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THE SEDONA CONFERENCE COMMENTARY ON CROSS-BORDER PRIVILEGE ISSUES

A Project of The Sedona Conference Working Group on International Electronic Information Management, Discovery, and Disclosure (WG6)

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PREFACE

Welcome to the July 2022 final version of The Sedona Conference *Commentary on Cross-Border Privilege Issues* ("*Commentary*"), a project of The Sedona Conference Working Group 6 on International Electronic Information Management, Discovery, and Disclosure (WG6). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The mission of WG6 is to develop principles, guidance and best practice recommendations for information governance, discovery and disclosure involving cross-border data transfers related to civil litigation, dispute resolution and internal and civil regulatory investigations.

The Sedona Conference acknowledges Editor-in-Chief Nichole Sterling for her leadership and commitment to the project. We also thank Contributing Editors Jordan Cowman, Conor Crowley, Huw Edwards, Karen Hourigan, Sean Lynch, Bill Marsillo, Mr. Justice Elliott Myers, and Todd Presnell for their efforts, and Jeane Thomas for her guidance and input as Steering Committee liaison to the drafting team.

In addition to the drafters, this nonpartisan, consensus-based publication represents the collective effort of other members of WG6 who reviewed, commented on, and proposed edits to early drafts of the *Commentary* that were circulated for feedback from the Working Group membership. Other members provided feedback at WG6 meetings where drafts of this *Commentary* were the subject of the dialogue. The publication was also subject to a period of public comment. On behalf of The

Sedona Conference, I thank both the membership and the public for all of their contributions to the *Commentary*.

We encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG6 and several other Working Groups in the areas of electronic document management and discovery, data security and privacy liability, international data transfers, patent litigation, patent remedies and damages, and trade secrets.

The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
July 2022

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I. INTRODUCTION[1]

Protections that limit discovery of documents and information under doctrines such as attorney-client privilege[2] and the work-product doctrine[3] vary from country to country. The differences are greatest between common law and civil law jurisdictions, reflecting material differences in the scope of discovery between these jurisdictions. This *Commentary* provides an overview[4] of select laws and the differences between them and sets forth practice points to consider in managing and resolving the conflicts that can arise in multijurisdictional matters where the protections afforded in one jurisdiction may not be

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1. The Drafting Team for this *Commentary* would in particular like to thank the following individuals for their assistance and thoughtful comments during the drafting process: Francesca Rogo and Priyanka Surapaneni, Associates, Baker & Hostetler LLP in New York, New York; Franziska Fuchs, Robert Bosch GmbH in Stuttgart, Germany, and Jerry Johnson, Robert Bosch LLC in Farmington, Michigan; Natascha Gerlach, Director of EU Privacy and Data Policy, The Centre for Information Policy Leadership in Brus-sels, Belgium; Evelien Jamaels, Counsel, and Blanch Devos, Associate, Crow-ell & Moring LLP in Brussels, Belgium; Jared Weir, Associate, Greenberg Traurig LLP in Dallas, Texas; and Madeline MacDonald, former Clerk at the Supreme Court of British Columbia (currently at Harris and Company LLP in Vancouver, Canada).

2. The "attorney-client privilege" is referred to as "legal professional privilege," "client legal privilege," "legal advice privilege," and similar names in other jurisdictions. For purposes of this *Commentary*, "attorney-client privilege" is generally used to include all similar concepts, though differences in how those concepts are interpreted or applied in various jurisdictions are discussed as relevant. When other terms are used in this *Commentary*, it is for jurisdiction-specific reasons.

3. While recognizing that distinctions do exist between, for example, the U.S. work-product doctrine and the U.K. litigation privilege, we will use work-product doctrine generally throughout to refer to all similar concepts for protecting documents, unless a specific distinction is helpful.

4. A more detailed explanation of key laws discussed in various exemplar jurisdictions can be found in Appendix A.

recognized in, or may be in conflict with, those of another.[5] In our increasingly global world, multijurisdictional conflicts (and their attendant privilege issues) are becoming more common. Situations that counsel might encounter include:

- Producing documents and information during U.S. discovery that have been collected from custodians in various international jurisdictions with divergent privilege and disclosure protections.
- Voluntary disclosure of documents for regulatory compliance (or good will) in one jurisdiction that can lead to a privilege waiver in the courts of other jurisdictions during subsequent litigation.
- Protecting privilege in cross-border investigations that include the collection and review of (often sensitive) information and conducting employee interviews in multiple foreign jurisdictions before issuing an investigation report, which may be subject to compelled disclosure in certain jurisdictions.
- The conclusion of a litigation in one jurisdiction that is followed by a subsequent litigation in another jurisdiction, in which parties seek

5. The U.S. court system as well as the court systems of many other countries are divided into federal (national) courts and state courts. This *Commentary* focuses generally on national-level rules and decisions regarding privilege. We note there are a number of rules at the state level in the United States and elsewhere that may need to be consulted, depending on the particulars of a given situation. In the United States, most litigation involving parties from other countries will take place in federal courts under diversity jurisdiction.

> the production of previously produced documents and information, and the application of the same privilege determinations, despite significant jurisdictional differences in applicable privileges.

To understand the policies that shape the evidentiary and confidentiality protections that exclude documents and information from discovery in different jurisdictions, it is first helpful to understand the general scope of permitted discovery in the jurisdictions of interest. At a high level, civil procedure rules in common law jurisdictions typically permit parties to obtain nonprivileged documents and information relevant to their asserted claims and defenses from opposing parties and third parties. The scope of discovery within common law jurisdictions varies and, though not unlimited, can be quite broad, particularly in the United States.[6] Therefore, parties and courts will expect that any relevant documents and information will be produced. As a result, assertions of privilege and other protections to limit or preclude disclosure of requested documents and information are critical in many cases and are regularly disputed.

By contrast, in civil law countries, the scope of discovery is significantly narrower, and disputes concerning privilege, confidentiality, and other document protections are correspondingly less common. Discovery in most civil law countries is limited to the documents or information a party wants to rely upon to support its own case. Plaintiffs typically must support their cases with publicly available documents or information already

6. For example, U.S. courts, upon a party's request, may enter a protective order limiting or precluding the discovery of certain documents or information due to substantive reasons or the burden on the producing party. U.S. courts also may narrow or prohibit discovery that is duplicative, broader than necessary, seeks information of which the cost outweighs its benefit to the proceeding, or seeks confidential and proprietary information.

in their possession. Parties in many civil law countries may request orders from the court requiring another party to disclose a particular document, but these are limited disclosures. Jurisdictions vary as to how amenable courts are to such requests and the evidence required to support a successful request, effectively limiting such disputes.

Section II of this *Commentary* broadly explains the distinctions between common law and civil law privilege and other legal protections against disclosure. Section III lays out practical considerations for navigating these differences. Section IV explores the choice-of-law analysis used by some courts for deciding the application of privilege laws. Section V provides an appendix of privilege and other legal protections in selected exemplar jurisdictions.

II. PRIVILEGE AND OTHER LEGAL PROTECTIONS AGAINST DISCLOSURES

A. Common Law Privilege and Other Legal Protections

Common law jurisdictions generally protect documents and information falling within the scope of the attorney-client privilege or the work-product doctrine. As the name implies, the attorney-client privilege covers communications between a lawyer and client, including in-house counsel on behalf of the corporate employer client, in the context of seeking or providing legal advice. The work-product doctrine protects information gathered, created, or prepared, by or for counsel, for the purposes of litigation, whether anticipated or actual.[7] Notably, in some common law jurisdictions, such as Canada and the United States, the work-product doctrine does not require the involvement of counsel.[8] Additionally, the common-interest (or joint-

7. Note that U.S. courts vary as to the degree of motivation required to demonstrate that a document was prepared in anticipation of litigation. A majority of the federal circuit courts use a "because of" test, looking to whether the document was created because of the anticipated litigation. Other federal circuit courts use a "primary motivation" test whereby the primary motivating factor for the creation of the document is the anticipation of litigation. What qualifies as a litigation is also broad in the United States, and most courts will define any adversarial proceedings as falling within the scope of litigation for work-product protection. For further information on what can be considered anticipation of litigation for the purposes of implementing legal holds, which can inform whether work product applies, see The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341 (2019).

8. Blank v. Canada, [2006] S.C.C. 39 (Can.); Lizotte v. Aviva Ins. Co. of Can., [2016] S.C.C. 52 (Can.); United States v. Am. Tel. & Tel., 642 F.2d 1285 (D.C. Cir. 1980).

defense) doctrine,[9] while not uniform in its application, generally holds that a party does not waive the attorney-client privilege or work-product protection by sharing protected information with another party with whom it shares a common legal interest.[10]

Any common law privilege or protection can be waived explicitly or implicitly. The recognition of privilege or the loss of it in another jurisdiction outside the forum is largely governed by rules established by the courts.

1. Fundamental Tenets of the Common Law Attorney-Client Privilege

The attorney-client privilege is the oldest of the common law privileges, and aspects of this privilege can be detected in Roman law. Grounded in traditional concepts of honor, the attorney-client privilege has been well established in English law since the sixteenth century.[11] The attorney-client privilege in the United States and other common law jurisdictions covers confidential communications between a client and the client's attorney regarding legal advice. In the United States, the United Kingdom, and most other common law jurisdictions, the privilege can extend to licensed in-house counsel acting in a legal

9. This *Commentary* recognizes the distinctions between the common-interest and joint-defense doctrines but generally finds it easiest to discuss the two together.

10. To maintain the common-interest or joint-defense privilege in sharing communications with others, a party must typically demonstrate (1) that the communications were made pursuant to a joint defense or common interest of the parties; (2) that the communications were made to further the goals of that joint defense or common interest; and (3) that the privilege was not otherwise waived (i.e., that the joint defenders are not sharing the communications beyond their limited group).

11. EDNA SELAN EPSTEIN, 2 THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE (4th ed. 2001).

capacity. The attorney-client privilege is the foundation of the legal profession in common law countries, encouraging open and honest conversations between the client and the attorney without fear of disclosure, which in turn enables the attorney to provide sound legal advice.[12] The attorney-client privilege underpins the work done by attorneys practicing in common law jurisdictions on a daily basis, whether that work is related to litigation, business transactions, or other advice given by legal counsel, but this privilege can easily be lost if not protected.[13]

While each jurisdiction may have different requirements for creating and maintaining the attorney-client privilege, generally the elements of establishing the attorney-client privilege are:[14]

1. A confidential communication
2. between an attorney and a client
3. for the purpose of giving or receiving legal advice
4. when the privilege has not otherwise been waived.

We explore each of these elements and other related considerations in the Sections that follow.

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12. Jackie Unger, *Maintaining the Privilege: A Refresher on Important Aspects of the Attorney-Client Privilege*, ABA BUS. L. TODAY (Oct. 31, 2013), *available at* https://www.americanbar.org/groups/business_law/publications/blt/2013/10/01_unger/.

13. *Id*.

14. *See, e.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950); *In re A*ir Crash Disaster at Sioux City, Iowa on July 19, 1989, 133 F.R.D. 515, 518 (N.D. Ill. 1990); SEC v. Beacon Hill Asset Mgmt. LLC, 231 F.R.D. 134, 138 (S.D.N.Y. 2004); Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 625 (D.Nev. 2013).

2. Common Law Confidentiality and Other Legal Protections

Generally, to assert the attorney-client privilege under the law of most common law jurisdictions, the proponent of the privilege must prove the documents or communications were "intended to be, and in fact were, kept confidential[.]"[15] Typically, this requires the proponent of the privilege to have a "reasonable expectation of confidentiality[.]"[16]

Importantly, many courts in the United States have found that the absence of a reasonable expectation of confidentiality results in a finding of no privilege. This can have a profound impact, including with respect to communications using employer-provided email.[17] In *United States ex rel. Ray v. GSD&M Idea City*, for example, the court concluded that an employee did not have "a reasonable expectation of privacy in the e-mail communications transmitted to and received from his attorney over his workplace computer using his workplace email account."[18]

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15. United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011). *See also* Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003).

16. *Mejia* at 133–34. *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981) (allowing that the disclosure of documents to employees, even fairly low-level employees, on a need-to-know basis does not demonstrate an indifference to the confidentiality of the documents and does not waive privilege).

17. *See, e.g.*, Multiquip, Inc. v. Water Mgmt. Sys. LLC, No. CV 08-403-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009) (email auto-fill function accidentally resulted in privileged documents being sent to opposing counsel, and privilege was lost); Muro v. Target Corp. 243 F.R.D. 301 (N.D. Ill. 2007) (internal emails sent to large distribution lists indicated a lack of confidentiality).

18. United States *ex rel.* Ray v. GSD&M Idea City LLC, No. 3:11-CV-1154-O, 2012 WL 12925016, at *8 (N.D. Tex. May 15, 2012). *See also* Long v. Marubeni Am. Corp., No. 05 Civ. 639 (GEL)(KNF), 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006); Aventa Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083 (W.D. Wash. 2011).

In finding the attorney-client privilege did not apply to the emails in question, the Court observed that "[w]here . . . . . a company has explicit and straightforward guidelines addressing the monitoring of e-mail communications, an employee has no reasonable expectation of privacy in the e-mails, even if the company does not routinely enforce the monitoring policy."[19] Thus, the absence of a reasonable expectation of privacy meant the emails were unprotected by the attorney-client privilege.[20]

In this context, counsel should remain mindful of the scope of any applicable privilege in the relevant jurisdiction(s), because a failure to maintain confidentiality or to maintain the privilege in one jurisdiction can have far-ranging effects. For example, in the *RBS Rights Issue Litigation*, the English court held that English privilege law applied to communications occurring in the United States.[21] English courts tend to take a narrower view of who is the client when applying the legal-advice privilege than most U.S. courts when applying the attorney-client privilege. Thus, the *RBS* court concluded that certain information, including U.S. outside counsel's notes regarding interviews with RBS employees, was discoverable. Once information is produced, it is more vulnerable to being discoverable in other

19. *United States ex rel. Ray*, 2012 WL 12925016, at *4.

20. This rationale has been mentioned in the context of cross-border privilege issues. In *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 CIV. 5316 RMB MHD, 2006 WL 3476735, at *16–18 (S.D.N.Y. 2006), the court analyzed a claim of privilege under U.S. law and explained that the unlicensed French attorney did not have privilege under French law. In *dicta* the court noted that the communications at issue occurred in France and stated "there is no reason to believe that there was any expectation by the participants that confidentiality could be maintained in the face of French law." *Id.* at 17. *Louis Vuitton* suggests that a company does not have a reasonable expectation of confidentiality if it places information in the hands of in-house counsel in a country that does not recognize privilege for in-house counsel.

21. *Re* RBS Rights Issue Litig. [2016] EWHC 3161 (Ch) (Eng.).

jurisdictions, because it becomes more difficult to argue that confidentiality has been maintained.

From a cross-border perspective, it also is important to keep in mind that confidentiality obligations may not be treated as a legal privilege in many jurisdictions. Many countries impose professional confidentiality obligations on attorneys, and U.S. courts have distinguished these confidentiality obligations from the attorney-client privilege.[22] If an assertion of attorney-client privilege is to be based in part on another country's professional confidentiality obligations, those obligations must be examined carefully to determine, among other things, what exceptions to the confidentiality obligations exist.

3. Common Law Definition of Attorney

Each common law jurisdiction has its own unique requirements for qualification as an attorney. For example, the United States typically defines a lawyer as a member of the bar, which commonly requires a law degree, passage of a bar examination, and proof of good ethics. Ireland requires either a law degree or a preliminary examination, an entrance examination to the Law Society of Ireland, and professional and in-office training to be admitted to the Roll of Solicitors. Northern Ireland and England and Wales follow similar requirements.

Some common and civil law jurisdictions recognize multiple categories of lawyers, and the attorney-client privilege only applies to certain categories of lawyers. Some jurisdictions, including common law jurisdictions, do not require, or may not allow, in-house counsel to be licensed attorneys, which can lead to

22. Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 67 (S.D.N.Y. 2010) (internal quotation marks and citations omitted).

inadvertent waivers of an applicable privilege.[23] In *Gucci v. Guess?*, for example, the U.S. court found that certain communications with an unlicensed patent agent in Italy were not privileged under U.S. law, because the agent's work was not supervised by an attorney, and the communications were not intended to remain confidential.[24]

4. Common Law Definition of Client

Each jurisdiction has its own unique laws and views on what constitutes a "client" for purposes of attorney-client privilege. In general, a client will be the direct beneficiary of the attorney's legal advice, which is used to further the client's interests. Having a clear understanding of who the client is and which laws may apply to a privilege determination are important considerations for a variety of issues, including which person(s) or organization(s) should maintain the possession and confidentiality of potentially privileged documents. While in most, if not all, common law jurisdictions, the attorney-client privilege and work-product doctrine apply to documents and information whether in the possession of the attorney or the client, in some civil law jurisdictions the laws protecting confidentiality and privilege apply only to information in the attorney's possession.

Further, under U.S. law, when an entity is the client, the attorney-client privilege is not automatically extended to affiliates

23. *See, e.g.*, Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479 (S.D.N.Y.) (in-house counsel in China are not required to be members of the Bar, and attorney-client privilege did not apply). *But see In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997) (implementing a reasonable-belief test for attorney-client privilege—if the client reasonably believe the lawyer is authorized to practice law, the attorney-client privilege will apply); Anwar v. Fairfield Greenwich Ltd., 306 F.R.D. 117 (S.D.N.Y. 2013), *aff.d*, 982 F. Supp. 2d 260 (S.D.N.Y. 2013) (despite the client's poor comprehension of Dutch law, the client knew the Dutch attorney was not licensed).

24. *Gucci*, 271 F.R.D. at 72–73.

and subsidiaries. Notably, one entity's partial ownership of another entity may not be enough to preserve the privilege if privileged information is shared between them.[25] Although the issue of whether particular jurisdictions extend the protections of the attorney-client privilege and similar doctrines to subsidiaries and affiliates is beyond the scope of this *Commentary*, different jurisdictions take various approaches to the issue, and counsel representing such corporate clients will need to understand each client's corporate structure and how that could impact privilege in relevant jurisdictions.

5. Business vs. Legal Advice

To be protected by attorney-client privilege, a communication must be for the purpose of giving or receiving legal advice. Communications that seek business advice from counsel are not entitled to the protections of the attorney-client privilege.[26] This distinction can be complex, particularly for in-house counsel who may have both legal and business functions. In-house counsel roles can vary greatly, and the advice sought from in-house counsel may or may not give rise to attorney-client privilege. It is only in circumstances where counsel's legal advice is

25. *See, e.g.*, Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Tr. No. 1B, 230 F.R.D. 398, 416 (D. Md. 2005) (unless there is "common ownership or control" courts must engage in a "painstaking analysis to determine whether 'the third party . . . shares an identical, and not merely similar, legal interest as the client with respect to the subject matter of the communication between the client and its attorney'"); Music Sales Corp. v. Morris, No. 98CIV.9002(SAS)(FM), 1999 WL 974025 (S.D.N.Y. Oct. 26, 1999) (communications between wholly owned subsidiaries are privileged because corporations operated as a single entity).

26. *See* United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002).

sought that the protection of privilege arises.[27] When disputes about business and legal advice in the context of privilege occur during litigation, these situations often result in painstaking analysis of what advice was being sought, by or for whom, for what purpose, and the response given.[28]

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27. *See* The Sedona Conference, *Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context*, 21 SEDONA CONF. J. 1 (2020), 26–77, which offers legal guidance and practical guidelines regarding the application of attorney-client privilege and work-product protection in the context of cybersecurity but with some broadly applicable guidance as well. For example, communications that are about the growth of the business or profit increases even when sent to an in-house attorney would likely be considered business advice. *See, e.g.*, Fed. Trade Comm'n v. Abbvie, Inc., No. CV 14-5151, 2015 WL 8623076, at *10 (E.D. Pa. Dec. 14, 2015); *In re* Denture Cream Prods. Liab. Litig., No. 09-2051-MD, 2012 WL 5057844, at *15 (S.D. Fla. 2012) (communications about potential litigation related to product labeling were considered privileged, but marketing and business decisions about product labeling would not be privileged).

28. *See, e.g.*, Reid v. British Columbia (Egg Marketing Board), 2006 B.C.S.C. 346 (when business and legal advice are intertwined to such an extent they cannot be extricated from one another, attorney-client privilege may apply); Breneisen v. Motorola, Inc., No. 02 C 50509, 2003 WL 21530440 (N.D. Ill. July 3, 2003) (there may be a presumption that in-house counsel is giving legal advice, but this presumption is not dispositive, and in-house counsel's business advice is not protected by the attorney-client privilege); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977) (the attorney-client privilege applies only if the attorney is acting as a lawyer giving advice on legal implications). Note that outside counsel's provision of business advice is also not be privileged. *See, e.g.*, Koumoulis v. Indep. Fin. Mktg. Grp., Inc., 295 F.R.D. 28 (E.D.N.Y. 2013) (outside counsel's advice related to human resources during an internal investigation were not privileged).

6. Common Law Work-Product Doctrine

The work-product doctrine, known as "litigation privilege" in some jurisdictions, protects documents or information prepared or collected:[29]

1. In anticipation of litigation
2. by or for a party or its representative.

Work product can include but is not limited to communications, written statements, private memoranda, fact chronologies, mental impressions, personal beliefs, and other information assembled by attorneys or parties in anticipation of litigation, which is often broadly defined in the United States as any adversarial proceeding.[30] Work product thus is not limited to confidential communications between attorney and client, as the attorney-client privilege is. In the United States, the work-product doctrine applies to "ordinary" or fact work product (for example, materials prepared by a party in anticipation of litigation, such as fact collection and witness interviews)[31] and opinion work product (for example, an attorney's mental impressions, opinions, analysis, and conclusions). [32]

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29. FED. R. CIV. P. 12(b)(3). *See also* Hickman v. Taylor, 329 U.S. 495 (1947); FED. R. EVID. 502(g)(2).

30. The definition of litigation is broad. *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 268 F.R.D. 114, 118 (D.D.C. 2010) (protecting materials prepared for an administrative hearing); United States v. Stewart, 287 F. Supp. 2d 461, 465–67 (S.D.N.Y. 2003) (protecting materials prepared for a grand jury proceeding); Abdallah v. Coca-Cola Co., No. A1:98CV3679RWS, 2000 WL 33249254 (N.D. Ga. Jan. 25, 2000) (protecting materials prepared for a government investigation); and Jumper v. Yellow Corp., 176 F.R.D. 282 (N.D. Ill. 1997) (protecting materials prepared for arbitration).

31. *See, e.g.*, *In re* Doe, 662 F.2d 1073 (4th Cir. 1981).

32. *See, e.g.*, *In re* Vitamins Antitrust Litig., 211 F.R.D. 1 (D.D.C. 2002); Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D 397 (E.D. Va. 1975).

Though a broader set of materials could fall within the scope of the work-product doctrine, the doctrine is "weaker" than the attorney-client privilege at least with respect to fact work product in that a party could seek production of fact work product by showing need and undue hardship. Opinion work product tends to be more strongly protected, and motions to compel production of opinion work product are rarely granted. In light of how the different forms of work product are treated, counsel should carefully research how courts in the relevant jurisdiction(s) have distinguished between those categories.

Note that in some jurisdictions—such as Canada, England, and Wales—it is not necessary that the information be prepared by a lawyer or that a lawyer be involved at all for litigation privilege to apply. The question is whether the predominant purpose for the generation of the information was for use in litigation, whether existing or contemplated. A similar test applies in the majority of U.S. federal courts.

7. Common Law Waiver

As a general matter under U.S. law, the attorney-client privilege may be waived through voluntary, intentional disclosure of confidential communication to someone outside the attorney-client relationship.[33] The privilege can also be waived through inadvertent disclosure, such as by disclosing an otherwise privileged document, making a privileged document accessible to

33. *See* United States v. Kovel, 296 F.2d 918, 921–22 (2d Cir. 1961). According to the "Kovel doctrine," an agent of an attorney may be included in the privilege if the attorney supervises the agent and relies on the agent in order to be able to provide legal advice. These typically include law clerks, legal assistants, paralegals, and other employed by the attorney or the law firm but may also include outside consultants. In interpreting *Kovel*, courts have varied on whether the agent must be "necessary" to or "add value" to the attorney's work to be covered by the privilege.

someone who is not within the scope of the privilege, or by having a confidential conversation in an area where a third party can overhear it. In cases of inadvertent disclosure, the waiver determination often will turn on whether the party took reasonable steps to prevent disclosure in the first place and also acted promptly to rectify the error. Disclosure also may trigger "subject matter waiver" where "fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[34] Subject-matter waiver is rare and typically arises only where a party tries to use the privilege as a sword and as a shield, such as by claiming he or she acted appropriately based on legal advice but then withholding disclosure of documents or information concerning the substance of that advice.[35]

Whether there has been a waiver of work product can depend on whether the work product is categorized as fact work product or opinion work product. The distinction is important because although a requesting party sometimes can overcome a work-product assertion concerning fact work product by showing substantial need (for example, disclosure of a witness interview memorandum for a witness who died), courts in the United States rarely allow discovery of legal strategies,

34. FED. R. EVID. 502 advisory committee's note. *See also In re* OM Grp. Sec. Litig., 226 F.R.D. 579 (N.D. Ohio 2005) (subject-matter waiver applied when the waiver was substantial, intentional, and deliberate).

35. *See, e.g.*, *In re* Grand Jury Proceedings Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) (selective disclosure led to wider privilege waiver) and *Doe 1 v. Baylor Univ.*, 320 F.R.D. 430, 439–40 (W.D. Tex. Aug. 11, 2017) (intentional release of the law firm's factual findings and recommendations necessarily disclosed attorney-client communications and constituted sweeping privilege waiver).

counsel's opinions or mental impressions, and other opinion work product.[36]

A U.S. court's determination that another country's law applies to a privilege determination may result in a finding that the privilege or protection is inapplicable or has been waived because the other jurisdiction does not recognize the privilege or protection at all, or because the privilege or protection was waived under the particular circumstances. To assert the attorney-client privilege in the United States, it is necessary to show, among other things, that confidentiality was maintained, so an applicable privilege could be waived if the documents or information are shared with persons outside the scope of the privilege.[37] That is true even within the context of documents or information being shared among personnel within the same corporate client. For example, if the documents or information at issue were shared with in-house counsel in a jurisdiction that does not recognize privilege or other similar confidentiality or professional secrecy obligations for in-house counsel, there may be an argument that the attorney-client privilege does not apply or has been waived.[38]

8. Common Law Burden of Proof Regarding Privilege

In the United States, it is well established that the party asserting a privilege generally has the burden of proof.[39] This

36. *See* United Coal Cos. v. Powell Constr. Co., 839 F.2d 958 (3d Cir. 1988).

37. *See* United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011).

38. *See, e.g.*, Louis Vuitton Malletier v. Dooney & Bourke, Inc., No. 04-CV-5316-RMB-MHD, 2006 WL 3476735 (S.D.N.Y. Nov. 30, 2006); Shire Development, Inc. v. Cadila Healthcare Ltd., No. 10-581-KAJ, 2012 WL 5331564 (D. Del. Oct. 19, 2012); and Veleron Holding, B.V., v. BNP Paribas SA, No. 12-CV-5966-CM-RLE, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014).

39. *See, e.g.*, United States v. Jones, 696 F.2d 1069 (4th Cir. 1982); Weil v. Inv./Indicators, Research and Mgmt., Inc., 647 F.2d 18 (9th Cir. 1981). *But see*

means that the party generally has the burden to establish that a privilege should be recognized under the relevant law. If a party asserting the privilege argues that documents should be protected because they would be privileged in another country, then that party also has the burden of demonstrating that the other country's law should be applied.

9. Common Law Choice of Law

Choice-of-law analysis, discussed in additional detail in Sections III.H and IV, determines which laws a court in one country will apply to decide whether a privilege may be validly asserted.[40] For example, in the United States, a court may choose to apply the laws of another country using accepted forms of analyses. However, even when U.S. courts (and even courts within the same judicial district) purport to apply the same choice-of-law analyses, they have reached different outcomes in similar scenarios. For example, federal courts in the Second Circuit use the "touch base" test to determine which country's privilege laws apply. In *Wultz v. Bank of China Ltd.*, the court described the "touch base" test as follows:

> Under this analysis, the Court applies the law of the country that has the predominant or the most direct and compelling interest in whether [the] communications should remain confidential, unless that foreign law is contrary to the public policy of this forum. The country with the predominant interest is either the place where the allegedly privileged relationship was entered into or the place in which that relationship was

Sampson v. Sch. Dist. of Lancaster, 262 F.R.D. 469 (E.D. Pa. 2008); Texaco, Inc. v. La. Land & Exploration Co., 805 F. Supp. 385 (M.D. La. 1992).

40. *See* FED. R. CIV. P. 44.1; FED. R. EVID. 501; RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); Hague Convention art. 11.

> centered at the time the communication was sent. Thus, American law typically applies to communications concerning legal proceedings in the United States or advice regarding American law, while communications relating to foreign legal proceeding[s] or foreign law are generally governed by foreign privilege law.[41]

In *Wultz*, Judge Shira Scheindlin of the Southern District of New York determined that U.S. privilege law would apply to all communications related to U.S. legal issues.[42] However, applying this same "touch base" test, Judge Barbara Jones of the Southern District of New York reached a notably different result[43] in *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, deciding that U.S. privilege law would apply to all communications.[44]

Additionally, in some jurisdictions, determining which law applies can turn on whether the privilege is considered a matter of procedure or a substantive rule of law. For example, when an action brought in a Canadian court involves claims governed by laws of another jurisdiction, the general rule is that matters of procedure continue to be governed by the laws of the forum.[45]

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41. Wultz v. Bank of China Ltd., 979 F. Supp. 2d 479, 486 (S.D.N.Y. 2013) *on reconsideration in part*, 11 CIV. 1266 SAS, 2013 WL 6098484 (S.D.N.Y. Nov. 20, 2013) (internal quotation marks and footnotes omitted).

42. *Id.* at 492, *modified on reconsideration*, 2013 WL 6098484, at *2 (Nov. 20, 2013) (clarifying the scope of the privilege).

43. *See* Teradata Corp. v. SAP SE, U.S. Dist. LEXIS 232053 *43–47 (N.D. Cal. Sept. 9, 2019) for a further analysis of the different results reached by Judge Jones.

44. Astra Aktiebolag v. Andrx Pharm. Inc., 208 F.R.D. 92, 101–02 (S.D.N.Y. 2002). The decision protected Korean documents that would have been deemed nonprivileged under Korean law (although nondiscoverable under Korean discovery rules).

45. Livesley v. Horst Co., [1924] S.C.R. 605, 608 (Can.).

Traditionally, Anglo-Canadian courts have classified solicitor-client privilege as a matter of procedure rather than as a substantive rule of law. As a result, the question of whether a person can claim the privilege in a legal proceeding is a matter of procedure to be determined by the law of the forum.[46]

This position is further illustrated in *Lawrence v. Campbell*, the seminal English case on cross-border privilege.[47] The issue in *Lawrence* was whether the communications between Scottish lawyers practicing Scottish law in England and their Scottish client in Scotland were privileged. A plaintiff brought an action in England against both the Scottish client and the Scottish lawyer. English law recognized the privilege and would have prevented documentary production, though this arguably would not have been the outcome under Scottish law. The Court held that the communications were privileged since the governing law was that of England rather than Scotland. Vice Chancellor Sir Richard Kindersley stated:

> A question has been raised as to whether the privilege in the present case is an English or a Scotch privilege; but sitting in an English Court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and therefore the letters in question are privileged from production.[48]

Lawrence was followed by *Re Duncan*, which dealt with communications between an English client and a non-English

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46. *See* Oilworld Supply Co v. Audas, [1985] B.C.J. No. 1472 (Can.), where Judge William Campbell stated "it is well established that questions as to . . . privilege are matters of procedure governed by the law of the *lex fori*."

47. Lawrence v. Campbell [1859] 62 Eng. Rep. 186.

48. *Id.* at 491.

lawyer.[49] The plaintiff, who was challenging a foreign will, had consulted with a lawyer outside of England before eventually bringing the proceeding in an English court. The defendant argued that the communications should be disclosed on the basis that no privilege was recognized in the other jurisdiction. Lord Justice Ormrod found this argument inconsistent with *Lawrence* and held that the law of the forum governs solicitor-client privilege. As a result, the plaintiff was entitled to assert solicitor-client privilege over communications with his non-English lawyer. *Re Duncan* has also been followed in Canada.[50]

B. Civil Law Privilege and Other Legal Protections

1. Origin of Civil Law Privilege

In civil law countries, judges are central to determining the type of evidence needed for a matter and generally closely control the disclosure process. Because of the limited discovery in civil law countries, there has been less need to build out the complex privilege protections regularly found in common law jurisdictions. Statutes further govern the legal profession by way of civil law professional confidentiality or secrecy obligations. This means that instead of traditional "attorney-client privilege" as understood in many common law countries, civil law protects the confidentiality of communications between attorneys and their clients through "legal professional privilege."

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49. *Re* Duncan, [1968] 2 W.L.R. 1479 (Can.).

50. *See, e.g.*, Morrison-Knudsen Co. v. British Columbia Hydro & Power Auth., [1971] 3 W.W.R. 71 (Can. B.C.S.C.). Citing *Re Duncan* for the premise that advice from a foreign lawyer can fall within the scope of the solicitor-client privilege. The communications in question were between American in-house counsel of an American parent company and officers of that company's Canadian subsidiary. The court held that those communications were privileged on the basis that the communications would have been privileged had they occurred in Canada.

Notably, in many civil law jurisdictions, an in-house lawyer by definition cannot qualify as an attorney, meaning no attorney-client privilege can extend to in-house counsel. Thus, in some jurisdictions, information in the hands of in-house counsel may have no protection, and providing them with access to otherwise privileged materials may waive the privilege. Whether a particular document is protected may turn on whether it was created by outside counsel, how it was shared with in-house counsel, and where it is stored (i.e., who has possession, custody, or control of the document).

2. Types of Civil Law Privilege

The civil law legal professional privilege belongs to the lawyer rather than the client, and this privilege cannot be waived. Because the legal professional privilege and professional secrecy are obligations of the lawyer, a client cannot authorize a lawyer to divulge the privileged information to a third party, as can typically be done in common law jurisdictions. A number of civil law countries, including Belgium, France, Germany, and Italy, impose criminal sanctions on lawyers who violate legal professional privilege.

Litigation privilege, which is similar to the common law work-product protection discussed above, may exist in civil law jurisdictions, but the protections afforded by the litigation privilege are typically more limited and vary significantly by jurisdiction.

3. Civil Law Duty of Confidentiality

Many civil law jurisdictions recognize that attorneys, working in their capacity as attorneys, have a duty not to disclose confidential communications of their clients. Civil law jurisdictions do not generally consider this a privilege but a duty of confidentiality or professional secrecy. Clients may not be able to

waive this duty of attorneys, but clients may themselves choose to disclose the confidential information.

While most civil law jurisdictions recognize the special relationship between attorney and client in some form, the scope of protection the relationship affords can differ greatly.[51] In many civil law jurisdictions, the risk of disclosure is minimal, as parties simply disclose to other parties only what they wish to disclose.[52] Thus, communications themselves are not privileged, but lawyers have a duty not to disclose the information contained within the communications. Most civil law jurisdictions also do not have a formal process of disclosure, but the parties may apply for a court order that the opposing party or a third party disclose one or more specific, clearly defined documents containing relevant evidence of important facts. Many civil law jurisdictions provide attorneys the opportunity to resist such production orders through proof of a confidentiality obligation or other extenuating circumstances.

As the world becomes increasingly interconnected, companies involved in multinational business operations require extensive communications with their attorneys. A company is at risk of being involved in litigation in jurisdictions where they do business and may thus be subject to the laws of the forum country in determining the scope of privilege. Inconsistent rules applying to multinational communications bring greater risks to lawyers and clients alike, especially in maintaining

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51. Steven C. Bennett, *International Issues in Privilege Protection: Practical Solutions*, 82 U.S. L. WEEK 708 (2013), *available at* https://www.jonesday.com/files/Publication/123b31e2-e3a2-4849-ba42-7d61bd10db3e/Presentation/PublicationAttachment/dd0de71e-159b-4860-9b69-ed53d12c787c/bennettprivilege%20protection.pdf.

52. Philip M. Berkowitz, *The Attorney-Client Privilege and Advising Across Borders*, LITTLER MENDELSON (Nov. 29, 2013), https://www.littler.com/publication-press/press/attorney-client-privilege-and-advising-across-borders.

privilege.[53] For example, the European Union (EU) has drawn a clear distinction between communication with lawyers designated as *in-house counsel* and *outside counsel* in determining whether the communication is privileged, where communications between in-house counsel and others at the corporation are not considered privileged.[54]

4. Civil Law Choice of Law

Many civil law jurisdictions, including, for example, Germany and Switzerland, have no specific choice-of-law rules governing privilege. These civil law jurisdictions may determine that a third-country's privilege laws apply in some circumstances, such as when evidence is obtained through a request for mutual legal assistance in another country.[55] However, it should not generally be expected that the privilege applicable in common law jurisdictions will be applicable in civil law jurisdictions. For example, French courts have held that discovery compelled in France is subject to French law even if the compelled materials contained U.S. documents (and despite the French court's ability to determine the merits of the matter through the application of U.S. law if it wished).[56] French courts will, however, apply another country's privilege laws to information exchanged or relationships established entirely outside

53. Nina Macpherson & Theodore III Stevenson, *Attorney-Client Privilege in an Interconnected World*, 29 ANTITRUST 28 (2015).

54. Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348 (Ct. of First Instance 2007).

55. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 21, 2012, 1 Strafsenats [StR] 310/12 (Ger.), noting that there is a broad consensus that prohibitions on the use of evidence obtained through mutual legal assistance could arise due to either the domestic legal system of the requesting state or the principles of international law.

56. French Supreme Court, 1st Civil Section, Nov. 3, 2016, 15-20495; French Supreme Court, 1st Civil Section, July 4, 2007, 04-15.367.

of France. Other civil law countries, such as Brazil and the United Arab Emirates, will not typically apply another country's law if it conflicts with their own rules related to attorney-client privilege.

III. PRACTICE POINTS FOR ADDRESSING CROSS-BORDER PRIVILEGE ISSUES

A. Practice Point 1: Remain Mindful That Approaches to Privilege Differ

The substantial differences between, and even within, civil law and common law jurisdictions mean that counsel, courts, and parties must identify what potential privileges and protections are available, and what waiver risks there are, under the law of each jurisdiction as early as possible. In-house and outside counsel working regularly in particular jurisdictions should be knowledgeable regarding the common privilege distinctions they will encounter, so that they can take proactive steps to protect documents and information.

Protections afforded to documents and information related to a party's communications with counsel and attorney work-product protections vary by jurisdiction. Identical materials may be privileged in one jurisdiction but not another. For example, in the *RBS Rights Issue Litigation*, the English court held that English privilege law applied because the litigation forum was England, even though the legal advice was provided in the United States.[57] English courts take a narrower view of who the client is when applying the legal-advice privilege than most U.S. courts do when applying the attorney-client privilege.[58] Thus, the *RBS* court concluded that some information, including U.S. outside counsel's notes and other materials regarding interviews with RBS employees, were not privileged and were discoverable in England. Once information is produced in one jurisdiction, there is a greater likelihood that it will be discoverable in other jurisdictions. Thus, in establishing and

57. RBS Rights Issue Litig. [2016] EWHC 3161 (Ch).

58. *Id*.

maintaining privilege, care must be taken to anticipate where the otherwise privileged information might be relevant and requested and what steps can be taken to mitigate risk.

If a jurisdiction does not recognize a "privilege," the jurisdiction may afford other disclosure protections such as under a theory of confidentiality. Many countries impose confidentiality obligations on attorneys. However, some U.S. courts have distinguished confidentiality obligations from the attorney-client privilege:

> [A] professional secrecy obligation is not an evidentiary privilege—a critical distinction . . . . [S]imply because a [foreign] statute requires a party to keep clients' affairs secret does not mean that a privilege exists. A foreign tribunal may compel disclosure if it determines the need for the information is sufficient to outweigh the secrecy obligation, while the privilege, in contrast, is absolute and inviolate.[59]

If a party grounds a privilege assertion in another country's confidentiality obligations, the party must carefully examine those obligations to determine, among other things, whether exceptions to the confidentiality exist. For example, confidentiality obligations in civil law jurisdictions often do not cover documents possessed by a client, which may support waiver in common law jurisdictions where confidentiality is a required component of the attorney-client privilege.

Work-product protection generally is only available in common law jurisdictions. Many civil law jurisdictions either limit or do not recognize similar work-product protections. Attorneys should take precautions when creating documents in

59. Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 67 (internal quotation marks and citations omitted).

anticipation of litigation and in determining whether and to whom to disclose their work product in the context of multi-jurisdictional matters. Such precautions include determining whether in-person meetings and conference calls can substitute at times for written, and therefore more readily discoverable, communications.

B. Practice Point 2: Be Aware of the Limitations on In-House Counsel Privilege

The application of disclosure protection laws can vary depending on whether in-house counsel or outside counsel created or participated in the putatively protected documents.[60] The differences in these attorney roles have implications for privilege and other disclosure protections in the jurisdictions that recognize them. For outside counsel, privilege is clearly defined by the attorney-client relationship, although there are jurisdictional nuances regarding who within an entity can be deemed the client for the purposes of the privilege.[61] Similarly, interactions between in-house counsel and their outside counsel are well established within the attorney-client relationship and are generally privileged or protected, but there are many

60. *See also* The Sedona Conference, *Practical In-House Approaches for Cross-Border Discovery and Data Protection*, 17 SEDONA CONF. J. 397 (2016) (providing more detailed guidance for in-house counsel navigating cross-border data transfer and discovery issues).

61. For example, in the United States, employees generally have been recognized as being able to have privileged communications with in-house counsel regardless of the level of their position in the company. *See* Upjohn Co. v. United States, 449 U.S. 383, 390 (1981). England uses a more limited definition of the client. *See* Three Rivers District Council v. Governor and Company of the Bank of England (No. 5) [2003] EWCA (Civ) 474 (Eng.) (holding that only those employees with express or implicit authority to seek and receive legal advice on behalf of the company could qualify as the client for purposes of privilege).

jurisdictional variants as to whether in-house counsel may be considered an attorney to the client company employing the in-house counsel. Communications between in-house counsel and their outside nonlegal, third-party contractors (such as public relations firms, experts, eDiscovery vendors, and accountants) are less clearly defined. For example, under English law, such communications would not be privileged, although they may be under U.S. law.[62]

Within many organizations, in-house counsel plays a dual role as legal adviser and as business adviser. Context can affect whether privilege attaches to those communications and advice in different jurisdictions, because privilege typically only attaches to those instances when the in-house counsel is acting as a legal adviser.[63] In-house counsel should be mindful of these

62. *See, e.g.*, *Three Rivers District Council* (communications with third parties could not be considered protected by the attorney-client privilege); Pricewaterhouse Coopers v. Commr of Taxation of the Commonwealth of Australia [2004] FCAFC 122 (finding there was no reason to prevent privilege from being claimed for third-party communications, as legal counsel frequently relied on outside assistance to give accurate legal advice given the complexities of modern business); *In re* Bieter Co., 16 F.3d 929 (8th Cir. 1994) (if a nonemployee contractor is the functional equivalent of an employee, privilege can attach). Note courts differ widely on this in the United States, and expert advice is encouraged if the work of third-party contractors is being completed under attorney-client privilege.

63. *See, e.g.*, U.S. Postal Serv. v. Phelps Dodge Refining Corp., 852 F.Supp. 156 (E.D.N.Y. 1994). Courts have also varied as to what is a legal and business function for in-house counsel. For example, some courts have determined that in-house counsel participating in a negotiation is functioning in a business role. Georgia Pacific v. GAF Roofing Mfg. Corp., 1996 WL 29392 (S.D.N.Y. Jan. 25, 1996). *See also* MSF Holdings, Ltd. v. Fiduciary Trust Co., Int'l, 2005 WL 3338510 (S.D.N.Y. Dec. 7, 2005) (in-house counsels' communications did not include specific references to legal principles or contain legal analysis, so the communications were deemed to be of a predominantly business nature and not privileged).

issues and consider clearly separating communications into business advice and legal advice whenever possible.[64]

For in-house counsel, the "client" is generally considered to be the legal entity employing the in-house counsel; however, certain jurisdictions define the client more narrowly. Many civil law jurisdictions find that in-house counsel is not sufficiently independent to provide legal advice to the corporate client, so privilege cannot attach to in-house counsel work.[65] Therefore, when in-house counsel communicates with other employees, or former employees, those communications may not be privileged. This is also the case in some common law jurisdictions, which may only recognize a limited in-house counsel privilege. For example, in the English *Glaxo Wellcome* case, emails between an in-house counsel and an employee gathering information to provide to external lawyers were not protected by the legal-

64. One admittedly time-intensive example of how this could be done is through a "charging memo," which is documentation provided to a specific set of people, laying out the scope of work, explaining the legal reasons for the work, and providing instructions on the steps and appropriate privilege or confidentiality labeling that employees should take. Recipients should then acknowledge this document and records maintained. In-house counsel would also need to update the memo regularly as the scope of work or instructions change. Additionally, in-house counsel can consider providing training for employees on handling and protecting privilege, both in general and on a project-specific basis, including communication planning, data storage, and standard labeling conventions.

65. A notable exception is Spain, which recently passed a law explicitly laying out that in-house counsel will be subject to a separate lawyers labor agreement that recognizes the independence and legal privilege required to practice in the legal profession. *See Real Decreto 135/2021, de 2 de marzo, por el que se aprueba el Estatuto General de la Abogacía Española* (March 24, 2021), *available at* https://www.boe.es/boe/dias/2021/03/24/pdfs/BOE-A-2021-4568.pdf; Marten Männis, *A Giant Leap Forward in Continental Europe Toward Full Unification of the Legal Profession—legal privilege for Spanish in-house lawyers clarified and enshrined in law*, IN-HOUSE LEGAL (March 8, 2021), *available at* https://inhouse-legal.eu/legal-privilege/spanish-decree-law/.

advice privilege.[66] Similarly, England's *Three Rivers* case found that internal communications, even with the intent of sharing the information with outside counsel, were not privileged.[67] With respect to in-house counsel, the extent to which any privilege applies can also vary depending on the specific function, licensing, or certification of the in-house counsel.[68]

Particularly at the outset of litigation, in-house counsel should be mindful of potential challenges to privilege and aware that engaging outside counsel to provide legal advice may help to protect privilege in some situations.[69] In-house counsel responsible for contract negotiations should coordinate with litigation counsel (in-house or outside) to ensure that contractual choice-of-law clauses make sense for the entity, as these

66. Glaxo Wellcome UK Ltd (t/a Allen & Hanburys) & anr v Sandoz Ltd & ors [2018] EWHC 2747 (Ch) (Eng.). In *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652 (Eng.), the England & Wales Court of Appeal held that emails between board members, which had been prepared for the purpose of discussing a settlement proposal of a dispute, were not covered by litigation privilege. The court held that litigation privilege is restricted to circumstances where the dominant purpose of communications is for obtaining advice or information, not the conduct of litigation more broadly.

67. *Three Rivers District Council*, [2003] EWCA (Civ) 474 (Eng.) Note that this decision has been divisive, and the Hong Kong Court of Appeals found the decision unworkable, deciding instead that the appropriate test for determining privilege within an entity was the "dominant purpose" test. Citic Pacific v. Secretary of Justice [2012] 2 H.K.L.R.D. 701.

68. *See* Sundenga Indus., Inc. v. Global Indus., Inc., No. 18-2498-DDC, 2020 WL 2513072 at *5 (May 15, 2020 D. Kan.) (noting that U.S. judges have "distinguished between countries where in-house counsel are not required to be members of the bar or have some form of legal credentials, such as China or the Netherlands, and those where they are" when determining the applicability of the attorney-client privilege).

69. Note that the engagement of outside counsel must involve legal advice. The engagement of outside counsel merely as a means to maintain the color of privilege would not likely be effective and would be unlikely to gain favor with courts or opposing parties.

can have serious impacts on privilege if litigation or arbitration arises later. Actions taken at an early stage of a matter without due consideration of the privilege implications may have later consequences that cannot be remedied. Furthermore, these consequences may crystallize in jurisdictions that are not contemplated at those early stages. Take, for example, an investigation by the European Commission. Under EU antitrust case law, the attorney-client privilege does not protect documents prepared by in-house lawyers or the in-house lawyer's communications with company colleagues. Disclosure of in-house work product to the European Commission may prompt later arguments that the disclosure amounted to a waiver of privilege elsewhere.

Figure 1 (below) shows a decision tree that in-house counsel based in Europe could follow in assessing whether a privilege will cover documents and other information and whether, for example, U.S. privilege law may apply. The first step in the assessment is understanding who wants or will want the document or information. For example, if the inquiry is being made by a national regulator, much will depend on which authority is seeking the documents or information, and thus the specific laws that may apply. Similarly, if the documents or information are being sought by, or are likely to be sought by, a private party, in-house counsel should examine which jurisdictions' laws could apply. If there is an action in the United States, for example, and there is an argument that the communications "touch base" with the United States or the United States has the most significant interest in the communication, then U.S. privilege law may apply. In that scenario, if other conditions for the privilege to apply are satisfied (i.e., the communication was confidential, between attorney and client, and for the purpose of giving or receiving legal advice), the communication is more likely to be protected.

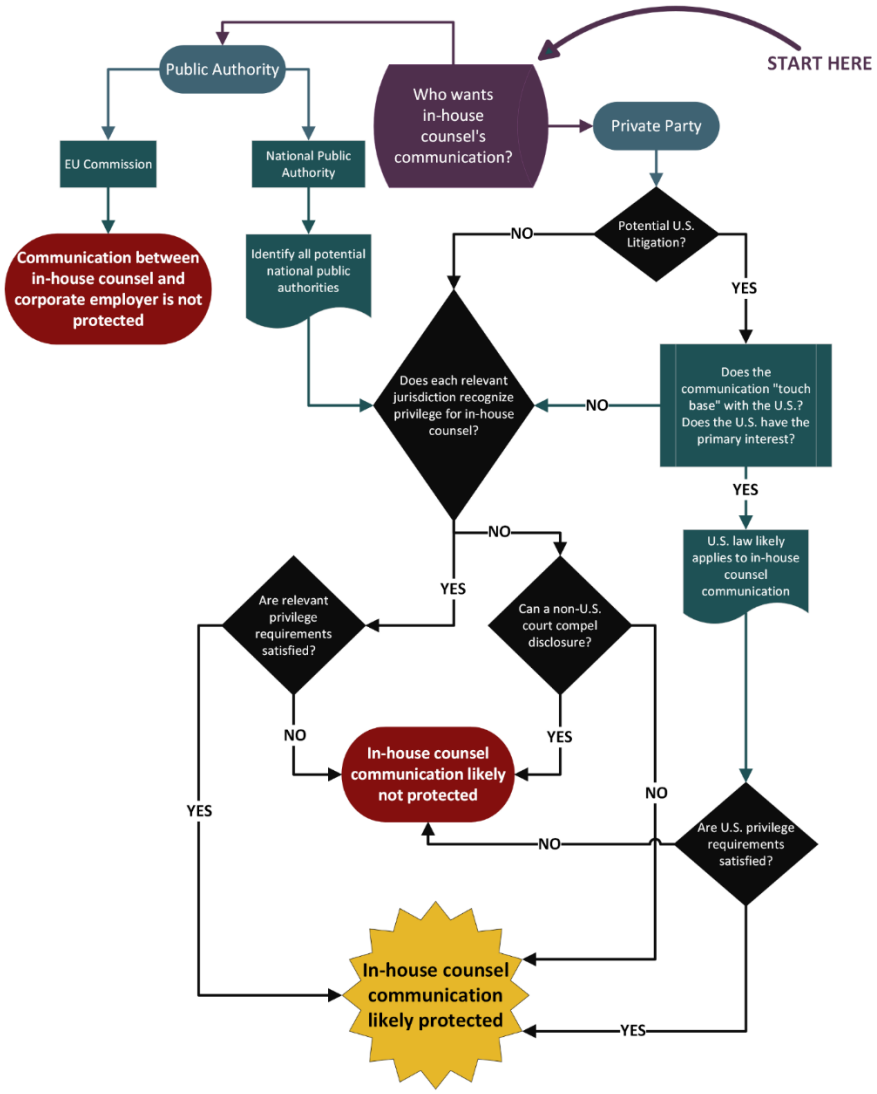

Figure 1. An example of the analysis EU in-house counsel might take to understand applicable privileges.

C. *Practice Point 3: Consider Applicable Governmental and Regulatory Privileges and Weigh the Risks of Waiver before Making a Regulatory Disclosure*

Counsel should consider whether documents are subject to regulatory privileges, such as confidential supervisory information or the bank-examiner privilege, which are held by regulators. Supervisory regulatory privileges vary greatly by jurisdiction and can affect the disclosure of documents, such as when voluntary disclosure is desired by a client but refused by a regulator holding the privilege.

Additionally, before disclosing materials to a regulatory body, counsel must consider what effect such disclosure may have on their clients' interests in other jurisdictions. Disclosures in one jurisdiction may contribute to a finding that privilege has been waived in another. The confidentiality of such document disclosures also may not be guaranteed. For example, governments may share documents with other governments through requests or information sharing agreements. While some regulatory bodies treat all disclosures as confidential (and thus an argument can be made that privilege has not been waived), others do not, and disclosure in that jurisdiction may be considered waiver in another. For example, in Canada, a disclosure of documents to the Competition Bureau under a Section 11 Order for the production of documents is considered "confidential."[70] That is, the Canadian Competition Bureau will not further disclose any of the documents provided under the Order.

In the United States, by contrast, disclosure to a governmental agency is more likely to result in a waiver of applicable privileges or protections. For example, the U.S. Court of Appeals for the Ninth Circuit held that if a party provides attorney-client privileged materials to the government, the party cannot later

70. Competition Act, R.S.C. 1985, §§10(3) and 29.

claim privilege over the same materials in civil litigation.[71] In another recent Ninth Circuit case dealing with whistleblower retaliation, *Wadler v. Bio-Rad*, the court found that not only had Bio-Rad previously waived any applicable privileges by disclosing relevant communications to the governmental agencies in pre-suit investigations and administrative proceedings, but that Wadler could rely on the privileged communications necessary to prove his case.[72]

Counsel must work with their clients to consider generally the upside of government or regulatory cooperation with the potential downside of the loss of privilege or other protections. Counsel should also consider when and how to reasonably limit the production of documents and information to governments and regulators through, for example, trying to negotiate a narrower scope for requests and the redaction of protected information.

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71. *In re* Pac. Pictures Corp., No. 11-71844, 2012 WL 1293534 (9th Cir. Apr. 17, 2012). The Eighth Circuit, in contrast, recognizes limited or selective waiver, in which voluntary disclosure to the government, which is often done in order to cooperate with an investigation, does not waive the privilege. Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (en banc). All other U.S. circuit courts have rejected the limited waiver of *Diversified Industries.*

72. Wadler v. Bio-Rad Laboratories, Inc., No. 15-cv-023560-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016). Further, the Court recognized Rule 1.6 of the Model Rules of Professional Conduct, which permits an attorney to reveal privileged information when that information is required to establish a claim or defense related to "a controversy between the lawyer and the client." Privilege is an important factor to encourage whistleblowing. Both compliance and law enforcement consider this to be critical, especially as many major international fraud investigations have begun with a whistleblower who might not have come forward absent such protections.

D. Practice Point 4: Be Proactive in Exploring and Exercising Options to Protect Applicable Privileges

Counsel should be diligent in exercising all available options in protecting the privilege and other disclosure protections at all stages of a representation.[73] Counsel, both in-house and outside, should consider privilege issues early and regularly as part of both general litigation preparedness and specific matter planning, identifying how to protect documents under relevant different privileges and different privilege regimes. Counsel should consider which jurisdictions might have an interest in a client or a specific matter. It is often prudent to assume that the least protective privilege law may apply. Counsel should not assume that broad U.S. privilege protections will apply in other countries.[74]

Counsel should also consider and utilize properly drafted confidentiality agreements and protective orders, which can provide limited protections to privileged materials disclosed in litigation.[75] U.S. courts may order both confidentiality

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73. For additional guidance on protecting electronically stored information (ESI), *see* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95 (2016). This publication also has valuable guidance on the implementation of protective orders to safeguard privilege in U.S. litigation.

74. *See* RBS Rights Issue Litig. [2016] EWHC 3161 (Ch) (Eng.).

75. *See, e.g.*, Tenneco Packaging Specialty & Consumer Prods., Inc. v. S.C. Johnson & Son, Inc., No. 98 C 2679, 1999 WL 754748 (N.D. Ill. Sept. 14, 1999) (confidentiality agreement helped to preserve privilege in a dispute about waiver). *See also* The Sedona Conference, *International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition),* Appendix C: Model U.S. Federal Court Protective Order (January 2017), *available at* https://thesedonaconference.org/publication/International_Litigation_Principles [hereinafter *Sedona Conference International Litigation Principles*], which includes a "No Waiver of Privilege Provision" and other privilege protections. Principle 4 of The Sedona Conference International Principles also

agreements that include nonwaiver provisions and protective orders that can be binding in other U.S. litigation.[76] However, these will not necessarily provide protection in non-U.S. jurisdictions or during governmental or regulatory investigations. A court-sanctioned protective order can be implemented to include provisions in which both sides agree that inadvertent disclosure does not constitute waiver (i.e., that such disclosure remains confidential), and that the material cannot be used in any other proceeding. Absent specific agreement between the parties, protective orders may not govern the use of inadvertently produced privileged materials, and inadvertent disclosures in U.S. litigation can still lead to privilege disputes between the parties. Similar agreements are regularly utilized as part of document exchange protocols in Canada.

Because many jurisdictions do not recognize in-house counsel privileges or protections, knowing when to engage and leverage the expertise of outside counsel is advised. Even in common law jurisdictions, judicious engagement of outside counsel may help to avoid the complex legal-versus-business advice analysis that often occurs in privilege disputes about in-house counsel functions, as the engagement of outside counsel to provide legal advice offers a clearer delineation between legal and business functions. In multijurisdictional matters, consider whether engaging local counsel from the relevant jurisdiction(s) with the broadest privilege or disclosure protections would be helpful. When it is contemplated or likely that an engagement will involve activities in more than one jurisdiction, the attorney

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supports the use of protective orders in the context of minimizing conflicts between data protection laws and U.S. discovery demands.

76. *See* FED. R. EVID. 502, which limits subject-matter waiver and allows additional protections through protective orders (often called 502(d) orders in U.S. litigation). *See also* Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2013 WL 50200 (D. Kan. Jan 3, 2013).

being engaged should be able to advise the client on the potential risks associated with varying and conflicting laws concerning privilege. Using local counsel in another country to assist in navigating that jurisdiction's privilege framework can provide critical guidance and value. Further, retaining local counsel in other jurisdictions may, depending on the jurisdiction, support the protection of privilege under the other jurisdiction's rules.

Privilege is not only a litigation issue. Counsel must consider the nature of a particular client engagement as well, such as whether the engagement is for advice related to a commercial matter where there is no litigation, or for assistance on an adversarial matter related to a dispute. Nonlitigation advice related to privilege may require assistance with issues, such as choice-of-law clauses, to help proactively protect privilege.[77] For engagements related to disputes, counsel will need to help best negotiate maintaining the privilege and marshal the most compelling arguments for the strongest privilege to apply. However, counsel may have little input or ability to determine retroactively which jurisdiction's privileges will apply. Some courts, for example, equate anticipation of litigation for triggering the preservation obligation with anticipation of litigation for purposes of identifying protectable work product.[78] Where that is

77. *See also* The Sedona Conference, *Commentary and Principles on Jurisdictional Conflicts over Transfers of Personal Data Across Borders*, 21 SEDONA CONF. J. 393, 423 (2020). "In commercial transactions in which the con-tracting parties have comparable bargaining power, the informed choice of the parties to a contract should determine the jurisdiction or applicable law with respect to the processing of personal data in connection with the respective commercial transaction, and such choice should be respected so long as it bears a reasonable nexus to the parties and the transaction." This advice can reasonably be extended to matters of privilege as well.

78. *See, e.g.*, LendingTree, LLC v. Zillow, Inc., No. 3:10-CV-00439, 2014 WL 1309305, at *10 (W.D.N.C. March 31, 2014) ("duty to preserve evidence arose no later than its assertion of the attorney work product privilege"); Siani v.

the case, timely legal holds may also help to define the scope of work-product protections by indicating a starting date for the work-product protection to apply.[79] However, for clarity, legal holds themselves do not confer any privilege status on the documents and information under legal hold.

Counsel are responsible for informing their clients about privilege—when it exists, how to protect it, and when it can be waived—so that clients can make informed choices. For example, in common law jurisdictions, it is important for clients to understand that privilege belongs to the client, not the counsel. Clients need to understand that as it is their privilege, they are able to waive it, inadvertently or otherwise. Clients should be informed that all documents and discussions related to a litigation must remain private and confidential (must not be communicated to third parties) or the privilege is lost. When working with corporate clients, counsel should ensure that work performed by nonlawyers, including third parties, is appropriately labeled and identified as privileged or protected when appropriate. In-house counsel may need to offer specific training to help others in the organization understand when they are working on privileged projects and how to stamp or brand related documents to help preserve privilege. Although the identification of documents as privileged is not dispositive, a protocol for such work will be invaluable in assisting outside counsel with understanding when particular stamping or branding is implemented in order to best protect client documents.

State Univ. of N.Y. at Farmingdale, No. CV09-407 (JFB)(WDW), 2010 WL 3170664 (E.D.N.Y. Aug. 10, 2010) (if litigation foreseeable for work product, it was reasonably foreseeable to trigger preservation).

79. For additional information on legal holds, see The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341 (2019).

Counsel should be mindful of and inform their clients about data residency concerns. While clients and counsel may believe that documents they author are stored locally on their laptop or on a server in their office, this setup is often not the case. Many large corporations and law firms have moved to cloud-based storage, which may or may not be storing the data in the jurisdiction where it is created. Furthermore, the use of certain publicly available services, such as Google Translate or Apple's virtual assistant, Siri, may void the privilege and may violate professional secrecy obligations in many jurisdictions. These services may additionally route information to other jurisdictions or potentially affect the confidentiality of the information. Similar to other issues regarding the transmission of privileged materials to another jurisdiction, storing data in a certain jurisdiction but accessing it from another can raise concerns about confidentiality and privilege, especially in instances where individuals in (or outside) the storage jurisdiction have access to that privileged content. However, certain issues may be mitigated through, for example, access controls and the use of a formal vendor engagement program that assesses vendor risk and imposes strict confidentiality obligations on vendors.

When traveling, it is important for counsel to understand that invasive searches of electronic devices could open up the entirety of the data in the attorney's (or client's) possession to border investigators.[80] For example, if border agents search a device that is connected to a cloud server, then they may have access to all files to which the individual has access. Individuals with access to privileged content on their devices or access to cloud servers should take care to limit the privileged content

80. *See, e.g.*, U.S. v Kim, 103 F. Supp. 3d 32 (D.D.C. 2015); *see also* Riley v. California, 573 U.S. 373 (2014).

they are carrying and disconnect from those servers before crossing any border to maintain the confidentiality of data.[81]

Proactive planning should also include consideration of the other protections that could apply to protect documents from disclosure when privilege may not. For example, professional duties of confidentiality, secrecy laws and other obligations, blocking statutes, and even data protection laws. Data protection laws, such as the EU's General Data Protection Regulation,[82] prevent the disclosure of personal data without a valid legal basis and concomitant protections of that data during and after transfer. Although not intended as laws to protect legal privileges, data protection laws and related privacy safeguards typically contain strict confidentiality obligations and disclosure restrictions that may, when applicable, provide supplementary grounds for refusing to disclose privileged or other protected information that contains personal data.

E. Practice Point 5: Assess Possible Privilege Waivers and Take Practical Steps to Minimize Waiver Risks Going Forward

Counsel should assess whether there has been a waiver of an applicable privilege by determining who has had access to the

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81. Rawles, Lee, *Traveling lawyer get new protections in device searches at border*, ABAJOURNAL (Jan. 25, 2018), https://www.abajournal.com/news/article/new_guidelines_for_electronic_device_searches_at_us_borders_will_impact_att; American Bar Association Center for Professional Responsibility, Electronic Device Advisory for Mid-Year Meeting Attendees (2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_electronic_device_advisory_exec_summary.pdf.

82. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L119/1) *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679#PP3Contents.EU 2016/679.

documents or information, whether there was a prior disclosure to any third parties, identifying to whom disclosure was made, and understanding the circumstances of that disclosure. With respect to documents and information subject to disclosure, counsel should set up a defensible privilege review protocol and act immediately to retrieve any inadvertently disclosed privileged documents or information.

A U.S. court's determination that another country's law applies to a privilege determination can result in a finding that a protection is inapplicable or was waived because the other jurisdiction does not recognize the protection at all, or because the protection was waived under the particular circumstances. For example, to receive the protection of the attorney-client privilege in the United States, it is necessary to show, among other things, that the communication was kept confidential.[83] And, even if confidentiality was maintained within a corporate party, the privilege may be waived if the communication was shared with someone to whom the privilege does not apply. For example, if a communication is made accessible to in-house counsel in a jurisdiction that does not recognize the privilege for in-house counsel, a court could find the attorney-client privilege has been waived based on the rationale that the information was disclosed outside the scope of the privilege.

Clients may choose to waive privilege in order to cooperate in litigation or with a governmental investigation. Counsel should be aware of this potential strategy and its impact on the future use and protections of documents voluntarily disclosed. To the extent there was a disclosure to a third party (including a governmental or regulatory body), counsel should closely examine the circumstances of the disclosure, such as whether the disclosure was compelled, voluntary, or inadvertent; the scope

83. *See* United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011).

of the disclosure; and whether the disclosure was made pursuant to a confidentiality agreement, protective order, or other order of a court or other authoritative body.[84] Factors that may weigh in favor of nonwaiver are that the disclosure was unauthorized, compelled, very limited in scope, and/or made under a confidentiality agreement or court order. For example, in the United Kingdom, a privileged document may be selectively shared with regulators for a defined purpose without necessarily losing its privileged status.[85] By contrast, a broad voluntary disclosure to a third party in the absence of a confidentiality agreement will likely weigh in favor of a finding that there has been a waiver. If the disclosure was inadvertent, counsel should be prepared to clearly articulate how the privilege review protocol was reasonable and appropriate under the circumstances and how counsel acted immediately to retrieve the inadvertently disclosed documents or information.

Finally, to the extent practicable, counsel should avoid putting privileged documents or information directly at issue, such as by arguing that the client acted in good faith based on the client's review of a particular privileged document or legal advice received from counsel, which could waive otherwise applicable privilege. If counsel cannot avoid putting arguably privileged documents or information at issue, counsel should take all reasonable steps to narrow the scope of any waiver, including through negotiating an agreement with the other party or

84. *See* Regents of the Univ. of Cal. v. Super. Court of San Diego Cnty., 81 Cal. Rptr. 3d 186 (Cal. Ct. App. 2008) (finding no waiver of privilege because at the time of the cooperative disclosure "it would not have been reasonable for defendants to resist or otherwise challenge the government's requests").

85. *See* Prop. All. Grp. Ltd. v. The Royal Bank of Scotland Plc [2015] EWHC 1557 (Ch) (UK). Selective waiver is only followed by a minority of U.S. courts. The First, Third, Fourth, Sixth, Ninth, Tenth, and D.C. Circuits all reject the selective-waiver doctrine.

by seeking a protective order or other relief from the court that the use and disclosure of the document will not result in a broad waiver. However, such protection may still fail to protect disclosed information from waiver in other jurisdictions.

F. Practice Point 6: Special Planning is Necessary for Parallel Proceedings and Simultaneous or Sequential Litigation

Counsel should be aware that parallel proceedings and simultaneous or sequential litigation require special planning and cooperation.[86] In international litigation, "parallel proceedings" often refers to the simultaneous pendency of claims between the same or similar parties in the courts of different countries. "Parallel proceedings" also can refer to simultaneous or successive investigations or litigations arising out of a common set of facts, initiated by any combination of criminal, civil, or administrative authorities as well as private plaintiffs.

When a parallel proceeding involves an investigation by a foreign regulator or prosecutor, counsel should carefully assess legal privileges on a global scale, as the production of documents otherwise protected from disclosure to a foreign regulator may have multiple ramifications in parallel or successive

86. *See also Commentary and Principles on Jurisdictional Conflicts over Transfers of Personal Data Across Borders*, *supra* note 77, at 447–48. "While we believe that, as a general proposition, it is in the best interests of all concerned parties (and authorities) to cooperate on some level and work together to ensure that all matters proceed more or less in tandem, and to ensure that the end results are, if not uniform, at least not inconsistent or mutually exclusive, we also realize that in some situations one or more of the parties may not think that cooperation or coordination is in its own best interest. In those circumstances, it may be incumbent on the presiding tribunals (in the case of litigation) and the responsible government authorities (in the case of investigations) either to "encourage" any reluctant party to cooperate or, where that is not possible, to exercise its powers to maintain progress in its pending matter and prevent any unjustified delay."

proceedings.[87] For example, when evaluating whether to produce a legally privileged document to a foreign regulator voluntarily to demonstrate cooperation in an investigation, counsel should assess the possibility of and risks associated with subsequent litigation or investigations in other jurisdictions where such production may result in waiver of the privilege over the specific document produced as well as all documents concerning the same subject matter.[88]

To the extent multiple law firms are representing an entity involved in parallel proceedings, their considerations, recommended strategies, and approaches regarding the benefits and risks of disclosing or withholding certain documents should be coordinated as much as practicable.

Simultaneous or sequential proceedings may lead to inconsistent rulings, including inconsistencies regarding whether legal privileges apply to documents at issue. This issue is not unique to matters involving cross-border privilege concerns. Counsel should consider various options to mitigate the risks of

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87. *See* The Sedona Conference, *International Principles for Addressing Data Protection in Cross-Border Government & Internal Investigations: Principles, Commentary & Best Practices*, 19 SEDONA CONF. J. 557 (2018) (providing practical guidelines for investigations that require the transfer of protected data across national borders). Principle 3 provides that "Courts and Investigating Authorities should give due regard both to the competing legal obligations, and the costs, risks, and burdens confronting an Organization that must retain and produce information relevant to a legitimate Government Investigation, and the privacy and data protection interests of Data Subjects whose personal data may be implicated in a cross-border investigation."

88. *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214. 1221 (D.C. Cir. 1981) (privilege should not allow a party to "pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others"); United States v. Massachusetts Institute of Technology, 129 F.3d 681 (1st Cir. 1997) (privilege was waived for documents disclosed to a government agency); *In re* Pac. Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (rejecting selective-waiver doctrine).

inconsistent privilege rulings to the extent they are available, depending on where the proceedings have occurred or are pending.[89] In the United States, this may include seeking to transfer, consolidate, or coordinate matters pending in different courts. It also may include requesting a stay on certain discovery if another forum is better suited to evaluating the applicable privileges and discovery procedures.

Courts have multiple options within their discretion to exercise when confronted with the possibility of inconsistent rulings in simultaneous proceedings for matters pending in multiple jurisdictions. They may choose to do nothing and continue to press ahead with the matter(s) before them, reflecting a preference to allow the plaintiff to be permitted to pursue its action in its chosen forum and a reluctance to dismiss or delay a local action over which it has proper jurisdiction and venue. They may raise the possibility of transfer, coordination, or consolidation with the parties and with the judges in other jurisdictions in an effort to not only mitigate the risks of inconsistent rulings but also reduce discovery costs and duplicative motion practice in different courts, thereby conserving party and judicial resources. In the United States, formal statutes and rules may govern transfer, consolidation, and scheduling issues; courts also may rely on their inherent authority to manage litigation before them. Where adjudication of privilege claims over the same documents are simultaneously pending in different jurisdictions, one court may choose to stay or defer ruling on the dispute to allow another court to make its ruling, permitting the other court to analyze the first court's decision and determine whether to follow or depart from it. The two courts may—with

89. *See* Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264 (E.D. Va. 2004) (work-product protection was not waived when documents were produced subject to a court order in a parallel litigation).

the consent of the parties—wish to confer on the procedure to be adopted.

In sequential litigation in different countries or jurisdictions, the parties in the subsequent matter may seek discovery of documents or testimony provided in the initial matter. Counsel and the courts should consider the propriety of such requests and whether the court has the authority to allow for such sharing or productions of documents from foreign proceedings to occur. There may be agreements, protective orders, or confidentiality orders that prevent authorizing access to such documents or testimony. It might be necessary to go back to the original court and request a change in its order(s). In addition, although allowing access or sharing arguably may promote efficiency and cost savings, they may circumvent the scope of permissible discovery in the subsequent proceeding and create unfair or inequitable results.

G. Practice Point 7: Assist Courts with Cross-Border Privilege Issues, as Courts May Lack Familiarity with Relevant Jurisdictional Laws

Counsel can responsibly assist courts, regulators, and others with understanding and navigating privilege and other protection issues in multijurisdictional matters. Counsel is accountable for understanding the applicable rules and practices concerning the discretion afforded courts in determining issues of privilege. Counsel bears the burden of demonstrating that a foreign jurisdiction's law is applicable, and the documents or information in question fall under those laws.

In civil litigation in U.S. federal courts, Federal Rule of Civil Procedure 26(f) requires litigants to meet and confer early in the litigation process and propose a discovery plan. Rule 26(f)(3)(B) and (D) require that the parties address these topics in their discussions leading to their proposed discovery plan: "(B) the

subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;" and "(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502." Parties should use these required early conferences to present an informative plan to the court and to flag issues, including cross-border privilege issues, that may become larger disputes at a later point.

Where parties and their counsel are aware early in the lawsuit that discovery may implicate the privilege laws of non-U.S. jurisdictions, Rule 26(f)'s required meet-and-confer discussions and discovery plan provide an opportunity for parties and their counsel to raise and potentially reach agreement regarding the need and approach for addressing such documents. This may include, among other topics, reaching agreements regarding the privileged or protected nature of the documents, the scope of their discovery, and whether a phased approach to the potential production of such documents may be appropriate. A phased approach, focusing, for example, first on U.S. documents and information, might avoid the potential for protracted disputes regarding the application of non-U.S. jurisdictions' privileges if, after the discovery of U.S. documents, non-U.S. materials are only marginally relevant to the parties' claims and defenses (and therefore may not require production). Discovery focused on non-U.S. materials at the outset may then be disproportionate to the litigation if the parties can obtain adequate discovery from other sources or means that do not implicate cross-border privilege issues.[90]

90. *See, e.g.*, FED. R. CIV. P. 26(b)(1) and (f)(3).

Although less frequently invoked, Federal Rule of Civil Procedure 44.1 also is instructive if the non-U.S law issue arises later in the lawsuit, if the parties dispute whether non-U.S. law applies, or if the parties dispute how non-U.S. law affects the discoverability of the documents and information at issue. Rule 44.1 not only requires that the parties provide notice of their intent to raise an issue about non-U.S. law, it also provides guidance to the court regarding what sources the court may use to adjudicate the non-U.S. law and states that the determination is a question of law, not a question of fact. Specifically, Rule 44.1 states:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

The Federal Rules of Civil Procedure also permit the court to appoint a special master or an expert to assist the court in its determination of the non-U.S. law.[91]

The 1966 Advisory Committee Notes highlight the court's flexibility in determining the applicability of non-U.S. laws. They state that the court "may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in

91. *See, e.g.*, FED. R. CIV. P. 53 (appointing special masters) and FED. R. EVID. 706 (court-appointed expert witnesses).

insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel." The Advisory Committee Notes further state that "the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties." If the court engages in its own research, it is not obligated to provide notice to the parties; however, the Advisory Committee Notes encourage that, ordinarily, "the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely."

When issues arise in discovery regarding the applicability in federal courts of non-U.S. privileges or other protections, such as confidentiality or professional secrecy obligations, in practice the parties often submit declarations or affidavits from experts regarding the non-U.S. law and the discoverability of the documents or information in dispute.[92] The parties also may submit translations of non-U.S. laws or non-U.S. court opinions that may be relevant to the court's determination of the applicable law regarding privileges and discoverability.

To assist the court in its determination of non-U.S. law, counsel should proactively compile relevant treatises, laws, court opinions, and authorities. Counsel also should identify potential experts who are qualified to credibly address the non-U.S. laws and their application to the documents or information in dispute.

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92. Note that, although Federal Rule of Civil Procedure 26(b) as amended in 2010 provides some protection against disclosure, documents and materials provided to testifying experts and drafts of their reports may still be discoverable in U.S. litigation, even if they contain otherwise privileged information. *See, e.g.*, *In re* Application of the Republic of Ecuador, 735 F.3d 1179 (10th Cir. 2013); *In re* MTBE Prods. Liab. Litig., 293 F.R.D. 568 (S.D.N.Y. 2013).

H. Practice Point 8: Understand Applicable Choice-of-Law and Comity Principles

Counsel should comprehend and evaluate the forum jurisdiction's choice-of-law rules, including the forum's recognition and implementation of comity principles. Where appropriate, counsel should advocate for a choice-of-law analysis that applies the privilege law of the jurisdiction with the most compelling interest in whether the putatively privileged information remains confidential.

Common law countries have traditionally based choice-of-law analyses on whether the dispute at issue is procedural or of substantive law. If the dispute involves a procedural issue, then the jurisdiction typically follows the *lex fori*, or law of the forum, approach. But if the dispute involves a matter of substantive law, then the jurisdiction, applying comity principles, evaluates whether to apply the law of the jurisdiction with the most compelling interest in the legal matter at issue.

The principle of comity, in a traditional sense, is one of courtesy arising from a general disposition to accommodate.[93] In a legal sense, comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[94] Comity is not an absolute obligation or a rule of law. Rather, it is a principle of convenience, expediency, and "due respect" under which courts apply another country's law if doing so does not violate

93. Disconto Gesellschaft v. Terlinden, 106 N.W. 821 (Wis. 1906).

94. Hilton v. Guyot, 159 U.S. 113 (1895); McFarland v. McFarland, 19 S.E.2d 77 (Va. 1942); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. LAW INST. 1987).

the forum country's public policy or prejudice the rights of its citizens.[95]

In the disclosure protection law context, some common law countries, such as the United Kingdom, apply the *lex fori* approach to cross-border privilege disputes even though they recognize privilege law as substantive in nature. Other countries, such as the United States, recognize privilege law as substantive and apply various versions of a comity-based, most-compelling-interest test. Still other jurisdictions, such as Canada, traditionally have applied the *lex fori* approach to what the courts viewed as procedural-based privilege law but have since recognized as substantive, leaving the choice-of-law analysis open to further clarification.

Whether the jurisdiction considers privileges as procedural or substantive, counsel should nevertheless evaluate whether and how comity principles should affect a court's determination of which privilege law to apply to a cross-border disclosure dispute. The Sedona Conference has suggested that courts apply comity principles in other information-protection contexts[96] and continues that guidance in the context of cross-border privilege disputes. To the extent practicable under the circumstances, counsel should advocate for and courts should consider, as recommended below in Section IV, a comity-based choice-of-law analysis that applies the privilege law of the jurisdiction with

95. *Hilton*, 159 U.S. at 163–65 (stating comity is not an "absolute obligation" nor "mere courtesy and good will"); Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (stating comity is not a rule of law but one of practice, convenience, and expediency); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 546 (1987) (stating that American courts should "demonstrate due respect" for issues that foreign litigants confront).

96. *See Commentary and Principles on Jurisdictional Conflicts over Transfers of Personal Data Across Borders*, *supra* note 77, at 404–06; *Sedona Conference International Litigation Principles*, *supra* note 74, at 9–10.

the most compelling interest in whether the putatively protected information remains confidential, unless that law violates the forum's public policy or otherwise prejudices the rights of those within its jurisdiction.

To preemptively deal with choice-of-law issues and minimize the risk that another jurisdiction's privilege laws will apply to documents or information, counsel should consider including, and carefully negotiate, forum-selection and choice-of-law provisions in their clients' contracts, including in mandatory arbitration provisions. In 2013, for example, the Supreme Court of the United States confirmed deference to forum-selection clauses in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, explaining that when "parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations." Counsel should ensure that choice-of-law provisions specify the chosen jurisdiction's disclosure protection laws, including evidentiary privileges and the work-product doctrine.[97]

97. In *Hercules, Inc. v. Martin Marietta Corp.*, 143 F.R.D. 266 (D. Utah 1992), the court held that Utah's accountant-client privilege applied even though the parties' contract called for application of Colorado law. The court determined that the choice-of-law provision governed "the contract" and that "[n]othing in the express terms of the contract applies to the law of privileged communications."

IV. RECOMMENDED CHOICE-OF-LAW ANALYSIS

Documents or information protected from disclosure in one jurisdiction may not receive the same disclosure protection in another jurisdiction. When this conflict-of-laws issue arises, the jurisdiction in which the dispute is pending must apply its choice-of-law rules to determine whether its protection law or another country's protection law governs the disclosure dispute. In jurisdictions where the choice of privilege law analysis remains an open question or lacks uniformity, counsel should advocate for, and courts should consider applying, a comity-based approach. This approach is one in which the privilege law of the jurisdiction with the most compelling interest in whether the documents or information at issue remain confidential is selected. Recent Sedona Conference Choice of Law Principles regarding personal data support this approach.[98] Choice of Law Principle 4, for example, recognizes that "a person's choice of jurisdiction or law should not deprive him or her of protections that would otherwise be applicable to his or her data."[99] Choice of Law Principle 6 advocates for the protection of personal data in the context of litigation and investigations in that "such data shall be provided when it is subject to appropriate safeguards that regulate the use, dissemination, and disposition of the data."[100] An exception to the application of such a comity-based approach would be if applying a foreign jurisdiction's privilege law, or acknowledging that jurisdiction's confidentiality and professional secrecy obligations, would violate fundamental

98. *Commentary and Principles on Jurisdictional Conflicts over Transfers of Personal Data Across Borders*, *supra* note 77.

99. *Id.* at 435. "Principle 4 recognizes that every affirmative choice of jurisdiction or law may imply a derogation of protections and standards that may be considered unacceptable by another jurisdiction . . . ."

100. *Id.* at 441.

public policy, or other fundamental rights, such as individual rights, in the forum.

Courts in some common law countries apply the law of the forum—*lex fori*—approach, which typically derives from the fact that courts in those jurisdictions treated the application of a privilege or other protection as a procedural matter. Courts in other common law jurisdictions, by contrast, determine cross-border privilege disputes using a multifactor choice-of-law analysis. Those jurisdictions often consider the application of a privilege as a matter of substantive law rather than as a procedural matter.

A. United Kingdom

Courts in the United Kingdom typically follow the *lex fori* approach and apply the forum's privilege law when there is a conflict of privilege laws in cross-border proceedings.[101] As previously discussed in Section II.A.9, the English court established this rule in *Lawrence v. Campbell*.[102]

Though the *lex fori* approach often traces its roots to the view that the attorney-client privilege is a matter of procedure and not a matter of substantive law, courts have not focused their analysis on that dichotomy. In *Re Duncan*, for example, the English court applied the forum's solicitor-client privilege between

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101. GIBSON DUNN, ARE WE SPEAKING THE SAME LANGUAGE? PRIVILEGE ISSUES IN CROSS-BORDER LITIGATION, INVESTIGATIONS, AND INTERNATIONAL ARBITRATION 6 (May 16, 2017), *available at* https://www.gibsondunn.com/webcast-are-we-speaking-the-same-language-privilege-issues-in-cross-border-litigation-investigations-and-international-arbitration/.

102. [1859] Eng. Rep. 385. "A question has been raised as to whether the privilege in the present case is an English or Scotch privilege; but sitting in an English Court, I can only apply the English rule as to privilege, and I think the English rule as to privilege applies to a Scotch solicitor and law agent practicing in London, and therefore the letters in question are privileged from production."

a domestic client and foreign counsel without basing its ruling on finding that the privilege is a procedural matter. Rather, the court pointed to a more practical consideration—the complexity involved in determining another jurisdiction's privilege law. Deciding to apply *lex fori*, the English court stated that "any other conclusion would lead to an impossible position for if this court were required to investigate the position of such communications in foreign law it must first determine the foreign law."[103]

In the 2016 *RBS Rights Issue Litigation*, the English court again upheld the longstanding *Lawrence* rule, applying *lex fori* doctrine in resolving a privilege issue in a cross-border proceeding.[104] There, the Royal Bank of Scotland (RBS) argued that the court should apply the privilege law of the United States, the jurisdiction most closely connected to the communications at issue.[105] RBS argued that the traditional rule imposing the forum's law on privilege questions was obsolete, because courts now recognized the legal professional privilege as a substantive right rather than a procedural rule of evidence.[106] The court rejected this "bold submission" and found "no sufficient basis" to disturb the well-established *lex fori* approach,[107] explaining that "it would be altogether too drastic and unsupported departure to adopt an entirely new ''choice of law rule.'" RBS's proposed rule would have applied the law of the jurisdiction most closely connected to the engagement or instructions under which the putatively privileged documents came into existence, unless that jurisdiction's law was contrary to English public policy. The court

103. *Re* Duncan, [1968] 2 W.L.R. 1479 (Can.).

104. [2016] EWHC (Ch) 3161 [174] (Eng.).

105. *Id.* at 145.

106. *Id.* at 147.

107. *Id.* at 148.

identified this proposed rule as the most-significant-relationship test that many U.S. courts apply. The court found the proposed rule counterintuitive because it would start by subordinating English public policy—the *lex fori* policy—to the laws of another jurisdiction only to allow English public policy to be reasserted if the foreign jurisdiction's law departed too far from the *lex fori* approach.

The English court remained true to the *lex fori* approach even though it doubted that courts ever based this rule on the privilege's classification as substantive or procedural. Rather, the court stated that the forum law approach was a decided public policy, and even recognizing a privilege as a substantive right did not justify departing from the well-settled rule. The court noted that an alternative rule would be difficult to implement. The court also did not see its adherence to the *lex fori* rule as "hostile to comity" because this rule is the implementation of public policy.

Still, the English court indicated the possibility that exceptions to the *lex fori* rule could exist through the court's "discretionary override."[108] A statute provides courts with the ability to prevent disclosure even if unprotected by the forum's privilege law where the disclosing party proves a "right or duty" to withhold disclosures. Although the court recognized that the "right or duty" could be foreign law, it said that parties have a higher hurdle where the foreign law is an expectation of confidentiality and the forum's law is based on public policy.

B. United States

United States federal courts apply comity principles to varying degrees in addressing cross-border privilege disputes. Courts in the Second Circuit, for example, apply a "touch base"

108. *Id.* at 174.

analysis that includes a comity element.[109] This standard centers on whether the United States or another country has the predominant or most direct or compelling interest in whether putatively privileged communications remain confidential.[110] These courts apply U.S. privilege law to communications that "touch base" with the United States. But, as a matter of comity, courts apply another country's privilege law when the communications relate "solely" to the other country unless the other country's law is contrary to U.S. public policy.[111] "Communications concerning legal proceedings in the United States or advice regarding United States law are typically governed by United States privilege law, while communications relating to foreign legal proceedings or foreign law are generally governed by foreign privilege law."[112]

Even where courts have not strictly applied the touch-base analysis, the factors courts examine in undertaking that analysis have informed decisions on application of a privilege. For example, in *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*,[113] the

109. *See* Mangouras v. Squire Patton Boggs, 980 F.3d 88, 98–99 (2nd Cir. 2020) (noting that "touch base" is a "traditional choice-of-law ''contacts' analysis to determine the law that applies to claims of privilege involving foreign documents" and recognizing the "touch base" test as the "proper choice-of-law test for purposes of determining" legally applicable privileges in the § 1782 context).

110. Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 98–99 (S.D.N.Y. 2002); Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 518–19 (S.D.N.Y. 1992).

111. Veleron Holding, B.V. v. BNP Paribas SA, No. 12-CV-5966 (CM)(RLE), 2014 WL 4184806, at *4 (S.D.N.Y. Aug. 22, 2014); Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 64–65 (S.D.N.Y. 2010); Bayer AG & Miles, Inc. v. Barr Labs., Inc., 1994 WL 705331, at *3–4 (S.D.N.Y. Dec. 16, 1994).

112. Anwar v. Fairfield Greenwich Ltd., 982 F.Supp.2d 260, 264 (S.D.N.Y. 2013).

113. *Astra Aktiebolag*, 208 F.R.D. at 96–99.

court determined that under the touch-base test different countries' privilege laws applied to different documents. The court found that Korean law applied to certain documents and determined that the documents were not protected by privilege under Korean law.[114] However, the court also observed that the documents in question would have never been discoverable in the first instance in Korean litigation.[115] Because the application of Korean privilege law would "require disclosure of many documents (1) that are protected from disclosure under American law and (2) that would not be discoverable under Korean law," the court ultimately decided to apply U.S. privilege law, even though the communications did not "touch base" with the United States.[116] The court then concluded that certain documents were privileged under U.S. law, including a communication between the company and its outside Korean counsel.[117]

The *Wultz* court narrowly cabined the *Astra* court's approach.[118] In *Wultz,* the party resisting discovery relied upon *Astra* to argue that Chinese law should not apply to certain documents, because American-style discovery would never occur in

114. *Id.* at 100–02.

115. *Id.* at 101 ("However, both of these findings—lack of a statutory attorney-client privilege and work product protection in Korea—rest on the assumption that parties may be ordered or required to testify or produce documents concerning confidential communication by a Korean court during a lawsuit. The court finds that such an assumption is, in fact, erroneous. Astra has demonstrated sufficiently for the purposes of this court's present document review that these documents would not be subject to production, whether through a discovery process or by court order, in a Korean civil lawsuit.").

116. *Id.* at 102.

117. *Id.* at 104–05.

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

China.[119] Nevertheless, the court applied Chinese law to certain documents.[120] For the *Wultz* court, the fact that information theoretically was discoverable under Chinese law was sufficient to distinguish *Astra* and find that the documents were not privileged.

Courts in the Seventh Circuit, by contrast, and at least in the patent agent context, avoid the touch-base approach[121] and apply a comity functionalism approach under which comity

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119. *Id.* at 490. *See also* Gucci America, Inc. v. Guess?, Inc., 271 F.R.D. 58, 65 (S.D.N.Y. 2010) ("[C]ommunications relating to legal proceedings in the United States, or that reflect the provision of advice regarding American law, 'touch base' with the United States and, therefore, are governed by American law, even though the communication may involve foreign attorneys or a foreign proceeding.").

120. *Id.* at 490–91 ("*Astra* does not stand for the proposition that principles of comity forbid the application of foreign privilege law of any jurisdiction where discovery practices are more circumscribed than in the United States. . . .

The critical inquiry in *Astra* is not whether the disclosure of attorney-client communications *would* happen, but rather whether it *could* happen. The court in *Astra* made clear that the documents at issue could not be produced under the specific limited circumstances designated by statute and the opposing party had no independent legal right to the documents under Korean law.

Here, even [the expert of the party resisting discovery] admits [t]here are general provisions in [Chinese] law that allow judges to compel parties to provide certain information under certain circumstances. . . . [N]othing in Chinese law prevents the disclosure of these documents in the same way that Korean law prevented the disclosure of the documents in question in *Astra.* . . . Because attorney-client and work product communications and documents could be subject to discovery under Chinese law, applying Chinese privilege law does not violate principles of comity or offend the public policy of this forum.").

121. Baxter Int'l, Inc. v. Becton, Dickinson & Co., No. 17 C 7576, 2019 WL 6258490, at *2 (N.D. Ill. Nov. 22, 2019) (stating that "Courts in this District have decided to forego the 'touching base' test").

principles drive the choice-of-law analysis rather than just serve as an element of the evaluation. In *SmithKline Beecham Corp. v. Apotex Corp.*,[122] the court applied a two-pronged test to determine whether the attorney-client privilege protected communications between a client and its United Kingdom patent agents. As a matter of comity, the court first looked to whether English law supplied privilege protection to patent agent communications. Second, the court examined the function that the patent agents were performing to determine whether they were "engaged in the substantive lawyering process."[123] From a choice-of-law standpoint, the court stated that, "as a matter of comity, and as a functional approach to the problem, the trend is for courts to look to the foreign nation's law to determine the extent to which the privilege may attach."[124] Applying that analysis, the court determined that under English law, patent agent work was protected, as they more or less functioned as attorneys, and that confidential legal advice should remain privileged.[125] As a

122. No. 98 C 3952, 2000 WL 1310668 (N.D. Ill. Sept. 13, 2000).

123. *Id.* at *2.

124. *Id. See also* McCook Metals, LLC v. Alcoa, Inc., 192 F.R.D. 242, 256 (N.D. Ill. 2000) (stating that "if an attorney-client privilege exists in a country, then comity requires us to apply that country's law to the documents at issue"); *Baxter Int'l*, 2019 WL 6258490, at *2 (applying Swedish law to determine whether the attorney-client privilege applied to communications providing legal advice to a Swedish company).

125. *See also* Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 520 (S.D.N.Y. 1992) ("[C]ommunications by a foreign client with foreign patent agents 'relating to assistance in prosecuting patent applications in the United States' are governed by American privilege law whereas communications 'relating to assistance in prosecuting patent applications in their own foreign country' or 'rendering legal advice . . . on the patent law of their own country' are, as a matter of comity, governed by the privilege 'law of the foreign country in which the patent application is filed,' even if the client is a party to an American lawsuit.").

result, the court ruled that the party's communications with British patent agents were protected from disclosure.

Taken together, these brief examples demonstrate that it is difficult to predict with certainty what laws of privilege U.S. courts will apply, even when the courts are operating within the District or Circuit. However, the touch-base approach gives courts the necessary flexibility to determine a fair path through discovery snarls involving documents and information from multiple countries and to determine privilege questions after giving due consideration to various interests.

C. Canada

Canadian courts, citing the English *Lawrence* and *Duncan* decisions, typically apply the *lex fori* approach to disclosure disputes concerning communications with or materials prepared by foreign lawyers. Many of these decisions simply decided whether Canada's solicitor-client privilege applied to communications involving foreign counsel without determining whether the forum's law applied (because of the procedural-substantive dichotomy) and without setting forth the specific factors the court considered in reaching the result.[126]

While Canadian courts generally apply the country's privilege law even when the putatively privileged communications involve foreign counsel, the Supreme Court of Canada has not addressed the conflict of privilege laws issue. Nor has there been a consistent body of case law setting forth the factors courts employ in selecting the privilege law to apply or the rationale

126. *See, e.g.*, Morrison-Knudsen Co. v. British Columbia Hydro & Power Auth. (1971), 19 D.L.R. 3d 726 (citing *Lawrence* and *Duncan* in applying Canada's solicitor-client privilege to communications between U.S. lawyers and a U.S. corporation without addressing whether privilege was substantive or procedural or whether U.S. privilege law governed).

underlying those decisions. As a result, Canada's preferred choice-of-law analysis for privileges is unsettled.[127]

Indeed, authority exists to support a choice-of-law analysis that involves principles of comity rather than strict adherence to *lex fori*. First, Canadian courts' definition of comity mirrors the definition given by the Supreme Court of the United States in *Hilton v. Guyot*.[128] Comity plays an important role in courts' *forum non conveniens*[129] analyses and, generally, in enforcing letters rogatory seeking discovery for use in a foreign jurisdiction.[130] Second, while the solicitor-client privilege's "historical roots are a rule of evidence," indicating that it is procedural in nature, courts frequently identify the privilege as a "fundamental right" and a "substantive rule of law."[131]

Canadian courts' application of comity principles and recognition that privileges are substantive in nature offer a basis for lawyers to advocate for a comity-based choice-of-law analysis. These maxims were on display in *Glegg v. Glass*,[132] where the court identified the solicitor-client privilege as a substantive rule of law and applied traditional comity principles to reject a Florida court's request for the deposition of a Canadian solicitor. The court stated that as a matter of comity, courts will give effect to the laws of another jurisdiction "out of mutual deference and respect," unless it is contrary to Canada's public policy. The court then identified Canada's solicitor-client privilege

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127. Brandon Kain, *Solicitor-Client Privilege and the Conflict of Laws*, 90 CAN. B. REV. 243, 252–53 (2011), *available at* https://cbr.cba.org/index.php/cbr/article/view/4270.

128. Morguard Invs. Ltd v. De Savoye, [1990] 3 S.C.R. 1077 (quoting Hilton v. Guyot, 159 U.S. 113 (1895)).

129. Panniccia v. MDC Partners, Inc., 2017 ONSC 7298.

130. Glegg v. Glass, 2019 ONSC 6623.

131. R. v. McClure [2001] 1 S.C.R. 445.

132. 2019 ONSC 6623.

as a substantive rule of law and held that the Florida court's request for discovery from a solicitor would violate this substantive rule of law and was therefore contrary to Canada's public policy.

D. Australia

Australia applies the *lex fori* approach in determining whether the legal professional privilege protects documents and information from disclosure. In *Stewart and Others v. Australian Crime Commission*,[133] the court faced the issue whether Australian or California law protected documents from discovery. The court stated that the first inquiry is whether privilege exists, and if so, whether it would apply Australian choice-of-law rules to determine whether Australia or California privilege law applied. In making that choice-of-law determination, the court held that "the better argument is that the governing choice-of-law rule for legal professional privilege is the *lex fori*."[134] Its reasons varied and included the fact that English cases follow the *lex fori* approach even though most of these cases, rendered prior to the *RBS Rights Issue Litigation*, were decided when the courts viewed privilege as procedural in nature. The Australian court also noted that privilege is not linked to the theory of liability, such as in contract or tort, but rather is an immunity to otherwise compelled disclosure. Further, legal professional privilege has several "important connecting factors" with the forum, such as the request for and production of documents and the claim and assertion of privilege, and the court

133. [2012] 206 FCR 347.

134. *Id*.

determined that the forum's privilege law governs cross-border privilege disputes.[135]

E. Other Considerations

The touch-base approach has previously been endorsed by the American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT), which originally proposed Rule 24.2 in its preliminary draft of civil procedure rules:

> Evidence cannot be admitted of information covered by other privileges recognized by the law of the place with the most significant relationship to the parties to the communication, unless the court determines that the need for the evidence to establish truth is of greater significance than the need to maintain confidentiality of the information.[136]

In the final version of the UNIDROIT Transnational Principles of Civil Procedure, Rule 24.2 was removed and replaced with the evidentiary privilege and immunities principles. Specifically, 18.1 gives a broader, blander principle that "[e]ffect should be given to privileges, immunities, and similar provisions of a party or nonparty concerning disclosure of evidence or other information."[137]

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135. *Id.* The court also noted that Australian legal professional privilege "incorporates within it a foreign element," which the court appears to have deemed sufficient to protect other country's interests.

136. Am. Law Inst. & UNIDROIT, Preliminary Draft of Transnational Rules of Civil Procedure (2000), *available at* https://www.unidroit.org/english/documents/2000/study76/s-76-02-e.pdf (last visited July 13, 2022).

137. Am. Law Inst. & UNIDROIT, ALI/UNIDROIT Principles of Transnational Civil Procedure Section 18.1 (2006), *available a*t

F. Recommended "Touch Base" Approach

Common law countries regularly consider comity principles and acknowledge that privilege law can be substantive in nature. While certain common law countries continue to follow the entrenched *lex fori* approach for determining choice-of-law issues, the touch-base approach gives courts the flexibility to apply the law of privilege more fairly. Where there is latitude within a jurisdiction, there may be advantages to arguing for the application of the touch-base legal analysis to privilege disputes, including to argue for the acknowledgement of confidentiality or professional secrecy obligations in other jurisdictions when appropriate. Further developing choice-of-law considerations present practitioners and courts with the ripe opportunity to consider the appropriate analytical framework for determining whether to compel a party to disclose putatively protected information in litigation. Even in England, where *lex fori* has been the law since 1859, courts still see merit in recognizing a choice-of-law analysis that deviates from a *lex fori* approach on a case-by-case basis where there are "compelling reasons" of "exceptional concern." The framework provided by the touch-base approach would offer valuable guidance in such circumstances.

A conflict-of-laws analysis grounded in the touch-base approach promotes public policy goals. First, the approach implements the internationally recognized principles of comity.[138]

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https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles (last visited July 13, 2022).

138. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974) (ruling that applying a foreign country's privilege law to communications pertaining solely to a foreign country implemented "principles of comity"). These public policy goals correspond with The Sedona Conference International Litigation Principles. For example, Principle 1 of the Sedona Conference International Litigation Principles states that "[w]ith regard to data that

This concept permits courts to defer to a foreign jurisdiction's privilege law or other binding protections, "having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[139] Yet, comity principles embody flexibility because the forum jurisdiction may reject another country's protections if they violate the forum's public policy or harm its citizens. In other words, "[m]echanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."[140]

Second, the approach fulfills the communicating parties' reasonable expectations of confidentiality, which leads to the better observance of laws, accepted practices, and the administration of justice. If the rationale for privilege and other disclosure protections is to allow and encourage the free flow of information between a client and the client's counsel, then recognizing foreign protections—even if the same privileges and protections would not be recognized domestically—promotes the goal of encouraging communication between client and counsel. Conversely, refusal to recognize a foreign privilege if the same would not be recognized domestically could chill open communications between client and counsel. Parties communicating with attorneys or other privileged persons in jurisdictions that recognize the privilege or other protections typically expect their discussions to remain confidential. With this

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is subject to preservation, disclosure, or discovery in a U.S. legal proceeding, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws."

139. Hilton v. Guyot, 159 U.S. 113 (1895); McFarland v. McFarland, 19 S.E.2d 77 (Va. 1942).

140. Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514 (S.D.N.Y. 1992).

expectation, parties provide their counsel with full and frank information so that the attorney, in turn, has a complete evidentiary narrative from which to provide optimal legal advice.[141] An unexpected foreign jurisdiction's compelled disclosure of information created with confidentiality expectations could chill attorney-client communications and thereby reduce the value of counsel's legal advice.[142] This result would fail to "promote broader public interests in the observance of law and administration of justice."[143]

To be sure, the comity-influenced touch-base approach is imperfect. Its application sometimes places significant factual and legal burdens on courts. The forum court would first have to determine, for instance, whether the privilege laws of two (or more) jurisdictions actually conflict. If so, the court must make a factual determination regarding which jurisdiction has the most compelling interest in the putatively protected information. The court next must identify the legal scope of the interested foreign jurisdiction's evidentiary privileges or other disclosure protection doctrines. This determination may come after considering extensive briefing and the opinions of competing legal experts (and/or court-appointed experts). These difficulties "are compounded where, in multi-jurisdictional cases involving several parties, there is the potential for a variety of different putatively applicable laws, and the prospect of having

141. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108 (2009); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

142. *See Upjohn*, 449 U.S. at 393 ("But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

143. United States v. Jicarilla Apache Nation, 564 U.S. 162, 169 (2011).

to determine them at an interlocutory stage, with cross-examination of experts if there is a disagreement."[144]

While there will always be a chance of inconsistent interpretations of foreign privilege law—based, for example, on different experts, judges, parties, timing, and facts—the disciplining effect of precedent can lead to more predictable outcomes and more functional guiding principles overall. Supporters of the *lex fori* approach will point to the fact that application of the forum's privilege law offers a simple and pragmatic approach to the problem. And while perhaps "mechanical" in application,[145] the *lex fori* approach allows a more consistent, and predictable, application of a well-developed body of privilege law. However, upending confidentiality expectations and allowing the mere selection of the forum to override all other compelling interests in a privilege determination is anachronistic and not in keeping with an increasingly connected world.

It also should be recognized that the exception in the touch-base approach—which allows for the forum law to apply when the foreign law violates the forum's public policy—can lead to circular application of the *lex fori* approach anyway. The *RBS Issues Litigation* court identified this "conundrum" as "unsatisfactory and counter-intuitive."[146] The conundrum arises because the first stage of the touch-base approach subordinates the forum's law to the privilege rules of another jurisdiction when the other jurisdiction has a more compelling interest in the privilege determination; yet, the second stage of the touch-base approach allows for reassertion of the forum's privilege law if applying the law of another country would conflict with the

144. RBS Rights Issue Litig. [2016] EWHC (Ch) 3161 [174] (Eng.).

145. *Golden Trade*, 143 F.R.D. at 514.

146. [2016] EWHC (Ch) 3161 [174].

forum's public policy.[147] This public policy exception conundrum echoes U.S. Supreme Court Justice Joseph Story's criticisms:

> [Comity] is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible, when it is contrary to its known policy, or prejudicial to its interests. Thus, comity was subject to what became known as the "public policy exception." Although the public policy exception is arguably necessary to prevent potentially absurd judgments, the exception is self-defeating because a judge is always free to offer some domestic policy that is offended by the foreign law. As one commentator has criticized, "comity and the public policy exception rationales . . . . . lack both analytical structure and standards for determining when and how they should be applied." The result is that a court can always apply the law of the forum state regardless of any foreign interest, however important.[148]

Weighing all considerations, on balance, a comity-based choice-of-law analysis that considers which jurisdiction has the most compelling interest is preferable to the *lex fori* approach in

147. Id.

148. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (7th ed. 1872), *quoted in* Daiske Yoshida, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 FORDHAM L. REV. 209 (1997).

cross-border privilege disputes. The touch-base approach applied in the majority of U.S. federal courts exemplifies this standard. The touch-base approach has a more fully developed framework for application through existing use and case law than the "comity functionalism" approach used by some U.S. courts, making the touch-base approach more readily applicable to a variety of complex privilege-conflict situations, such as those involving multiple foreign jurisdictions. In contrast to the *lex fori* standard, the touch-base approach better implements a complete choice-of-law analysis by applying the law that promotes the parties' reasonable expectations of confidentiality. Upholding the confidentiality expectations implements the strong, commonly held public policy of legal compliance and the administration of justice by encouraging parties to speak freely and candidly with their counsel so that counsel provides unimpeded legal advice. The approach also more fully executes comity principles by not obligating courts to apply foreign privilege law and allowing the forum's public policies to override foreign privilege law that may otherwise apply. So, while in some cases applying the touch-base analysis can lead to the same conclusion had the court applied *lex fori* from the start, allowing courts to weigh all of the factors and interests in performing the analysis will lead to fairer and more practical determinations that are in keeping with the fundamental policies underlying the attorney-client privilege and other disclosure protections.

V. APPENDIX: COMMON LAW AND CIVIL LAW EXEMPLAR JURISDICTIONS[149]

A. Common Law Exemplar Jurisdictions

1. Australia

Australia's Federal Court Rules provide the general scope of discovery in the country's federal courts.[150] In the Federal Court of Australia, discovery is not required unless the court orders it,[151] and a party should not apply for an order of discovery unless it will facilitate the "just resolution of the proceeding as quickly, inexpensively and efficiently as possible."[152] A party providing discovery without a court order is not entitled to any costs or disbursements for providing the discovery.[153] There are also rules regarding "preliminary discovery" wherein prospective applicants can apply for a court order to discover documents when the prospective applicant reasonably believes he or she may have the right to obtain relief from a prospective respondent but does not have sufficient information.[154]

Discovery under the Australian Federal Court Rules consists of "documents that are directly relevant to the issues raised by

149. The coverage of country specific information here is necessarily limited by the scope of the *Commentary*. For additional information on other countries, we recommend as a starting point DLA Piper's regularly updated Global Guide to Legal Professional Privilege, *available at* https://www.dlapiperintelligence.com/legalprivilege/.

150. *See generally Federal Court Rules 2011* (Cth) (Austl.) (May 21, 2019 update), *available at* https://www.legislation.gov.au/Details/F2019C00426. There are separate discovery rules for the state courts. For example, Part 21 of the New South Wales Uniform Civil Procedure Rules 2005.

151. *Federal Court Rules 2011*, Rule 20.12 (1).

152. *Id.*, Rule 20.11.

153. *Id.*, Rule 20.12 (2).

154. *Id*., Rule 7.21 et seq.

the pleadings or in the affidavits," "of which, after a reasonable search, the party is aware," and "that are, or have been, in the party's control."[155] These documents must be those on which the party intends to rely, documents adversely affecting the party's own case, document's supporting another party's case, or documents adversely affecting another party's case.[156] In order to be considered a "reasonable search," a party must take into account the nature and complexity of the proceeding, the number of documents involved, the ease and cost of retrieving a document, the significance of any document likely to be found, and any other relevant matter.[157]

The Federal Court Rules specify that a discovery order "does not require the person against whom the order is made to produce any document that is privileged."[158] The producing party must provide a list of documents that must describe "each document in the party's control for which privilege from production is claimed and the grounds of this privilege."[159]

Legal professional privilege protects communications between lawyers and their clients. More specifically, "client legal privilege" or "legal professional privilege" in Australia consists of two distinct types: "advice privilege" and "litigation privilege."[160] Advice privilege protects legal advice given by a

155. *Id.*, Rule 20.14(1).

156. *Id.*, Rule 20.14(2).

157. *Id.*, Rule 20.14(3).

158. *Id.*, Rule 20.02.

159. *Id.*, Rule 20.17(2)(c).

160. *Client Legal Privilege*, LAW COUNSEL OF AUSTRALIA, https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/client-legal-privilege (last visited July 13, 2022); *see also* Aaron Alcock, *Legal Professional Privilege*, HOPGOODGANIM (July 3, 2019), https://www.hopgoodganim.com.au/page/knowledge-centre/fact-sheets/legal-professional-privilege.

lawyer to his or her client.[161] Litigation privilege protects communications between a lawyer and a client (or third party) about actual or contemplated litigation or court proceedings.[162] For the Federal Court of Australia, these privileges are enshrined in Sections 118 and 119 of the Evidence Act 1995.[163]

The client can waive the privilege, but the lawyer cannot.[164] When determining whether the privilege covers a communication, Australian courts utilize the "dominant purpose test" (i.e., the dominant purpose of the communication was to provide the client with professional legal services).[165] The court employs an "inconsistency test," which looks at inconsistency between the conduct of the client and the maintenance of the confidentiality, to determine whether the client has waived privilege.[166]

Legal professional privilege in Australia has its limits. The Federal Court has held that privilege does not apply to communications made to facilitate an illegal or improper purpose.[167]

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161. *Id*.

162. *Id*.

163. *Evidence Act 1995*, *available at* https://www.legislation.gov.au/Details/C2018C00433. Similar or identical provisions have been adopted in New South Wales (see *Evidence Act 1995* (NSW)) and Tasmania (see *Evidence Act 2001* (Tas)).

164. Australian Government, Australian Law Reform Commission, *Client legal privilege* (Aug. 17, 2010), https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/14-privileges-extension-to-pre-trial-matters-and-client-legal-privilege/client-legal-privilege/.

165. Esso Australia Resources v Commissioner of Taxation [1999] 201 CLR 49 (Austl.).

166. *See Mann v. Carnell,* [1999] HCA 66. The court stated that it is the client who is entitled to the benefit of professional confidentiality, and the client may relinquish that entitlement. *Id.* at 26.

167. *See Aucare Dairy Pty. Ltd. v. Huang* [2017] FCA 746, [10]. The Court further held that the applicants did not need to prove that the respondent's

Professional privilege is further limited to admitted solicitors with a right to practice.[168] Similar to other jurisdictions, the Australian courts have determined that in-house counsel may not be sufficiently "independent" for communications with their corporate employer clients to be privileged, though decisions have not been categorical, and there thus remains flexibility to argue that circumstances in a particular case demonstrate the requisite "independence" has been shown such that the privilege applies.[169] Finally, legal professional privilege can be used to resist compelled production but will not entitle the privilege holder to a remedy, such as restraining the use of privileged documents.[170]

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solicitors had knowledge of or participated in the fraud in order to succeed in their application.

168. *See Vance v. Air Marshall McCormack* [2004] ACTSC 78. The court held at that, absent practicing certificates or the supervision of others with practicing certificates, the requirements for privilege would not be satisfied unless the solicitors enjoyed a statutory right to practice such as provided by the Judiciary Act.

169. *See Telstra Corp Ltd v. Minister for Communications, Information Technology and the Arts* (No. 2) [2007] FCA 1445. Judge Peter Graham stated that, in his opinion, an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his or her employment relationship with the employer. However, the court did leave open the opportunity for in-house counsel to meet the requisite level of independence by stating "[o]n the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied."

170. *Glencore International AG v. Commissioner of Taxation of the Commonwealth of Australia* [2019] HCA 26, [5]. The documents at issue were created for the sole or dominant purpose of obtaining legal advice but were stolen and provided to the International Consortium of Investigative Journalists and subsequently obtained by the Australian Taxation Office [ATO]. The court held that the documents were exempt from production by court process or statutory compulsion, but this declaration would not assist Glencore

As far as confidentiality of documents, Australian courts will generally attempt to fashion protective orders that balance the competing interests of the party seeking production and the privacy or commercial interest of the party claiming confidentiality.[171] While parties can negotiate a confidentiality agreement instead of relying on the courts to fashion an order,[172] courts are willing to order protection of confidential information. This may involve an individual inspecting the documents to execute express confidentiality undertakings, restricting the inspection of the documents to specified persons (such as a legal professional), redacting or editing the documents, or other protective measures that the court deems necessary.[173]

2. Canada

Discovery procedure in Canada is generally governed by the various provinces' rules of civil procedure, which are relatively uniform. Parties must list relevant documents in their

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because, once the documents were in ATO's possession, they could be used under the statutory powers granted by the Income Tax Assessment Act of 1936. The court further discussed the possibility of other relief and stated that the only judicial basis for relief regarding the use of the privileged material was in equity, for breach of confidentiality.

171. *See Mobil Oil Australia Ltd. v Guina Developments Pty. Ltd*. [1983] 2 VR 34, 39–40 (Austl).

172. *See* Michael Schoenberg, 'Evidence Gathering, Confidentiality, and the Courts' (2004) 99 *AMPLA Yearbook* 114 (2004), *available at* http://www.austlii.edu.au/au/journals/AUMPLawAYbk/2004/6.pdf.

173. *See* Hamish Austin, ''Protection of confidential information in litigation'' (2003) 77(1-2) LIJ *Law Institute Victoria* 46; Schoenberg, *supra* note 171, at 114; Graeme Slattery and James Fielding, *Protecting Commercially Sensitive Documents in Litigation*, SQUIRE PATTON BOGGS (2014), *available at* https://www.squirepattonboggs.com/~/media/files/insights/publications/2014/09/protecting-commercially-sensitive-documents-in-l__/files/protectingcommerciallysensitivedocumentsinlitiga__/fileattachment/protectingcommerciallysensitivedocumentsinlitiga__.pdf.

possession, control, or power. Privileged documents are generally required to be listed in a special section of the list of documents. They are to be described in a manner that protects the privileged content but gives the opposing party and, if challenged, the court sufficient information to allow it to determine if privilege has been properly asserted. If necessary, the court can review the documents.

A party is entitled to conduct an oral examination for discovery of each opposing party. In the case of corporate entities, the opposing party is entitled to examine one—and only one—corporate representative, unless consent of the parties or leave of the court is obtained for further discovery.

There is an implied undertaking to the court not to use the disclosed information for any purpose other than the case for which the production was made.[174] Therefore, information obtained through discovery cannot be shared with parties outside the litigation and cannot be used in other proceedings. A party may apply to the court to be relieved of the undertaking, which will only be granted where it has been shown that the purpose of the disclosure outweighs the interests of privacy and the efficient conduct of civil litigation."[175]

Protective or confidentiality orders can still be made to protect highly sensitive information such as trade secrets. These orders often restrict duplication of the documents and who has access to them, both within a law firm and with respect to the client.

The Supreme Court of Canada has classified privilege into two categories—class privilege and case-by-case privilege. Class privileges include solicitor-client privilege (or legal-

174. Juman v. Doucette, [2008] S.C.C. 8; Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., [2001] S.C.C. 51.

175. *Juman*, [2008] S.C.C. 8.

advice privilege), litigation privilege, and settlement privilege. It also includes informer privilege, but, as that arises in the criminal law context, it is beyond the scope of this *Commentary*. Once a communication has been shown to fall within one of the classes, it is presumed to be nondisclosable.[176]

Case-by-case privilege depends on each specific case, and the court must perform a balancing analysis to determine whether a specific communication is privileged by applying the four-part *Wigmore* test.[177]

Where non-parties share a common interest, the disclosure of privileged documents between them does not waive the privilege. This most often applies to experts but can go beyond that. The common interest can be in a litigation matter or in the obtaining of legal advice.[178]

Solicitor-client privilege (or legal-advice privilege) applies to communications between a lawyer and a client for the purpose of giving legal advice. It is based on the recognition that the justice system depends on full, frank, and free communication between those who seek legal advice and those who provide it. The privilege belongs to the client, not the lawyer. Thus, the lawyer must not disclose privileged information without the consent of the client.

Solicitor-client privilege was originally a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify about communications with a client. It has since evolved into a substantive legal rule, meaning

176. Lizotte v. Aviva Ins. Co. of Can., [2016] S.C.C. 52.

177. M. (A.) v. Ryan [1997] 1 S.C.R. 157.

178. Fraser Milner Casgrain LLP v. Minister of National Revenue, [2002] B.C.S.C. 1344; Iggillis Holdings Inc. v. Canada (National Revenue) [2018] F.C.A. 51.

that it extends beyond a rule of admissibility, protecting client confidences in any context.[179]

Solicitor-client privilege falls just short of being absolute. It is to be abrogated only on the basis of necessity, for example, inspection of incoming mail at a penitentiary for the purposes of safety and security. [180]

Litigation privilege is a class privilege. It applies to information gathered or created for the dominant purpose of actual or anticipated litigation. The existence of litigation privilege does not depend on the involvement of counsel. Documents prepared by a litigant or a third party at a litigant's request are protected, as long as the "dominant purpose" test is met.[181] The privilege ends with the litigation.[182]

Settlement privilege is another class privilege.[183] Settlement privilege applies to all communications for the purpose of settlement. It is not necessary that a communication be marked or negotiations specifically agreed to be "without prejudice"; what matters is whether the communication was made with the intent to settle a dispute. Settlement privilege attaches not only to unsuccessful negotiations but also to successful negotiations unless the settlement agreement itself is in issue in subsequent proceedings. Exceptions may be made to settlement privilege if it can be shown that a competing public interest outweighs the

179. Smith v. Jones [1999] 1 S.C.R. 455.

180. Ontario (Ministry of Correctional Services) v. Goodis, [2006] S.C.C. 31, para. 20

181. Blank v. Canada (Dept. of Justice), [2006] S.C.C. 39; *Lizotte,* [2016] S.C.C. 52.

182. *Blank*, [2006] S.C.C. 39, para. 36

183. This and the following propositions were confirmed by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] S.C.C. 37.

public interest in encouraging settlement; examples include allegations of fraud or undue influence.

3. United Kingdom

In the United Kingdom, legal-advice privilege will generally protect communications between a client and lawyer if the purpose of the communication is legal advice. A lawyer must be present when privileged communications are made. To maintain the privilege, the lawyer may only give advice to an "authorized" client. An authorized client is an individual who is explicitly approved to request and receive legal advice, for example, on behalf of a business.[184] Documents that reflect such privileged legal communications may also be privileged, for example, if forwarded to another authorized client. However, the legal-advice privilege is not absolute, and courts may make clear distinctions between legal and business advice; the latter is not covered by the legal-advice privilege.[185] Litigation privilege is also recognized in the United Kingdom and protects communications and documents created once litigation is anticipated or has begun if their main purpose is for use in that litigation.

In the United Kingdom, the Civil Procedure Rules and Practice Directions[186] govern the disclosure of documents in adversarial proceedings. Disclosure rules generally require that

184. RBS Rights Issue Litigation [2016] EWHC (Ch) 3161. Legal advice privilege attaches between lawyer and client individuals authorized to obtain legal advice on behalf of the client. In this case, privilege was denied over lawyer interview notes with employees not authorized by the client to obtain legal advice.

185. Kerman v. Akhmedova [2018] EWCA (Civ) 307. Lawyer cannot rely on client legal privilege to avoid giving evidence about a client's assets.

186. *Available at* https://www.justice.gov.uk/courts/procedure-rules/civil/rules.

litigants collect and review potentially relevant documents and then state to the other parties whether disclosable documents exist (or have existed). Disclosure may occur in a variety of avenues, but the most common is the standard disclosure. Standard disclosure requires parties to disclose documents on which they rely, documents that adversely affect their case or another party's case, documents that support another party's case, and documents that the party is required to disclose by a relevant Practice Direction.[187]

In standard disclosure, disclosed documents are served to other parties in a "list."[188] Following disclosure, other parties generally have a right to copy the disclosed documents during a process known as "inspection."[189] In making a disclosure under the standard-disclosure process, a party's list must indicate those documents to which a party claims a right or duty to withhold inspection.[190] A party may withhold inspection of documents that the party claims are privileged under the legal-advice privilege, the litigation privilege, or other privileges and confidentiality or secrecy obligations.[191] However, claiming one of these privileges may not allow a party to avoid including the potentially privileged documents in the party's list.[192] Instead, a person must apply for an order to withhold disclosure of a document.[193]

The civil procedure rules typically limit parties' use of disclosed documents to purposes related to the proceeding in

187. U.K. Civil Procedure Rules (CPR) 31.6.

188. CPR 31.10(2).

189. CPR 31.15.

190. CPR 31.10(4).

191. CPR 31.19(3).

192. *Id*.

193. *Id*.

which they were disclosed.[194] The court may also, on application of a party to the proceedings or the document's owner, order the restriction or prohibition of the use of a disclosed document.[195] Despite the protections that the Civil Procedure Rules afford, some litigants seek additional protection through the use of confidentiality "rings" or "clubs," which are analogous to the "confidentiality" and "attorneys' eyes only" designations made in American courts. Confidentiality rings limit the inspection of documents to limited categories of individuals and may be used to protect highly confidential information, such as trade secrets. However, in a recent case governing the propriety of confidentiality rings, the High Court explained that confidentiality rings are exceptional, must be limited to the narrowest extent possible, and require careful scrutiny by the Court to ensure that they do not promote unfairness.[196]

4. United States[197]

The United States permits expansive pretrial disclosure of information relevant and proportionate to a matter's claims and defenses. The philosophy of full pretrial disclosure was put in place in 1938 through the adoption of the Federal Rules of Civil

194. CPR 31.22.

195. *Id*.

196. Infederation Ltd. v. Google LLC, [2020] EWHC 657 (Ch).

197. Additional information on privilege in the United States can be found in a number of places throughout this *Commentary*. We also recommend Jenner & Block's regularly updated guide, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under The Attorney-Client Privilege And The Work Product Doctrine*, edited by David M. Greenwald and Michele L. Slachetka, *available at* https://jenner.com/system/assets/publications/19060/original/2019%20Jenner%20&%20Block%20Attorney-Client%20Privilege%20Handbook%20(Final)%20WEB.pdf?1561056973.

Procedure.[198] All states have followed suit, and the philosophy is embedded in procedural rules in the United States. Few other countries require the extent of disclosure that the U.S. pretrial procedures require. Consequently, litigants, courts, and government agencies in other countries may be unaccustomed to the myriad jurisdictions' practices and expectations regarding disclosure, privileges, and other protections from disclosure.

The attorney-client privilege is one of the oldest privileges protecting confidential communications.[199] The Supreme Court of the United States has stated that by assuring confidentiality, the privilege encourages clients to make "full and frank" disclosures to their counsel, who are then better able to provide candid advice and effective representation.[200] The source of the attorney-client privilege in the U.S. is the ethical rules established by each of the state bar associations governing attorney practice obligations in each state, as well as the American Bar Association (ABA) Model Rule 1.6 on Confidentiality of Information, upon which most states' rules are based: "A lawyer shall not

198. The Federal Rules of Civil Procedure govern the scope of discovery in federal courts, and similar state civil procedure rules govern the scope of discovery in state courts. In general, parties may obtain information from opposing parties or third parties that is relevant to a claim or defense in the adversary proceeding. FED. R. CIV. P. 26(a). The scope of discovery is broad, and courts typically interpret the "relevance" concept liberally.

Discovery, however, has limitations. Parties may not obtain documents and information where the costs associated with procuring that information are disproportionate to the discovery needs of the case. FED. R. CIV. P. 26. Parties believing that an opposing party's discovery is harassing, duplicative, or seeks proprietary information may seek a protective order that either limits disclosure to the parties in the case, certain personnel of corporate parties, or to the party's attorneys. FED. R. CIV. P. 26(c). Parties may not obtain information protected by an evidentiary privilege or other substantive protective doctrine.

199. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998)

200. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

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)." The attorney-client privilege doctrine is further refined by numerous state and federal court decisions.

Under U.S. law, the attorney-client privilege applies only to communications related to legal advice and does not apply to nonlegal business advice or opinions. The privilege will not protect communications between attorney and client made in the furtherance of a crime or fraud. Generally, to receive the protection of the attorney-client privilege in the United States, it is necessary to show, among other things, *that the communication was intended to be and was in fact kept confidential*.[201] The attorney-client privilege may be waived through voluntary, intentional disclosure of confidential communication to someone outside the attorney-client relationship. The privilege can also be waived through inadvertent disclosure, such as by producing an otherwise privileged document or by having a confidential conversation in an area where a third party overheard it. Further, if a communication is made accessible to in-house counsel in a country that does not recognize the privilege or does not recognize the privilege for in-house counsel, a U.S. court could find the attorney-client privilege has been waived based on the rationale that there was no intent to keep the information confidential, as evidenced by the fact that it was communicated to the foreign in-house counsel.[202]

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201. *See* United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011).

202. *See, e.g.*, Astra Aktiebolag v. Andraz Pharm., Inc., 208 F.R.D. 92 (S.D.N.Y. 2002) (applying multiple foreign laws: German law to certain communications; Korean law to others; and United States law in other circumstances depending on the law of the country with the predominant interest); Baxter Int'l, Inc. v. Becton, Dickinson and Co., No. 17-C-7576, 2019 WL

In cases of inadvertent disclosure, the inquiry may include the level of care in maintaining confidentiality, the amount of time that elapsed before the disclosure was discovered, and the significance of the disclosure. Accordingly, counsel should set up a defensible privilege review protocol and act immediately to retrieve any inadvertently disclosed privileged documents or information to avoid waiver. Although rare, disclosure may trigger "subject matter waiver" where "fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."[203]

The work-product doctrine, by contrast, is a procedural rule that protects from discovery documents that are created by a party or its attorney in anticipation of litigation. Although a party may overcome a work-product assertion upon proving a

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6258490 (N.D. Ill. Nov. 22, 2019) (finding a waiver of privilege when privileged documents were not carefully guarded but rather injected into the case); Gucci Am., Inc. v. Guess?, 271 F.R.D. 58 (S.D.N.Y. 2010) (applying the "touch base" approach for determining which country's law applies to claims of privilege involving foreign documents and noting that communications relating to proceedings in the United States or reflecting the provision of American legal advice will be found to touch base with the United States); Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530 (N.D. Ill. 2000) (holding that the party seeking to withhold the materials bears the burden of establishing the privilege, including providing the court with the applicable foreign law and demonstrating that the privilege applies to the documents it seeks to exclude from discovery); Teradata Corp. v. SAP SE, No. 18-cv-03670-WHO, 2019 WL 5698057 (N.D. Cal. Nov. 4, 2019) (reviewing choice-of-law considerations and applying the "touch base" approach to find United States privilege laws applied); Veleron Holdings, B.V. v. BNP Paribas SA, No. 12-CV-5966, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014) (applying the "touch base" test in accordance with the Second Circuit's choice-of-law analysis and noting that the jurisdiction with predominant interests is that where the allegedly privileged relationship was entered into or where the relationship was centered when the communication was sent).

203. FED. R. EVID. 502 advisory committee's note.

requisite level of need, the doctrine generally prohibits a party or its attorney from disclosing litigation strategies, legal opinions, and related deliberations.[204]

U.S. common law also recognizes the joint-defense privilege and common-interest doctrine, which are all effectively methods for avoiding a privilege waiver when communicating with certain third parties with a shared interest in the litigation or other shared interests. Although separate and distinct, the joint-defense privilege and common-interest doctrine are often treated as one privilege.[205]

As a strictly legal matter, the joint-defense privilege is a misnomer, because it is not actually an affirmative privilege; rather, it is an exception to the rule on waiver. Generally, sharing privileged and confidential information with a third party constitutes a waiver of the privilege. However, those protected by a joint-defense agreement can avoid a waiver and preserve the privilege notwithstanding the sharing of confidential information with third parties who are part of the agreement. Arising out of joint-defense agreements in the context of criminal representation, the privilege has evolved to include any parties whose positions in a case or transaction are so aligned that they all equally benefit from the same outcome. The privilege covers communications among lawyers representing different clients who share a common legal interest. Any communications between the lawyers and between any specific client representative and any lawyer on the team are privileged based on the

204. FED. R. CIV. P. 26(a). The common-interest doctrine is not an evidentiary privilege but rather a nonwaiver doctrine. This doctrine permits parties represented by separate counsel but with a common legal interest to share previously protected information without waiving those protections.

205. The joint-defense privilege is narrower than the common-interest doctrine and arises from actual litigation, while the common-interest doctrine does not require litigation to be pending.

common interest shared by all. Communications among client representatives without counsel present, however, would not be covered by privilege. This is because the privilege still involves the need to communicate with counsel, and the subject of the communication must be legal advice that affects all the parties. Discussions between parties are thus not generally included.[206]

The common-interest doctrine applies to parties who have aligned legal positions that are all implicated in the matter.[207] Therefore, it may be possible for in-house counsel representing different legal entities within a corporate family to consider sharing defensive strategies based on this doctrine if each entity is a party (or potential party) to the same or an identical lawsuit or legal matter. Due to the rather technical nature of the common-interest doctrine and joint-defense privileges, it is important that any decision to proceed on this basis be documented among the relevant parties. Although this documentation is not strictly required, it is frequently helpful in demonstrating the common-interest or joint-defense privilege in related discovery disputes.

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206. *See generally* discussion of common-interest privilege in *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007).

207. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974). *See also* FED. R. CIV. P. 26(a). The common-interest doctrine is not an evidentiary privilege but rather a nonwaiver doctrine. This doctrine permits parties represented by separate counsel but with a common legal interest to share previously protected information without waiving those protections. *In re Teleglobe Commc'ns Corp.*, 493 F.3d at 345. The scope of this nonwaiver doctrine lacks uniformity across federal and state jurisdictions, but generally the doctrine applies when the parties have a common legal, as opposed to a common business or commercial, interest regarding anticipated or pending litigation. Under this doctrine, the attorneys for the parties sharing the common legal interest may share privileged information without waiving any protection. *Id.* at 363 n.17.

B. Civil Law Exemplar Jurisdictions

1. Belgium

The Belgian legal system has a legal professional privilege. Lawyers cannot, with a few exceptions, reveal confidential information entrusted to them in the context of representing a client. Lawyers admitted to the Bar ("*advocaten*" in Dutch, "*avocats*" in French)[208] are subject to a duty of attorney-client privilege, which is called "professional secrecy."[209]

The obligation of strict professional secrecy for lawyers in Belgium is laid down in the Belgian Bar's Code of Ethics, rules of professional conduct that lawyers are obliged to comply with. The Belgian Constitutional Court has held that the legal basis for this professional secrecy obligation is a combination of Articles 10, 11, and 22 of the Belgian Constitution as interpreted in light of Articles 6 and 8 of the European Convention on Human Rights and Articles 7 and 47 of the European Union Charter. Further, Article 458 of the Belgian Criminal Code includes a sanction for lawyers who violate professional secrecy.[210] Professional secrecy can also be considered as part of the contractual obligation between the lawyer and the client.

Professional secrecy covers oral and written information, including phone calls, email, letters, notes, legal opinions and advice, and drafts or other preparatory documents. Professional secrecy also protects the lawyer's agenda, invoices, and bank account (with respect to the identity of the clients). Under

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208. Only lawyers admitted to the Bar are entitled to appear and plead in court (with a few exceptions such as trade union delegates who can represent employees (members of the trade union) before Labor courts).

209. "Beroepsgeheim" in Dutch and "secret professionnel" in French.

210. In this Section concerning Belgium, the *Commentary* does not discuss the European sources such as the articles 6 and 8 of the European Convention on Human Rights in depth.

professional secrecy obligations, lawyers are required to maintain the confidentiality of all information and documents entrusted to, heard by, or discovered by the lawyer in the context of his or her representation of the client. The source of the information is not relevant. Professional secrecy covers information received directly from the client, but also information provided to the lawyer by third parties, including the adverse party. Professional secrecy applies from the point that the lawyer receives the information and is not time limited. All correspondence between the lawyer and the client, and all advice provided by the lawyer during the representation of the client, whether of a litigation or nonlitigation nature, is also considered confidential and subject to the professional secrecy obligation.[211] However, the legal privilege does not apply to official documents and case materials such as judgments or trial briefs that are public.

There are some exceptions to the general principle of professional secrecy. Professional secrecy can, for instance, be overridden if a higher value is at stake, for example, to prevent imminent harm.[212] The lawyer's professional secrecy may also be put aside to defend the lawyer's own rights in court. The right of defense is considered to be of a higher value than the professional secrecy obligation. Also, if a lawyer commits (or participates in) a crime, professional secrecy can no longer be invoked, as the lawyer is acting outside the scope of legal representation.

Under Belgian law, contrary to some common law jurisdictions, there is no formal process of disclosure in civil law court proceedings. Parties should produce their own exhibits

211. Belgian Supreme Court, Oct. 3, 2018, case P.18.0235.F. Article 458 of the Criminal Code does not prevent the lawyer's client, the person protected by that provision, from producing, in his or her defense, his or her correspondence with the lawyer.

212. In practice, in such cases, the lawyer will inform the President of the Bar, who will then contact the Public Prosecutor.

supporting their claims or defenses. However, parties are obliged to cooperate in good faith with respect to the production of documents. The court may also require a party to produce documents that are needed to make a judgment.

Correspondence between Belgian lawyers is, in principle, confidential and cannot be used as evidence. There are some exceptions to this principle. Some correspondence between lawyers will be classified as "official" and can be produced in court. The Bar's Code of Ethics explains how the distinction between confidential and official correspondence should be drawn. Possible conflicts in this respect are resolved by the President of the Bar.

Legal actions taken in violation of the legal privilege will be deemed null and void. For example, criminal prosecutions or other regulatory investigations conducted on the basis of privileged information are not permissible except in exceptional circumstances,[213] for instance, if the legally privileged document itself constitutes a criminal offense or could establish the lawyer's participation in a criminal offense. In civil cases, the Belgian courts cannot accept privileged information as evidence.

Lawyers working as in-house counsel are not members of the Belgian Bar. Hence, they do not need to comply with the Bar's Code of Ethics, including the professional secrecy duty. However, legal advice given by "in-house counsel"[214] for the benefit of their corporate employer and within their role as legal

213. Belgian Constitutional Court, Jan. 23, 2008, case 10/2008. Information that the lawyer has obtained while carrying out the essential activities of his or her profession, such as assisting and defending a client in court and providing legal advice, even outside any legal proceedings, remains covered by professional secrecy and cannot be disclosed to the public authorities.

214. As defined by the Act of March 1st, 2003, establishing the Institute for in-house counsel.

counsel is deemed "confidential" by law.[215] The legal professional privilege for in-house counsel covers legal advice to the employer but also internal requests for legal advice, correspondence related to the advice, and preparatory notes and drafts.[216]

2. Brazil

The Brazilian Constitution recognizes lawyers as essential to the administration of justice. The conduct of attorneys and the attorney-client relationship in Brazil are regulated primarily by federal law[217] and the Code of Ethics and Discipline propounded by the Brazilian Bar Association. Other sources of authority concerning the conduct of attorneys include the Code of Civil Procedure and the Code of Criminal Procedure.[218]

Under Brazilian law, attorneys have a duty to protect the confidentiality of all information a client discloses to them, whether learned in the context of a litigation or in connection with providing other legal services.[219] Unless there are

215. *Cf.* article 5 of the Act of March 1st, 2003.

216. Brussels Appeal Court, Mar. 5, 2013. Recognition of in-house legal counsel privilege (with reference to the Act of March 1st, 2000). While this decision concerned the specific context of an investigation by the Belgian competition authorities, its effect could go beyond this context and strengthen the recognition of the in-house counsel privilege in other areas as well.

217. Estatuto da Advocacia e da Oab, Lei 8906/94 (Law No. 8906 of July 4, 1994) ("Statute") and the General Regulations of the Bar Association Statute.

218. For example, Section 297 of the Brazilian Criminal Procedural Code ("Code") exempts from the duty of giving testimony anyone who must keep privilege due to his profession. The Brazilian Civil Procedural Code has a similar provision in Section 406, II. With respect to internal investigations, practitioners should consult Provision 188/2018, which provides that attorneys have to keep all information gathered in an investigation confidential.

219. *See generally* Statute Articles 1 and 7; Code Chapters 26, 35.

exceptional circumstances, attorneys cannot disclose, and cannot be compelled to disclose, a client's confidential information. Those protections extend to all of the attorneys' files and communications and are generally inviolable. An attorney's obligation to maintain confidentiality and the associated protections afforded an attorney's files remain even after the attorney-client relationship is terminated.

Exceptional circumstances that may allow for an attorney to disclose otherwise confidential information are rare and include instances such as where there is a "severe threat to life or honor" or where disclosure is necessary for the attorney's defense.[220] Any breach of a client's confidentiality is a serious matter and can result in administrative, civil, and even criminal sanctions for an attorney if there was no good cause for the disclosure.[221]

Confidentiality obligations and protections apply to any qualified attorney, including in-house counsel. In addition, Brazil's Constitution protects professional secrecy by individuals whose duties require access to information generally considered private and confidential, which arguably includes in-house counsel. Nonetheless, some courts in Brazil have found that documents and information in the possession of in-house counsel were not protected because in-house counsel was viewed as an employee. In light of potential uncertainties concerning the protections afforded materials shared with in-house counsel, it may be prudent in particularly sensitive or contentious situations to assume communications and materials shared with Brazilian in-house counsel will not be protected. Moreover, as in many other jurisdictions, if in-house counsel provides business

220. *See generally* Code Chapter 3.

221. *E.g.*, Article 154 of the Brazilian Criminal Code (breach of professional secrecy without good cause is a crime).

advice rather than legal advice, the communication is not protected.

3. China

China has no formal discovery process and lacks general privilege rules that protect documents and information during discovery. China has no real equivalent to the attorney-client privilege or work-product protections found in other jurisdictions.

China's Lawyer's Law requires that lawyers keep clients' information confidential and protect the privacy of their clients, including state and trade secrets disclosed to the lawyer in the context of the client's representation.[222] These confidentiality and privacy obligations do not, however, extend to crimes committed by clients that could affect national or public security, which must be disclosed by the lawyer.[223]

Lawyers can be sanctioned for failing to disclose important information to a Chinese court if the court requests the information.[224] Chinese laws may also require the disclosure of confidential client information to governmental authorities. Citing China's absence of legal privilege, U.S. courts have allowed subpoenas and discovery requests for documents and information between Chinese counsel and their clients, although in practice, obtaining the documents and information may be difficult.[225]

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222. China Lawyer's Law (2009), arts. 33 and 38.

223. *Id*.

224. China Civil Procedure Law, arts. 67 and 72.

225. *See, e.g.*, Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).

4. European Union

Legal professional privilege in the European Union flows from the fundamental rights to be advised, defended, and represented and the right of defense as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.[226] Based on case law by the European Court of Justice, there are generally three categories of legal professional privilege recognized: (1) written communication between a party and an independent attorney barred in one of the member states (this excludes in-house counsel in most member states); (2) internal notes reflecting such communications; and (3) documents drawn up exclusively to seek legal advice from an attorney in exercising the rights of defense. These categories tend to be narrowly interpreted.

The European Union has drawn a meaningful distinction between communication with lawyers designated as *in-house counsel* and *outside counsel* in determining whether the communication is privileged.[227] In *Akzo Nobel*, the EU's Court held that lawyers employed as in-house counsel could not engage in privileged communications with their client, the corporation.[228] Under EU law, the analysis of whether a corporation's

226. F. Enrique Gonzales & Paul Stuart, *Legal Professional Privilege under EU Law: Current Issues*, COMPETITION LAW AND POLICY DEBATE, Sept. 2017, at 56, *available at* http://awa2018.concurrences.com/IMG/pdf/12._f.e._gonzalez-diaz_and_p._stuart_-_legal_professional_privilege_under_eu_law.pdf.

227. *Id.* Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348 (Ct. of First Instance 2007). *See also* C-155/79, AM&S Europe Ltd. v. Commission of the European Communities, 1982 E.C.R. 1575, holding that protected communications are those made by a lawyer licensed in a member state for the purpose of the clients' right of defense.

228. 2008 Bus. L.R. 348. The court affirmed the decision of the lower courts that the communications at issue with in-house counsel were not privileged under the rules established in C-155/79 AM&S Europe Ltd v. Commission, 1982 E.C.R. 1575.

communications with a lawyer are privileged is a two-step process.[229] First, the lawyer must be categorized as independent and cannot be bound to their client because of employment. Second, the communication between the independent lawyer and the client must involve legal advice and be made for purposes of the client's right of defense.[230] The *Akzo* court distinguished between communications with in-house counsel and outside counsel, holding that the same communication was protected from disclosure with outside counsel because they are "independent" for purposes of privilege, but that in-house counsel was not independent.[231] The *Akzo* ruling undermines the predictability of applicable privileged in those member states where in-house counsel communications have an expectation of privilege.[232]

The *Akzo* ruling had an additional impact on privilege by excluding lawyers qualified outside of the European Union from the application of legal professional privilege.[233] After the court established that privilege applies only to communication between a client and an independent lawyer, the court further limited privilege to lawyers "'entitled to practice [their] profession in one of the Member States, regardless of the Member State in which that client lives but not beyond those limits.'"[234] This *Akzo*

229. John Gergacz, *Privileged Communications with In-house Counsel under United States and European Community Law: A Proposed Re-Evaluation of the* Akzo Nobel *Decision*, 42 CREIGHTON L. REV. 323, 330–31 (2009).

230. *Akzo Nobel*, 2008 Bus. L.R. 348 at 374. The court found that in-house counsel did not constitute an "independent" lawyer and could not therefore engage in privileged communications with the corporation. *Id.* at 382–84.

231. *Id*.

232. Gergacz, *supra* note 229, at 335.

233. Justine N. Stefanelli, *The Negative Implications of EU Privilege Law under Akzo Nobel at Home and Abroad*, 60 INT'L & COMP. L.Q. 545, 545 (2011).

234. *Id.* at 546.

ruling has significant implications for cross-border business relationships. The United States and European Union, for example, have become heavily integrated through multijurisdictional business ventures and transnational companies.[235] The exclusion of non-EU attorneys from EU privileges runs the risk of complicating international business transactions and weakening the communications between clients and their counsel due to the fear of disclosure.[236] In light of the *Akzo* ruling, it is important for multinational companies and their counsel to analyze carefully the scope of privilege that governs their communications.

On 26 November 2018, the European Commission submitted a helpful overview of its policy on the treatment of legally privileged information in competition proceedings in the context of that year's Organisation for Economic Co-operation and Development roundtable discussions.[237] This policy makes it clear that the European Commission recognizes that privilege may exist and will not compel privileged documents or require parties to use them as evidence in competition proceedings. However, the European Commission may still very narrowly define the scope of the privilege that may exist.

5. France

As in many civil law jurisdictions, the French Code of Civil Procedure does not provide for general discovery like that found in common law jurisdictions. Article 9 of the Code of Civil Procedure provides that "[e]ach party must prove,

235. *Id.* at 556.

236. *Id*.

237. The European Commission submission to the Organisation for Economic Co-Operation and Development is available at https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)46/en/pdf.

according to the law, the facts necessary for the success of his claim."[238] Generally, parties must only disclose the evidence supporting their factual and legal arguments "in due time," which is generally understood to be when the party relies upon the evidence in a proceeding before the judge.[239] Yet, the judge also has the power to order "any legally appropriate investigation measures," and each party may petition the judge to ask the other side, or third parties, to produce evidence.[240] The decision whether a party should produce the requested evidence is at the judge's discretion. Judges order production where "there is a legitimate reason to preserve or establish" the evidence or when the party pleading the fact "does not have sufficient material to prove it."[241] Otherwise, there is no general obligation to disclose documents or evidence prior to trial or to preserve any such evidence.

Because of the narrow discovery allowed under the Code of Civil Procedure, French law has not fully developed an attorney-client privilege concept. French attorneys are bound not to disclose documents or evidence under either the French Criminal Code or the National Rules of the French Bar Council (*Réglement Intérieur National*). Under Article 2 of the National Rules, professional secrecy exists to protect communications between attorneys, or *avocats*, and their clients, regardless of the medium or context of such discussions.[242] As such, this professional obligation of secrecy applies to cover legal opinions provided to clients, correspondence between the attorney and client, notes

238. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).

239. *Id.*, art. 15.

240. *Id.*, arts. 10, 11.

241. *Id.*, arts. 145, 146.

242. Réglement Intérieur National [National Rules of the French Bar Council], art. 2.

taken by the attorney, information and documents provided to the attorney, the payment of fees by the client, and even extends to protect information required by French auditors.[243] French law provides that documents falling under the professional obligation of secrecy may not be used as evidence during civil litigation.[244] However, France does not recognize the same protections for in-house counsel (*juristes d'entreprise*), who are treated as a separate professional track from *avocats*.[245]

Due to the limited circumstances in which documents may be discovered under the Code of Civil Procedure, there are restrictions on which documents may be designated as "confidential" and kept from public disclosure. French Decree No. 2018-1126, creating Commercial Code Articles R. 153-1 to R. 153-9, allows judges to order that documents seized are to be treated as confidential.[246] The Decree also creates a procedure by which litigants may seek judicial intervention to protect the confidentiality of such documents.[247]

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243. *Id*.

244. Loi 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques [Law 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions], art. 66.5, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL JOURNAL OF THE FRENCH REPUBLIC].

245. DLA PIPER, LEGAL PRIVILEGE GLOBAL GUIDE 53–55 (June 1, 2020), *available at* https://www.dlapiperintelligence.com/legalprivilege/insight/handbook.pdf.

246. Ozan Akyurek, Thomas Bouvet, Bénédicte Graulle & Cyril Philbert, *New French Decree Strengthens Protection of Confidential Documents*, JONES DAY (Feb. 5, 2019), https://www.jdsupra.com/legalnews/new-french-decree-strengthens-98206/.

247. *Id*.

6. Germany

German law does not recognize legal privilege as an overall concept as is routine in common law jurisdictions. Attorney-client communication and attorney work product are therefore not protected as such. Germany instead imposes a professional secrecy obligation on lawyers (*Rechtsanwalts*) that prohibits them from disclosing client-related information that comes into their possession.[248] This secrecy obligation is the functional equivalent of a legal professional privilege but does not often arise because of Germany's limited discovery obligations. The professional secrecy obligation does not apply to in-house attorneys, so they may not invoke the obligation to avoid court-ordered production of documents, especially in criminal proceedings.

Attorneys have a right to refuse testimony,[249] including the right to refuse the production of documents in their possession, but this right does not attach to the document itself. For example, a document is not protected if it is in the possession of the client. Pretrial discovery is not inherent in the German system. Each party must instead obtain and produce the facts and evidence relevant to its argument directly, without cooperation of the opposing party (with limited exceptions, for example, in cartel follow-on damages cases). Exceptionally, the court may order a party to produce specific documents (to the court, not to the opponent), but this instrument is rarely used in practice.[250] If ordered by the court, a party cannot refuse the production of such documents even if they contain attorney-client

248. Bundesrechtsanwaltsordnung [The Federal Lawyers Act], 1994, § 43a(2).

249. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 383(1)(6).

250. Section 142 of the German Code of Civil Procedure provides that "The court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession and to which one of the parties has made reference."

communication or attorney work product, although in ordering the production of documents, the court should consider whether the documents could contain any confidential information. Lawyers can refuse the production of such documents based on their right to refuse testimony. This applies to outside counsel only and only those outside counsel enrolled at the German Bar or those recognized as equivalent (generally lawyers from other EU jurisdictions). In-house counsel do not have the right to refuse testimony and accordingly no right to refuse production of documents.

The German legal system does not have formal discovery procedures, and pretrial discovery in Germany is nonexistent.[251] German courts supervise adversary proceedings and typically request that each party presents all relevant evidence. These courts also issue orders for the taking of evidence that specify which evidence parties should obtain to establish a particular fact.[252] Each party bears the burden of proving the facts on which it bases a claim or defense. The parties decide which facts and documents to submit to the court in support of a claim or defense but have no obligation to disclose all information, even if it is relevant to the case.[253] However, there is a general obligation that the parties cannot mislead the court. A party may ask the court to compel the production of a document if the

251. *Privilege and disclosure*, GLOBAL LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/germany#chaptercontent3. (last visited July 13, 2022).

252. *Id*.

253. Stefan Rutzel, Andrea Leufgen & Eric Wagner, *Litigation and enforcement in Germany: overview*, GLEISS LUTZ, https://content.next.westlaw.com/Document/I2ef128401ed511e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true (last visited July 13, 2022).

document is known to be held by the other party—for example, if the opposing party has referred to the document on the record.[254]

Although there is a specific and narrow prohibition against the seizure of communications between attorneys and clients in the context of criminal investigations,[255] Germany's highest judicial body, the Federal Constitutional Court, ruled in 2018 that prosecutors who raided law offices of Volkswagen's outside counsel in Munich could proceed in reviewing the seized materials.[256] Volkswagen had retained outside counsel to conduct an internal investigation into the company's 2015 emissions testing protocols. The investigation covered activities at Volkswagen and Audi, a subsidiary of Volkswagen, but Audi had not formally entered into a relationship with the law firm. In relation to a criminal investigation into Audi, German prosecutors raided outside counsel's offices in Munich and seized documents. Outside counsel and Volkswagen filed suit to prevent prosecutors from reviewing the documents and other information related to the internal investigation. The German Federal Constitutional Court rejected their bid to block review, ruling that under German law, the materials were not covered by attorney-client privilege, as no such direct relationship existed between Audi and the outside counsel. In this decision, German courts highlighted the requirement of a direct relationship between attorney and client to invoke attorney-client privileges and ruled that the privilege does not extend to subsidiaries or

254. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 421 et seq.

255. This right is protected by Article 6(3) of the European Convention on Human Rights and Articles 2(1) and 20(3) of the German Constitution, which protect the right of an effective defense, but this is limited to defense work product.

256. BVerfG [Federal Constitutional Court], 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/17, June 27, 2018.

affiliates, unless they too enter into a separate, formal relationship with outside counsel.

7. Japan

As a civil law country, Japan's litigation and evidence-gathering concepts operate quite differently than in its common law counterparts.[257] Though Japan, like the United States, has a Code of Civil Procedure (*Minji Soshōhō*), "the scope of discovery in Japan is far narrower than that in the United States, and Japan does not have the same type of pretrial discovery as the United States."[258] The Japanese judicial system views evidence gathering as a goal of *trial*, rather than a *pretrial* function, and therefore the judge plays a central role in gathering and evaluating evidence.[259] There are no depositions, and under the *Minji Soshōhō*, judges may "examine evidence on their own motion and . . . . . cross-examine parties or witnesses on their own authority."[260]

The *Bengoshi Ho* ("Lawyers Law") is an ethical code that applies to all Japanese lawyers (*bengoshi*), and it requires them to maintain the confidentiality of all information gathered in the course of their representation.[261] Importantly, though, the privilege only protects communications in the possession of *bengoshi*. If the document has been prepared by a *bengoshi* but is in

257. *See* Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1, 16 (2002).

258. Masamichi Yamamoto, *How Can Japanese Corporations Protect Confidential Information in U.S. Courts? Recognition of the Attorney-Client Privilege for Japanese Non-Bengoshi in-House Lawyers in the Development of a New Legal System*, 40 VAND. J. TRANSNAT'L L. 503, 506 (2007).

259. *Id*. at 513; Wagnild, *supra* note 257, at 4.

260. Wagnild, *supra* note 257, at 4 (citing, *e.g.*, MINSOHŌ (C. CIV. PRO.) art. 207).

261. *Id*. at 514.

the client's possession, it is not protected.[262] Further, because in-house lawyers are not considered *bengoshi*, the privilege does not currently protect "communications between a corporation and non-*bengoshi* in-house lawyers."[263]

Formal confidentiality protections are also somewhat narrower in Japan, though they do exist. Lawyers must maintain the confidentiality of information learned in performing their legal work with clients that a client would reasonably expect to be kept confidential.[264] This obligation remains after the completion or transfer of a client's matter and may extend to third parties if the information is learned by an attorney in the scope of a client's representation. Both in-house and outside counsel are subject to these confidentiality obligations. If a lawyer fails to maintain this confidentiality, the lawyer can be sanctioned under the Japan Federation of Bar Association's Code of Attorney Ethics. Disclosure of confidential information is also a criminal violation under Japanese law.[265]

As in the United States, Japan favors open court proceedings.[266] In the original version of the *Minji Soshōhō*, "the principle of open judicial proceedings was applied to trade secrets with few, if any, exceptions," but subsequent amendments have adopted protections for trade secrets, in part to ensure that

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262. Joseph Pratt, *The Parameters of the Attorney-Client Privilege for in-House Counsel at the International Level: Protecting the Company's Confidential Information*, 20 NW. J. INT'L L. & BUS. 145, 161 (1999).

263. Yamamoto, *supra* note 258, at 515.

264. Bengoshihō [Attorney Act], Law No. 205 of 1949, art. 23.

265. KEIHŌ [PEN. C.], Law No. 45 of 1907. Violations may result in up to six months of imprisonment or a fine.

266. *See* ELIZABETH A. ROWE & SHARON K. SANDEEN, TRADE SECRECY AND INTERNATIONAL TRANSACTIONS: LAW AND PRACTICE 246 (2015).

Japan can remain "globally competitive."[267] Thus, the *Minji Soshōhō* contains provisions for maintaining the confidentiality of documents.[268] Lawyers may refuse court orders requiring the disclosure of client information or other confidential information in the lawyer's possession. However, if the client waives the confidentiality, the lawyer may no longer assert the refusal right.[269] The lawyer may still refuse to testify regarding such matters. These rights extend to criminal investigations but not investigations by the antitrust authority, which are considered administrative procedures by the Japanese government.

In the intellectual property context, protective orders are authorized by legislation translated literally as "Confidentiality Preservation Order under Patent Act."[270] However, "protective orders have been granted by courts in a very limited number of instances," likely because of the associated "threat of severe criminal penalties" for violating such orders.[271] Parties more commonly enter into "voluntary nondisclosure agreements."[272]

8. Switzerland

Switzerland's legal professional privilege is based on the Federal Constitution of the Swiss Confederation, the Swiss

267. *Id*. RUTH TAPLIN, INTELLECTUAL PROPERTY AND THE NEW GLOBAL JAPANESE ECONOMY 61 (2009).

268. *See* MINSOHŌ (C. CIV. PRO.) art. 92 (Restriction on Inspection, etc. for Secrecy Protection).

269. Minji Soshōhō [Civil Procedure Act], Law No. 109 of 1996, arts. 197 and 220.4(iii)).

270. Takanori Abe & Li-Jung Hwang, *Protective Order in Japan, Waves from U.S., towards Taiwan* (Dec. 2, 2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257959.

271. Kyle Pietari, *An Overview and Comparison of U.S. and Japanese Patent Litigation, Part II*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 970, 981 (2016).

272. *Id*.

Criminal Code, and other laws and codes binding attorneys. The Swiss Federal Constitution lays out the right to certain private life protections and the protection of personal liberty, which are the foundations for Swiss legal professional privilege.[273] Noncompliance with legal professional privilege is covered by the Swiss Criminal Code, which makes an attorney's disclosure of a secret a criminal offense with a penalty of a fine or up to three years in prison.[274] Legal professional rules bind attorneys to maintain the confidentiality of client matters and certain allegiances to clients if a contractual agreement is entered into. Swiss law does not distinguish between legal advice and litigation privileges, and privileges do not typically extend to in-house counsel's communications with employees or clients of the organization.[275] Privilege does apply to communications between in-house and outside counsel.

As long as the attorney is acting in a legal capacity, then legal professional privilege is likely to apply. Regular legal activities, including representing clients in court and before authorities and providing legal advice, are typically covered by the Swiss legal professional privilege. Even a client's identity may be considered privileged in some circumstances. Additionally, information available from a nonprivileged source can be considered privileged if the client wants the information kept secret. Corporate or other business-related types of advice, however, may

273. BUNDESVERFASSUNG [BV] [FEDERAL CONSTITUTION OF THE SWISS CONFEDERATION], arts. 10 and 13.

274. SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, art. 321.

275. Bundesgericht [BGer] [Federal Supreme Court] Mar. 14, 2008, BE.2007.10-13, and Oct. 28, 2008, 1B_101/2008. In-house counsel may be protected by privilege if they are the only person to receive documents or information provided to the in-house counsel by the organization, and the in-house counsel is the only person allowed to transfer the documents or information.

not be covered by the privilege even when provided by an attorney, as they are not strictly legal activities.[276]

The line drawn by Swiss courts regarding legal and nonlegal activities in terms of privilege is quite nuanced. Certain other activities may themselves have mandatory disclosure requirements. For example, if a Swiss attorney also offers financial services or advice not covered by the legal professional privilege, the attorney may be obligated to report money laundering suspicions.

There are several justifications that can remove the legal professional privilege protection from documents. Among these are by the agreement of the client whose information is protected, by authorization of the Lawyers' Supervisory Authority, in situations where self-defense is required, and when the production of the information is absolutely necessary (for example, to avoid imminent danger to an individual).

According to the Swiss Private International Law Act, parties to a contract may determine which law will apply to a contract, although Swiss attorneys tend to prefer that Swiss laws apply to contracts.

C. Other Exemplar Jurisdictions

1. India—Civil and Common Law

In India, professional communication between a legal adviser and a client is accorded protection under the Indian Evidence Act 1872, the Advocates Act 1961, and the Bar Council of India Rules. Sections 126 to 129 of the Indian Evidence Act codify the common law principles on professional communications between attorneys and clients in the context of the attorney-

276. *See* Bundesgericht [BGer] [Federal Supreme Court], 1B_85/2016 and 1B_437/2017.

client relationship. These sections restrict attorneys from disclosing communications exchanged with clients; extend this protection to those working with or for the attorney; prohibit an attorney from breaking the privilege unless called upon by a client as a witness; and state that courts cannot compel the production of privileged information. For the privilege to apply, the communications must remain confidential.[277] The Bar Council of India Rules reinforce this confidentiality as part of expected professional conduct.[278] These privilege protections apply to clients only and not legal professional advisers (a term that does not clearly include in-house lawyers). India also recognizes the privilege of documents created in anticipation of litigation as legal professional privilege.[279]

The protections for in-house counsel remain open to uncertainties, due to the fact that many of the provisions in Indian law are framed with reference to an "advocate," who is someone actually practicing law before an Indian court. Rule 49 of the Bar Council of India Rules states that an advocate shall not be a full-time salaried employee of any person, government, firm, corporation, or concern.[280] If an advocate takes up such employment, they are to disclose this fact to the Bar Council and shall then cease to practice as an advocate so long as the employment continues. According to the Advocates Act of 1961, persons working in the law department of a national or multinational firm are

277. Memon Hajee Haroon Mohomed v. Abdul Karim, (1878) 3 Bom. 91.

278. *See* Bar Council of India Rules, Part VI, Chapter II, Section II, Rule 17 (attorneys cannot breach the obligations of the attorney-client relationship established in Section 126 of the Indian Evidence Act).

279. *See* Larsen & Toubro Ltd v. Prime Displays Ltd, Abiz Business (P) Ltd. And Everest Media Ltd, (2002)(5) BomCR 158.

280. *See also* Satish Kumar Sharma v. Bar Council of Himachal Pradesh, AIR 2001 SC 509 (a full-time employee is not necessarily advocating on behalf of the employer).

not recognized as lawyers and, therefore, do not enjoy the same privileges as those working in private practice. This is because they are full-time, salaried employees and thus would not be able to claim any privilege nor could any privilege be claimed on their behalf by their employers.[281] However, the same duty of confidentiality binds both in-house and outside counsel, and communications may be confidential but not privileged.

281. *See* Municipal Corp. of Greater Bombay v. Vijay Metal Works, AIR 1982 Bombay 6 (a salaried employee who advises an employer on legal questions and matters may be protected the same as barristers, attorneys, and the like).