TRANSATLANTIC LITIGATION: A COMPARATIVE ANALYSIS OF PRIVILEGE IN THE US AND IN ENGLAND AND WALES

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Privilege is a fundamental right under both English and US law. It entitles a party (or its successor in title) to withhold evidence from production to third parties or a court. Some types of privilege protect communications between lawyers and their clients, the purpose being to allow parties to speak openly with their lawyer without fear that such disclosure may prejudice their position in the future. However, the protection of privilege is not available for every communication, even when these involve lawyers.

It is important for in-house lawyers and senior management in businesses to understand the scope of the rules in order to adequately protect their organisations. There is also the added complexity that in cross-border litigation or global investigations, material that is privileged in one jurisdiction may not be privileged in another.

Privilege in England and Wales

In England and Wales, if a communication is privileged, a party has the right to withhold it from production to the court, their opponent(s), and third parties without any adverse inference being drawn.

The English courts recognise several types of privilege, including legal advice privilege, litigation privilege, and without prejudice privilege (among others).

Legal advice privilege

Legal advice privilege protects confidential communications between a lawyer and their client that come into existence for the dominant purpose of providing legal advice. There are several important points to note.

First, the document or communication in question must be confidential. If it has been made public or even disseminated too widely, confidentiality will be deemed lost and it can no longer attract privilege.

Second, for corporate entities, the term 'client' is narrowly defined, and will only cover those employees who are actually charged with seeking and receiving legal advice on the organisation's behalf.

Third, the communication must be with a member of the legal profession such as a barrister, solicitor, legal executive or their employee or trainee (provided they are adequately supervised). Finally, the lawyer must be acting as the client's legal adviser, not merely as their 'man of business'.

Litigation privilege

Litigation privilege protects confidential communications between a lawyer and their client, the lawyer and a third party, the client and a third party and, occasionally, between non-parties, made for the dominant purpose of the conduct of existing, pending or reasonably contemplated litigation.

Litigation includes all proceedings where judicial functions are being exercised by a court or tribunal. It can also include regulatory or statutory processes, but the proceedings must generally be adversarial in nature as opposed to investigative or inquisitorial. The

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communication must be made with the dominant purpose of obtaining information or advice in connection with actual or potential litigation. If litigation is not yet underway, there must be a real likelihood rather than a mere possibility of litigation.

Legal advice privilege and litigation privilege are together referred to as legal professional privilege, and are discussed in more detail in our separate client guide 'Legal Professional Privilege'.

Without prejudice privilege

Without prejudice privilege protects communications made in a genuine attempt to settle a dispute. This means that should the settlement negotiations fail, any concessions made in these communications will not be admissible in court as evidence against the party that made them.

The underlying principle is that parties should be encouraged to try and settle their disputes out of court, and are more likely to succeed in doing so if they are able to speak freely. It is common in England and Wales for parties to head such correspondence with the words 'without prejudice save as to costs'. This is because the usual position in the English civil courts is that the winning party is entitled to recover a portion of their costs from the losing side. Communications exchanged between the parties that are 'without prejudice save as to costs' can be shown to the court after judgment has been given to inform the judge's decision on what costs order to make. If a party can demonstrate that they made genuine attempts to settle the dispute, that should weigh in their favour when the judge decides liability for costs.

Alternatively, a communication may be simply 'without prejudice'. Whether a communication is in fact 'without prejudice' or 'without prejudice save as to costs' depends on the nature of the communication itself and whether it constitutes a genuine attempt at settlement. The use of those particular words is of itself neither determinative nor necessary.

Privilege in the United States

Just as in England and Wales, parties under US law have the right to withhold from inspection communications which attract privilege. In the US, the main forms of privilege are attorney-client privilege and the work-product doctrine.

Attorney-client privilege

Attorney-client privilege protects confidential communications between an attorney and their client that are intended to be kept confidential and made for the purpose of seeking or obtaining legal advice. It also can apply to communications with third parties if the purpose of the communication with the third party is to help the attorney provide legal advice to the client.

Furthermore, documents created by employees in response to requests for information from the employer organisation's attorneys can attract privilege. Attorney-client privilege is an absolute privilege that cannot be overridden by public policy concerns. Attorney-client privilege and English legal advice privilege are broadly similar in nature.

Work-product doctrine

Work-product doctrine protects documents prepared by an attorney, and communications between the attorney, the client or a third party, so long as they were created in anticipation of litigation or for trial. Actual litigation is not necessary, but there does need to be a real threat that it will happen, or in some states, the slightly lower threshold of a credible possibility that litigation will ensue.

There are two types of work-product: ordinary work-product (eg factual information separate from legal analysis, such as transcripts of witness interviews) and opinion work-product (eg an attorney's mental impressions, notes or documents reflecting case strategy). Unlike attorney-client privilege, privilege under the work-product doctrine is not limited to communications and confidential matters. However, the work-product doctrine does not provide absolute protection, as an adversary may obtain discovery upon showing a substantial need for the material and a hardship in obtaining it by less intrusive means. The work-product doctrine is therefore similar to English litigation privilege.

Key differences

Despite the obvious parallels between legal advice privilege and attorney-client privilege, and between litigation privilege and the work-product doctrine, there are some notable and important differences. These include:

- The definition of 'client' is wider in the US than in England and Wales. In England and Wales, only a limited class of employees with express or implied authority to seek and receive legal advice on behalf of the company qualify as a client for the purpose of legal advice privilege (*Three Rivers District Council v The Governor and Company of the Bank of England No 5* [2003] EWCA Civ 474 (No 5)). In the majority of US states, the courts follow the test laid out in *Upjohn Co v United States*, 449 US 383, 101 SCt 677 (1981). Essentially, a corporation may assert privilege over communications between its lawyers and corporate employees (regardless of their position) where the employee is communicating with lawyers for the purpose of securing legal advice for the corporation and such communication is within the scope of that employee's corporate duties.
- The US concept of opinion work-product in relation to a lawyer's mental impressions is much broader than the protections available under English litigation privilege. For example, US courts have held that disclosure of newspaper articles gathered by the plaintiff's attorney were privileged because disclosure might reveal the attorney's thought process and therefore their client's litigation strategy (see, for example, *Flaherty v Seroussi*, 209 FRD 300 (NDNY 2002)). In England and Wales however, these articles would be

discoverable if relevant to the issues in dispute. A lawyer would have had to have incorporated the articles into a new document they had created in order for privilege to potentially apply.

- In both jurisdictions, privilege is a right held exclusively by the client and can be waived by the client alone. There are times when it might be deemed desirable to disclose a privileged document. In such circumstances, in England and Wales, a party can selectively waive privilege by disclosing a privileged communication to a third party for a limited purpose while otherwise maintaining privilege against any other parties, so long as the document remains confidential and has not entered the public domain. Any such limited waiver should be recorded in writing, setting out the express limited purpose for which privilege has been waived, and including confidentiality undertakings. It is different in the US, where it is largely accepted that any disclosure to a third party will result in a complete loss of privilege for the entire subject matter of the privileged documents.

What about communications by in-house lawyers?

The position of in-house lawyers (on both sides of the Atlantic) is trickier, as the parts of their work pertaining to their role as a lawyer may be covered by privilege, while other parts of their work relating to business matters or administrative functions may not.

Under English law, a common misconception is that communications or documents gathered or produced by in-house lawyers during an internal investigation will attract privilege. This is not necessarily true, as was shown in the *RBS Rights Issue Litigation* [2016] EWHC 3161, where it was held that privilege does not extend to information provided by employees (or ex-employees) to, or for the purpose of being placed before, a lawyer. Whether communications made in the context of an internal investigation are privileged will depend on the particular facts and circumstances of the investigation. Litigation privilege and work-product doctrine are unlikely to apply to early-stage internal investigations.

Given the importance of protecting a party's right to claim privilege, in-house lawyers should consider adopting the following practices:

- Identify and regularly review the individuals who are authorised to speak with external lawyers on behalf of the organisation. The 'client' for privilege analysis may change over time as employees come and go, or move roles.
- Label documents as privileged and confidential, and keep them in a separate and distinct file from business related documents.
- Avoid adding internal comments or recommendations to documents containing external legal advice or summarising that advice.
- Try to minimise the numbers of sensitive documents created: is it possible to give the advice or relay the information orally?
- Ensure, where possible, that advice given in an in-house lawyer's professional capacity as a lawyer is in a separate communication stream to that of any general business advice, even when the two may be connected.
- Keep the circulation of legal advice to a minimum and ensure the recipients know that it is confidential.

In international organisations, there is the added complexity that business disputes are often cross-border in nature, and documents or communications which are privileged in one jurisdiction may not be privileged in another. Caution should be exercised by US in-house lawyers (and indeed any external lawyers they have instructed) when transmitting documents and sharing information with employees and other parties based in other jurisdictions.

Identify the potential risks of exchanging communications with foreign personnel and create a protocol for ensuring that privilege is preserved wherever possible. Seek early commercial legal advice on the policy and practice of information management and communication, and obtain local advice when other jurisdictions are involved.

This article was co-written by Trey Reliford and Robert Lowell of US law firm, Polsinelli.

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