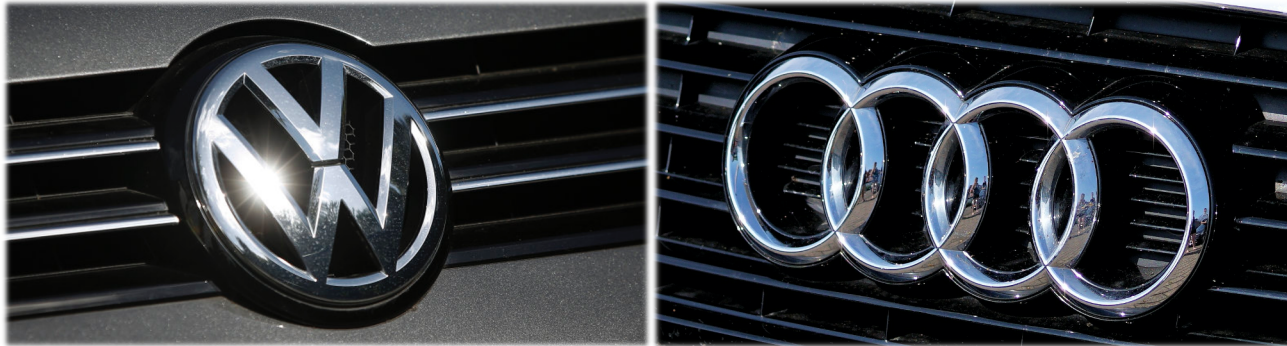
Are Foreign Attorneys Covered in the U.S.?

- Some courts have held that foreign attorneys who are not licensed to practice in the U.S. can still invoke the attorney–client privilege. *Renfield Corp v E Remy Martin & Co SA.*, 98 F.R.D. 442, 444 (D. Del. 1982).
- But be careful!
- Communications with foreign counsel may only be privileged if parties have expectation of confidentiality under the relevant foreign laws. *Louis Vuitton Malletier v Dooney & Bourke*, No. 04 Civ 5316 (RMB)(MHD), 2006 WL 3476735 (S.D.N.Y. Nov 30, 2006).

Privilege in Germany

- In-house counsel is covered by the privilege if . . .
 - Licensed to practice law in Germany;
 - The information conveyed is obtained in the course of providing legal, not business, advice; and
 - Maintains separate offices with sole access.
- But no U.S.-style discovery (only limited duties to produce documents), so not necessarily critical in civil litigation context.

Who is the Client?



- Volkswagen hired Jones Day to conduct internal investigation into the 2015 emissions testing
- Investigation covered activities at VW and at subsidiary, Audi
- Engagement agreement was only between VW and Jones Day
- Munich prosecutors raided Jones Day offices, took documents relating to Audi
- German Federal Constitutional Court held documents were not protected by the ACP because no attorney-client relationship between Jones Day and Audi
- U.S. based Jones Day was held to be unable to lodge a constitutional complaint under the German constitution at all, for being neither a domestic nor an EU legal entity, among other things as it did not demonstrate an effective place of management within Germany or the EU.

Privilege in China

- Civil Procedure Law: Weight of authority indicates that courts and government can compel an attorney to testify concerning confidential client matters.
 - Art. 70 of Civil Procedure Law requires individuals to provide testimony at court's request.
- Criminal Procedure Law: Criminal defense attorneys have right to keep in confidence information learned from the client *during representation*.
- Unclear whether attorney's right to refuse to testify in criminal litigation is also applicable to civil and administrative litigations.
- Chinese law is developing in this area. In practice, it is rare for privileged information to be disclosed in *civil* court proceeding because of limitations on all discovery.

Confidentiality in China

- The PRC Lawyers Law requires lawyers to “keep confidential facts and information learned during the representation which clients . . . are unwilling to have disclosed.”
- Lawyers outside the definition of “lawyers” include:
 - in-house legal counsel in China who are PRC nationals, including those who passed the PRC bar;
 - in-house legal counsel who are foreign (non-PRC) lawyers, including those who may maintain active and valid bar memberships in the US; and
 - unregistered foreign (non-PRC) lawyers visiting or on assignments in China, including in-house counsel from US home offices and law-firm practitioners.

Privilege in South Korea

- No concept of attorney-client privilege.
- Korean Code of Civil Procedure: Lawyer *may* refuse to testify on “secret matters” learned in the course of professional duties.
- Lawyers prohibited from disclosing confidential matters learned in the course of representation unless ordered by the court.
- Confidentiality rule protects communications received by lawyer.
- Same rules for outside and in-house counsel.
- But no U.S.-style discovery (only limited duties to produce documents), so not necessarily critical in civil litigation context.

Is Canning's Communication Privileged?

US

- Yes.

Germany

- Yes, if Canning is licensed in Germany and maintains offices separate from Chumhum, except in EU Commission antitrust investigations.

China

- No, but maybe confidential.

South Korea

- No, but maybe confidential.

United States – Choice of Law

Question:

If Chumhum is taken to court in the US,
which privilege law will the court apply?

Which Country's Law?

Answer:

Courts typically employ the “touching base” analysis to determine which country’s privilege law applies.

Golden trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 518-19 (S.D.N.Y.1992).

Which Country's Law?

- “[A]ny communications touching base with the United States will be governed by the federal discovery rules while any communications related to matters *solely* involving [a foreign country] will be governed by the applicable foreign statute.”
- Considerations:
 - Whether communications involved U.S. lawyers.
 - Whether client was U.S. resident attempting to protect a right under U.S. law.
 - Whether relevant proceedings were in the U.S.

Wultz v. Bank of China Ltd., 979 F.Supp.2d 479, 489 (S.D.N.Y. 2013).

Astra Aktiebolag v. Andrx Pharm. Inc.

- Touching base with US and US law applied for:
 - Communications b/w Astra outside American counsel and Astra employees, including in-house counsel (located in Sweden).
 - Communications b/w Astra in-house counsel and employees concerning U.S. litigation.
- Korea law applied for:
 - Communications b/w Astra in-house counsel and employees with outside Korean counsel on behalf of Astra U.S.A and located in Korea.
 - “When a Korean attorney is representing a foreign client in a Korean proceeding, the Korean attorney will generally anticipate that the Korean law of privilege will apply.”
- German law applied for:
 - Communications b/w Astra in-house counsel and outside German counsel.
 - Communications b/w Astra in-house counsel and Swedish Astra employees concerning the advice by outside German counsel.

Astra Aktiebolag v. Andrx Pharm. Inc.

- Korean privilege law:
 - Court found that Korean law does not have any statutory ACP or AWP privilege.
 - However, Court found documents not discoverable because under Korean discovery rules, the documents would not be discoverable. To order their production would violate principles of comity and American public policy.
 - Holding substantially narrowed by *Wultz*.
- German privilege law:
 - Court found that law protected communications as privileged.

Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92 (S.D.N.Y. 2002).

Wultz v. Bank of China Ltd.

- Internal investigation conducted by in-house counsel of bank in China
- Held not privileged in SDNY civil suit:
 - Court held Chinese law applied
 - China does not recognize attorney-client privilege
 - Even if U.S. law applied, privilege would not attach because in-house lawyers in China are not licensed attorneys

Applying Foreign Law

“The critical inquiry . . . is not whether the disclosure of attorney-client communications *would* happen, but rather whether it *could* happen.”

Wultz v. Bank of China Ltd., 979 F.Supp.2d 479, 489 (S.D.N.Y. 2013)
(distinguishing *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002)).

Applying United States Law

“To the extent BOC has claimed privilege over communications from, to and among members of legal or other departments who are not licensed attorneys, the attorney-client privilege does not apply.”

Wultz v. Bank of China Ltd., 979 F.Supp.2d 479, 489 (S.D.N.Y. 2013).

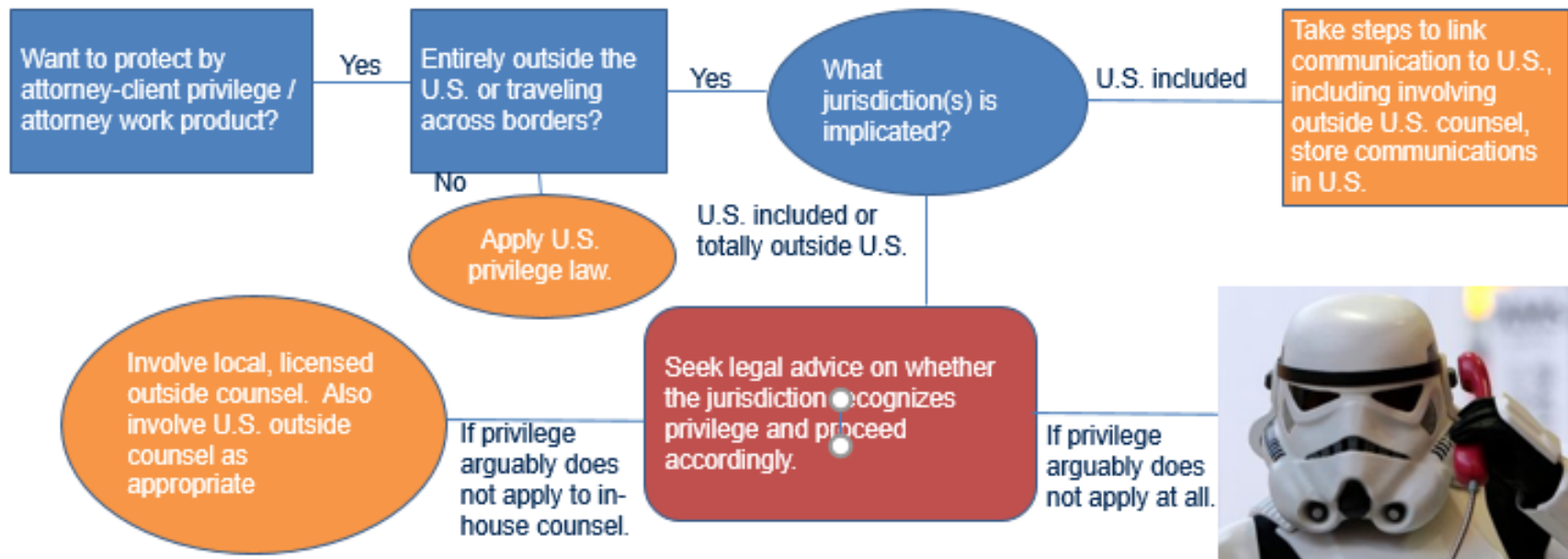
But see...Baxter Intl. v. Becton

- Recent, November 2019, decision out of the Northern District of Illinois. *2019 WL 6258490*.
- Court rejects “touching base” test in favor of comity and functional approach of “look[ing] to the foreign nation’s law to determine the extent to which the [attorney-client] privilege may apply.”
- Held Swedish documents between American patent attorney and client dated prior to 2010 not privileged under Swedish law.
- Reasoning:
 - patent attorneys not members of local bar and prior to 2010 statutory ACP did not extend to them.
 - Swedish law does not extend ACP to communications with in-house counsel.

Note on Work Product

In U.S. courts, the rules and practices of the forum court determine the applicable work product rule.

How to Think About Communications



Additional Tips

- Use local, licensed outside counsel for sensitive matters.
- Clearly mark privileged files and file separately to avoid confusion in dawn raid.
- Warn in-house counsel against summarizing/annotating outside counsel communications.
- Circulate sensitive materials among a small group. Warn against sharing more broadly.
- Minimize written communications to EU-based in-house counsel on matters historically the subject of Commission investigations.
- Include choice of law in contracts and specify preferred privilege rules.
- Use licensed in-house counsel and ensure in-house counsel don't mix legal and business in communications.

Ethics

- Witness communication
- Discovery
- Conflicts
- Confidentiality
- Ex parte communications
- Attorney fees
- Choice of law

Witness Communication

- Civil law systems generally prohibit pre-testimonial communication.
- Common law systems generally permit pre-testimonial communication.

Witness Communication

In Guernsey...

- Witness “coaching” is prohibited.
 - No mock questions or preparation based on facts of the case.
- Witness “familiarization” is permitted.
 - Courtroom format and procedures.
 - Tips for effective testimony.
 - Mock cross exams based on unrelated issues and content.

Discovery

- Treatment of inadvertent disclosures.
- Preservation and ensuring client compliance.
- Production process.

Conflicts of Interest

- Most jurisdictions are more permissive than U.S. conflicts rules.
- Informal, custom-based, lax enforcement.
- Often no imputation of conflicts.

Confidentiality

- May only cover information communicated by the client or learned from other sources.
- Doesn't always cover in-house counsel.
- Applicability of crime-fraud exception.
- Could cover communications with opposing counsel.

Other Examples

- Ex parte communications may be appropriate in some countries.
- Contingent fees are banned in many European countries.
- Payment of fact witnesses.

Questions?

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Ana is a Clinical Visiting Lecturer at Yale Law School, where she co-teaches Advocacy in International Arbitration. She has also served as an Adjunct Professor of Law at Georgetown Law School, where she co-taught a course in the use of experts in federal courts.

Ana was born in Montevideo, Uruguay, and grew up in Louisville, Kentucky. She received her B.A., *summa cum laude*, from Transylvania University in 1996. She received her J.D., *magna cum laude*, from Harvard Law School in 2000, where she was an editor of the *Harvard Law Review*. In 2014, Ana also received a Master's in International Public Policy, *with distinction*, from the Johns Hopkins University, School of Advanced International Studies.

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