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Privilege and International Implications against the Backdrop of the Panama Papers

By [Ava Borrasso](#)

At the behest of Panamanian prosecutors, police raided the offices of the Mossack Fonseca law firm on April 12, 2016, just weeks after it was disclosed that the firm's confidential records were hacked or possibly leaked months earlier. The public disclosure in late March 2016 of a bounty of information—dubbed “the Panama Papers”—documented more than 200,000 companies and structures of the firm's rich and famous (and some infamous) clients in more than 20 jurisdictions. Although the bulk of those vehicles may turn out to be legal, the Manhattan U.S. Attorney's Office instituted a criminal investigation within weeks to determine whether U.S. tax and anti-money-laundering laws had been violated. Seemingly ignored in this frenzy of activity, or more accurately put aside for future review, is the very bedrock of legal jurisprudence—the attorney-client privilege.

The Panama Papers highlight the interplay of the application of privilege in the international arena. Although the Mossack Fonseca law firm is based in Panama, it has offices in multiple jurisdictions, its clients are located throughout the world, and the structures it employed utilize bank accounts and corporate entities from mul-

multiple additional jurisdictions. In addition to the unfolding cross-border investigations of the underlying information, the Panama Papers also raise multiple privilege issues for potential future proceedings. What law applies? The law of the jurisdiction where counsel provided the advice, the client was located, or ensuing litigation occurs? In addition, how are the privilege laws distinguished, and what impact will those distinctions have on the use of the documents as evidence in subsequent legal proceedings?

The documents may face challenges to introduction into evidence if they were obtained through hacking or other unauthorized taking on grounds including that the privilege was not waived. Although the crime-fraud and similar exceptions may permit privilege to be pierced by the wrongdoing of an attorney or client to permit disclosure of communications made in furtherance of criminal conduct or fraud, *prima facie* evidence of criminal or fraudulent conduct generally must exist first in order to invade the privilege. Mere allegations are insufficient, and after-the-fact application of the exception under the circumstances of a hacking would present novel issues. In addition, lawyers are ethically constrained from reviewing material they know to be privileged. Each of

these thorny determinations has yet to be made, is fact-specific, and will be the subject of close scrutiny. Further, the documents may soon become transformed as “public,” raising additional issues that will certainly be subject to judicial review and analysis in the months and years to come.

The law on legal privilege is vast, and each topic addressed here in summary form has been subject to extensive and detailed analysis elsewhere. Many privileges are not addressed here, including those involving joint defense, common interest, and settlement communications. Further, there are exceptions to the protection and variations in treatment even as to the same privilege. The attorney-client privilege alone has nuanced application within U.S. jurisdictions depending on the underlying facts, and treatment varies broadly internationally. As such, consultation with local counsel is the best practice in assessing the application and maintenance of privilege for particular material.

This article provides an overview of privilege issues limited to confidentiality, attorney-client, and work-product from a U.S. common law perspective as generally compared to a civil law perspective. The treatment of international privilege issues

in U.S. courts and in international arbitration proceedings is then addressed.

Common Law Confidentiality and Attorney-Client Privilege

Although there are many types of protected communications, the broadest duty owed by U.S. counsel is that of confidentiality. It extends beyond matters communicated by a client in confidence to all information relating to the representation. Particularities of confidentiality vary from state to state, but lawyers cannot reveal information relating to the representation of a client without the client's informed consent except in limited circumstances. Under Rule 1.6 of the ABA Model Rules of Professional Conduct, those circumstances include when disclosure is necessary to: (1) prevent reasonably certain death or substantial bodily harm; (2) prevent commission of a crime or fraud; (3) prevent substantial injury to financial interests or property reasonably certain to result from a client's crime or fraud; (4) comply with other law or a court order; (5) secure legal advice regarding a lawyer's compliance with the Model Rules; (6) serve as a claim or defense between the lawyer and client; or (7) resolve conflicts of interest.

The most sacrosanct protection conferred under U.S. law is the attorney-client privilege. In the landmark decision *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the Supreme Court summarizes its importance:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

The classic definition of the attorney-client privilege applies when a party seeks

legal advice or a legal opinion from a professional legal advisor and protects from disclosure the communications relating to that advice made in confidence by the client or lawyer, unless the privilege is waived. 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2292, at 554 (McNaughton rev. ed. 1961). Qualifying communications will lose the protection upon voluntary disclosure of the information.

U.S. law protects qualifying communications even when the party seeking advice does not become a client or when the communication is made to an unlicensed subordinate of a member of the bar that otherwise satisfies the requisite elements. By contrast, and barring unusual circumstances, other types of information do not fall within the scope of the attorney-client privilege, including the underlying facts upon which legal advice is sought, business advice, information regarding the payment of legal fees, or a client's identity. Under U.S. law, the attorney-client privilege belongs to the client, not the lawyer, although the lawyer can invoke the privilege on the client's behalf. However, foreign jurisdictions vary as to who holds the privilege.

Privileged information that does not fall within an *exception* is therefore protected from disclosure. The crime-fraud exception bars application of the attorney-client privilege to matters made in furtherance of or in contemplation of a crime or fraud. The fiduciary or *Garner* exception derives from English common law and precludes a fiduciary from asserting the privilege against those to whom a common fiduciary duty is owed (e.g., shareholders or beneficiaries). The U.S. Supreme Court has determined that the "fiduciary exception is now well recognized in the jurisprudence of both federal and state courts, and has been applied in a wide variety of contexts, including in litigation involving common law trusts, disputes between corporations and shareholders, and ERISA enforcement action." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2332–33 (2011) (citations omitted). See *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970); *Nama Holdings, LLC v. Greenberg Taurig LLP*, 2015 N.Y.

Slip Op. 7346 (N.Y. App. Div. Oct. 8, 2015) (adopting the *Garner* test).

Overview of Civil Law Treatment

Civil law jurisdictions (prevalent in Europe and Latin America as well as parts of Africa and Asia) generally protect a "professional secret" by statute through criminal code or ethical rules. There is also a recognized right of defense that generally protects communications from counsel arising from a party's right to a fair trial. For example, some jurisdictions include penal code provisions that provide that disclosure of professional secrets by counsel may result in a prison term and monetary fine. Generally, the client cannot waive the privilege. The lawyer is required to maintain as confidential information that which falls within the scope of the privilege subject to disclosure in judicial or administrative proceedings.

Similarly, many civil law jurisdictions preclude counsel from disclosing client secrets as set forth in the law by civil code or through bar or ethical regulations. A lawyer in violation of these laws may be subject to liability and penalty. In some instances, criminal sanctions may be imposed. Although the client generally holds the privilege, in some jurisdictions even the client cannot waive the privilege.

Views on Communications Involving Corporate Counsel

Historically, application of the attorney-client privilege in the United States for communications between employees and corporate counsel was determined by the control-group test or the subject-matter test. The minority view, the control-group test, essentially protects communications seeking legal advice from high-level corporate officers—that is, members of the control group. By contrast, the subject-matter test looks to the substance of the communication and protects those communications made by mid- or low-level corporate employees who seek legal advice on behalf of the corporation for actions within the scope of their employment. In 1981, the U.S. Supreme Court weighed in and determined that the control-group test was

too restrictive and, although not binding on state courts, adopted the subject-matter test for federal cases. *Upjohn*, 449 U.S. at 398. That test has since become the majority position and the prevailing view in most states as well.

Communications between corporate counsel and employees made for the purpose of obtaining legal advice fall squarely within attorney-client privilege protection in the United States. However, communications related to business advice or regulatory matters are not protected. Similarly, information shared with third parties or beyond those necessary to obtain legal advice falls outside the parameters of the privilege. As a result, corporate counsel caution against inadvertent waiver of privilege by separating legal advice from business advice, limiting dissemination of privileged information to protected employees, and advising recipients to avoid forwarding privileged advice on e-mail chains.

Recently, a Washington, DC, district court compelled disclosure of legal advice related to an internal investigation that also had a regulatory purpose. On appeal, the court reversed and rejected the district court's narrow analysis of privilege in favor of broader protection that covered communications involving legal advice as "*one of the significant purposes* of the attorney-client communication." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). The case demonstrates the care required to preserve privilege by avoiding the communication of legal advice with regulatory, compliance, or business advice.

Most of Latin America extends the professional-secret privilege to in-house counsel and does not distinguish between corporate and outside counsel. However, the European Union (EU) takes a completely different approach. The EU does not protect communications between in-house counsel and corporate employees. Although the legal-professional privilege is viewed as a basic right among European Community (EC) members, it requires the lawyer's independence, and the communication must be related to the client's right of defense. *AM&S Europe Ltd. v. Commis-*

sion of the European Communities, 1982 E.C.R. 1575, Case No. 155/79. Corporate counsel is viewed as lacking the necessary independence by virtue of their exclusive affiliation with a single client to prevent disclosure of communications (e.g., *Akzo Nobel Chemicals Ltd. v. E.U.*, 2010 E.C.R. Case No. 550/07 ("It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.")).

Many national European jurisdictions follow suit. Lawyers practicing in these jurisdictions are subject to the laws of the local jurisdiction. As a result, due care must be taken by U.S. lawyers, in-house counsel, and corporate employees in their communications with European corporate counsel.

In this age of globalization, the privileges applicable in one place may impact the ability to claim them elsewhere. Counsel in jurisdictions with stronger privileges like the United States face practical risks in dealing with corporate counsel abroad. By way of example, communications exchanged with European in-house counsel may subject a U.S. lawyer's communication to disclosure in EC courts even when those same communications would be privileged in the United States. Similarly, U.S. corporate counsel who knowingly exchange or provide legal advice with a European counterpart or employee located in the EC may waive the privilege in U.S. courts. In short, it is critical to understand local privilege laws when conducting business or operating in multiple jurisdictions to fully preserve privilege.

Work-Product Doctrine or Litigation Privilege

In addition to the attorney-client privilege, the work-product privilege adds another protection to facts uncovered and opinions formed in preparation or anticipation of litigation. Common law jurisdictions that protect such materials routinely refer to this as the "litigation privilege."

Under U.S. law, material collected and facts uncovered by counsel in anticipation

of litigation are generally protected from disclosure. See *Hickman v. Taylor*, 329 U.S. 495 (1947). Such material may be obtained only upon a showing of substantial need for the material, and that the party seeking the information would suffer an undue hardship in obtaining substantially equivalent material through other means. See e.g., Fed. R. Civ. P. 26(b)(3). Fact-based work product may be subject to disclosure upon satisfaction of this stringent standard.

The other category—opinion-based work product—protects the mental impressions, opinions, theories, and conclusions of counsel and is subject to an even higher level of protection. Opinion work product is rarely subject to discovery. Unlike the attorney-client privilege, the work-product doctrine requires waiver by both the client and counsel. A client alone cannot waive the work-product privilege. See e.g., *In re Grand Jury Proceedings*, 43 F.3d 966 (5th Cir. 1994).

Foreign Privilege Treatment in U.S. Litigation

Federal Rule of Evidence 501 provides that application of privilege is an issue of common law unless there is a conflict with the U.S. Constitution, an applicable federal statute, or U.S. Supreme Court rules. Rule 501 also provides that, in civil cases, state law governs privilege.

The common law of the United States generally employs a choice-of-law analysis in determining which privilege law governs multi-jurisdictional cases. Typically, U.S. courts apply a "touching-base" analysis to determine whether foreign communications are protected. Protection for communications that do not implicate the United States, or do so only incidentally, is generally determined in accordance with applicable foreign privilege law unless contrary to U.S. public policy. This approach is essentially one of comity.

However, in cases involving communications within the United States, the courts seek to balance the overall transaction or relationship to determine where the predominant relationship took place and to apply the privilege of the jurisdiction with the highest interest in confidentiality. The

jurisdiction with the “most direct and compelling interest” is generally either the location where the relationship was entered or centered at the time of the relevant communications. When multiple jurisdictions are involved, the issue is fact sensitive, and courts have generally been inclined to follow foreign law when issues of foreign legal proceedings are involved, and U.S. law when advice or legal proceedings in the United States are at issue.

Recently, in *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260 (S.D.N.Y. 2013), the court applied the touching-base analysis to compel disclosure of communications between administrator Citgo and its unlicensed Dutch in-house counsel in litigation pending in the United States arising out of Bernard Madoff’s Ponzi scheme. Senior Dutch in-house counsel provided legal advice to Citgo in the Netherlands, which the court determined could have touched base with either the Netherlands (where the communications took place, the relationship was centered, and which in part related to Dutch law) or the United States (communications related in part to U.S. litigation and advice regarding U.S. law), but held the communications were not privileged in either case.

The court determined that, under U.S. law, the fact that the in-house counsel was unlicensed, and that Citgo knew that fact, precluded it from claiming the privilege. Under Dutch law, the communications would not be privileged because the Netherlands does not recognize a privilege between an employer and unlicensed in-house counsel. In addition, the court rejected Citgo’s contention that pretrial discovery was not available in the Netherlands and the communications were therefore subject to protection because the court determined that Dutch civil procedure and civil law did provide mechanisms to obtain disclosure of the underlying information.

Generally, documents sent to employees or created in jurisdictions that do not protect in-house counsel communications are not privileged in U.S. courts. See e.g., *Celeron Holding, BV v. BNP Paribas SA*, No. 1:2012cv05966 (S.D.N.Y. 2014) (compelling production of documents under

either Russian or Dutch law because relations were entered and centered there, and neither jurisdiction protected communications with unlicensed or in-house counsel). However, U.S. courts have protected communications from disclosure where the applicable foreign law would protect them. In *Cadence Pharmaceuticals v. Fresenius Kabi USA, LLC*, 996 F. Supp. 2d 1015 (S.D. Cal. 2014), the court protected communications between a client and a nonlawyer patent agent working under the direction of a patent attorney regarding the prosecution of European patent applications because that information was privileged under German law. This holding is generally in line with the U.S. perspective that extends privilege to qualifying communications with members of the bar or their subordinates and thus was not contrary to public policy.

Treatment of Privilege in International Arbitration

Although treatment of privilege in foreign courts is beyond the scope of this article, treatment within international arbitration proceedings may best exemplify problems that occur when privilege laws collide. In proceedings involving parties from both common and civil law jurisdictions, how should tribunals handle privilege? If a U.S. party seeks to protect a communication between a high-level employee and in-house counsel from disclosure to a French counter-party that does not recognize such protection, does the tribunal accord protection of underlying materials to the U.S. party and not to the French party consistent with application of their own legal systems? Does the answer differ if the proceeding is seated in the United States, France, or some other jurisdiction?

Commentators, institutions, and practitioners vary on these issues. Some favor application on an evidentiary basis opting for the procedural law of the seat, the law that governs the underlying arbitration agreement, or the law most closely related to the privileged communication. Arbitral tribunals exercise broad discretion in determining which law should be applied and, alternatively, may look to the law where the lawyer is licensed

or qualified to practice or where the client is located and the advice was given. The law of the location of the client or counsel is generally viewed as more predictable and consistent with the parties’ expectations.

In some instances, the rules of the administering institution attempt to address the issue directly. For example, Article 22 of the American Arbitration Association’s International Centre for Dispute Resolution Procedures (Including Mediation and Arbitration Rules) provides:

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, *apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.*

Other institutions provide for greater flexibility and, accordingly, less guidance (e.g., ICC, Art. 22.3 (“*Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*”)); IBA Rules on the Taking of Evidence, Art. 9.2(b) (“*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: . . . legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable . . .*”)).

Recently, the focus on these issues has led to various proposals, including incorporation of a clause in an arbitration agreement specifically addressing privilege. This is perhaps the safest course under the existing playing field. Some advocates have also suggested implementation of a model set of rules for privilege for international arbitra-

tion and undertaken some efforts toward drafting transnational rules. Barring further development, uncertainty is likely to continue permeating cross-border transactions involving parties subject to different privilege laws.

Conclusion

Not only is privilege at the foundation of the attorney-client relationship, but it provides a critical limitation on introduction of evidence as well, at least in most common law jurisdictions. Civil law jurisdictions provide a different view. Although less is protected, typically less is subject to disclo-

sure. In any cross-border deal or transaction, it is critical to understand the various protections in play and to exercise care in communicating with counterparties to preserve privilege.

Practitioners are likely comfortable with the limitations and particularities of their own system, but when these systems collide—as with the Panama Papers—things get more interesting. Undoubtedly, attorney-client privilege, work-product privilege, and the duty of confidentiality will be analyzed in future proceedings involving the documents taken from the Mossack Fonseca law firm. The impact each privilege will have on

access to this material in court proceedings may turn on the analysis of multiple jurisdictions and is likely to lack uniformity.

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