



Protecting the Privilege

Best Practices for Establishing & Maintain In-House
Attorney-Client Privilege

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Agenda for Today's Program

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How the Privilege Applies in Matters Involving Joint Representation

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When Dual Purpose Communications are Protected

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The Role of Privilege in Internal Investigations

5

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Jurisdiction Specific Overview



1

Scope of the Attorney-Client Privilege

What Communications are Privileged?

- Communications are privileged if they are:
 - confidential and
 - between a client
 - and a lawyer in a professional capacity
 - for the dominant purpose
 - of giving or getting legal advice or assistance



Attorney Work Product Doctrine

- Applies to documents and tangible things prepared in anticipation of litigation or for trial by or for a party or a party's representative or counsel.
- Protects attorney's notes, observations, thoughts and research from the discovery process.

Attorney Client Privilege Concerns Relevant to In-House Counsel

- Joint Representation
- Dual purpose representation
- Forwarding of legal advice to others
- Belief that inclusion of attorneys makes the communication automatically privileged
- Sharing information with third party consultants



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Joint Representation

Sharing Privileged Information Intercompany

- **Joint Client Privilege:** When one set of lawyers (in-house or outside counsel) advise multiple entities within a corporate group on a particular issue; and
- **Common Interest Privilege:** When multiple clients each have separate counsel and wish to share information on a matter of common legal interest



Takeaways

- Where a joint representation intended → execute an engagement letter or memorialize
- Where no joint representation intended → make that fact clear
 - *Upjohn* warning
 - Signed acknowledgement by employee



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Dual Purpose Communications

Dual Purpose Communications

- Definition: Communications that have mixed legal and business purposes
- Circuits are split on when dual purpose communications are protected by the attorney client privilege

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- The Primary Purpose Test: whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice (Second, Fifth, Sixth, Ninth Circuits)
 - A Primary Purpose Test: whether the dual-purpose communication had a "significant legal purpose" without considering the relative importance of any business or non-legal purpose (D.C. Circuit)
 - A Circuit Split: Writ of Certiorari pending with SCOTUS

Takeaways

To preserve privilege for communications with in-house counsel:

- Privilege banners
- Training of non-lawyers
- Set protocols for In-House counsel who support business teams





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The Role of Privilege in Internal Investigations

Scope of Privilege in Investigations

- Privilege is determined by the purpose of the investigation
- Business purpose vs. legal advice

Privilege Issues – The *Upjohn* Principle

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

Communications between in-house or outside counsel and lower-level employee may be protected if:

- The communications are made to corporate counsel
- The communications are made at the direction of corporate superiors to secure legal advice from counsel
- The information communicated is not available from upper management
- The information communicated concerns matters within the scope of the employee's duties
- The employees are made aware that they are being questioned in order for the corporation to secure legal advice

Applies in federal cases using federal law, and most states except: Alaska, Hawaii, Illinois and Maine



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How to Avoid Waiver in Cross-Border Communications

Meaning of "privileged persons" can differ

- Foreign jurisdictions differ from the U.S. in how they treat in-house counsel.
 - Common law countries (e.g., England, Australia, Hong Kong) generally view in-house counsel as "privileged persons," provided they are admitted to the governing bar association
- vs.
- Other civil law countries (e.g., France, Italy, Austria) do not view in-house counsel as "privileged persons" because they are not "independent" enough from their corporate employers to render independent professional judgment

Which Country's Privilege Law Applies?

- Courts consider the privilege law of the jurisdiction that "has the most predominant or the most direct and compelling interest" in whether the communications are privileged
- Practically speaking, this means that US privilege law usually applies to documents related to US proceedings, and foreign law usually applies to documents created for foreign proceedings
- Courts also consider location of interviews and documents, nationality of lawyers, language of interviews of documents, and structure of law firm, among other factors

Global Pitfalls

- Unlicensed attorneys
- Foreign attorneys
- Patent agents, paralegals, accountants
- In-house counsel may not be considered sufficiently independent
- Government investigations may trump privilege
- Documents crossing borders

Dos

1. Understand the law in the applicable jurisdictions
2. Understand who/what is the client and who holds the privilege
3. Consider use of U.S. counsel in communications in order to ensure U.S. privilege law applies
4. Establish a designated team to receive legal advice
5. At outset, consider which jurisdictions may be relevant for follow-on litigation and take action to maximize privilege protection
6. Confirm admitted status of in-house counsel, where applicable

Dos

7. Use legal counsel to engage third parties and document that these services are to assist counsel in rendering legal advice
8. Use legends:
 - "Request for facts so that legal advice can be given"
 - "For the purpose of receiving legal advice"
9. Describe the legal considerations which are involved in the subject matter
10. Be aware of the presence of unprivileged persons
11. Watch the distribution list – “need to know” basis
 - Be careful with "reply all"
 - Be alert for external email addresses
12. Include confidentiality messages on emails and faxes

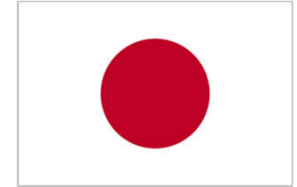
Dos

13. Limit storage of records in locations where the privilege does not exist or is limited in comparison to the U.S.
14. Designate note taker(s) for sensitive discussions with in-house counsel not protected by privilege

Don'ts

1. Don't be U.S. centric when operating internationally
2. Don't assume internationally that any privilege extends to non-legal "conduits" - don't assume privilege is the same as in the U.S.
3. Don't assume the EU is the only level of analysis for Europe – consider both EU and national levels
4. Don't write it if you don't have to
5. Don't mix law and business in the same writing
6. Don't funnel all information through in-house counsel
7. Don't store privileged documents in locations where rights are limited or nonexistent
8. Don't provide privileged documents or communications to third parties
9. Don't write a privileged communication that you would not want to see repeated on the front page of the Wall Street Journal.





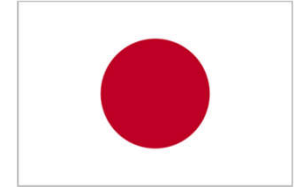
Japan

Article 197

A witness may refuse to testify:

- when an attorney at law (including a registered foreign lawyer), patent attorney, defense counsel, notary or person engaged in a religious occupation, or a person who was any of these professionals is examined
- with regard to any fact which they have learned in the course of their duties and which should be kept secret





Japan

(Obligation to Submit Document) Article 220

The holder of the document may refuse to submit the following document even if there is a court order:

- a document detailing a fact prescribed in Article 197 (i.e., attorney's duty of secrecy) that is still subject to the duty of secrecy

Note: There is no US-style discovery procedure in Japan





Canada

Two primary forms: Solicitor-Client Privilege and Litigation Privilege

- **Solicitor-client privilege** - Protects direct communications (oral and documentary) between the lawyer and their client for the purpose of giving or seeking legal advice which is intended by the parties to be confidential
 - Privilege can be waived implicitly or explicitly by the client
 - Considered a fundamental civil and constitutional right
 - Applies to in-house lawyers
 - Privilege will **not** be waived by disclosure to a third party with common interest in the same litigation or transaction



Canada

- **Litigation privilege** – Similar to US work-product privilege, litigation privilege protects documents and communications generated for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing
 - Litigation privilege protects: (1) communications between a lawyer and their client, (2) communications between a lawyer or client and a third party or (3) documents generated by the lawyer, client, or third party for the dominant purpose of litigation
 - Waiver of litigation privilege can be explicit, implicit or inadvertent



England & Wales



- Lawyers have the right to refuse the disclosure of documents covered by
 - (a) legal advice privilege; or
 - (b) litigation privilege
- Legal advice privilege is similar to US attorney-client privilege. Covers confidential communications between lawyer and client which are concerned with the giving and receiving of legal advice (litigation or otherwise)

England & Wales



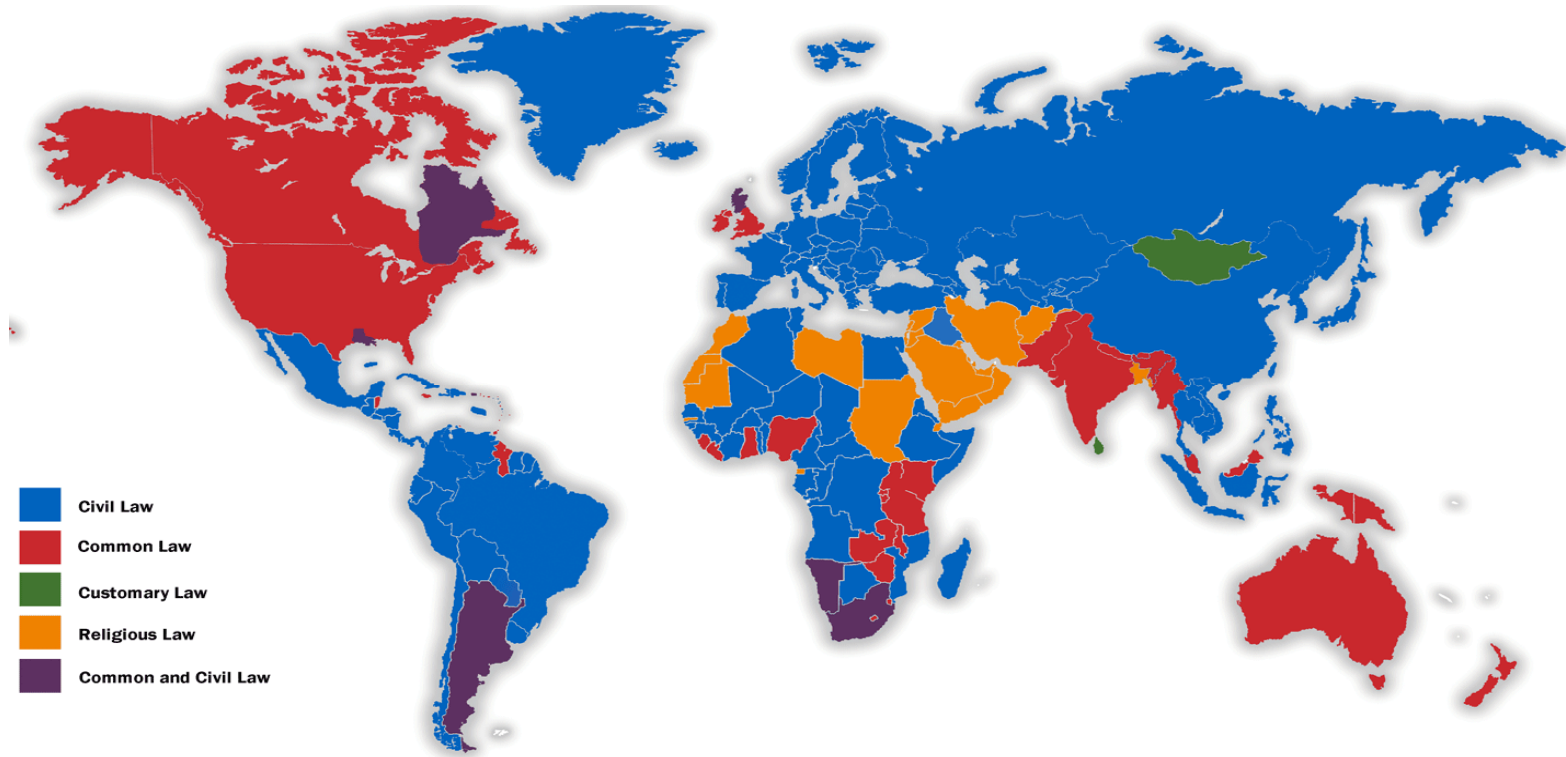
- Litigation privilege is similar to US work product protection. Covers confidential communications between any two parties provided litigation is at the time genuinely in prospect and the dominant purpose of the communication is either
 - (i) enabling legal advice to be sought or given; or
 - (ii) seeking or obtaining evidence to be used in connection with the litigation.
- Confidential information may be transferred to a third party without the loss of privilege if such party shares a *common interest* in the subject-matter of the document/litigation



European Union

- Special rules for enforcement of the European prohibition of cartels and prevention of dominant market position (EU competition law proceedings)
- **No privilege for in-house counsel**
 - Case C-155/79, AM&S Europe Ltd. v. Commission, 1982 E.C.R. 1575
 - Case T-125/03, T-253/03, Akzo Nobel Chemicals and Akcros Chemicals v. Commission, 2007 E.C.R. II-03523
- Rationale: in-house lawyers lack independence and are subject to the instructions and interests of their company

Map of Judicial Systems



Handbook

- Use this as a guide to determine what the attorney-client privilege law is in jurisdictions around the world
- if you would like to request access to the Privilege Handbook, please email nancy.sims@bakermckenzie.com
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