

News flash

Strictly P&C: Privilege Unwrapped

It is easy to assume that where a company is incorporated in a jurisdiction, it will be subject to only that jurisdiction's laws and regulations. Increasingly, as companies conduct business globally, this can expose the company and its directors to claims, legal action and regulatory investigation/enforcement *abroad*. Can companies then seek comfort and protection by relying on their own domestic laws? A common question that arises where litigation is afoot relates to confidentiality and privilege: where a document is privileged in one jurisdiction, can the same privilege be claimed to prevent disclosure in another jurisdiction? **Misha Nateghi** and **Elizabeth Simpson** delve into the mysteries surrounding legal privilege, particularly the differences between the UK and US legal systems.

UK Privilege Rules

In the UK, there are two types of legal privilege:

Legal Advice Privilege - confidential communications between a lawyer and his/her client that comes into existence for the purpose of giving/receiving legal advice, in respect of the client's legal rights and obligations. Communications between the lawyer and third parties are not similarly covered.

Litigation Privilege - arises once litigation is in reasonable contemplation. Documents that come into existence at the request of a lawyer/client, which are intended to be passed on to the lawyer are privileged from disclosure, provided their purpose is to obtain evidence and/or give/receive legal advice, in connection with that specific litigation.

US Privilege Rules

The US recognises several types of legal privilege. The most common are:

1. Attorney-Client Privilege; and
2. The Work-Product Doctrine.

The attorney-client privilege - protects confidential communications between an attorney and his/her client that are made in the course of legal representation, or for providing legal advice to the client. Privilege protects *only* the communication, and not the underlying facts.

The work-product doctrine - protects documents and physical things prepared in anticipation of litigation by an attorney's agent, but does not prevent disclosure of an attorney's mental

impressions, conclusions, opinions or legal theories, with regard to actual or reasonably anticipated litigation.

Where the UK and US diverge...

In the UK, privilege is an absolute protection, and in the US, it is not. The effect is that a privileged document in the UK is not necessarily afforded the same protection in the US unless it meets certain criteria.

When disclosing a document(s), in the UK, a party must describe the broad categories of documents it objects to producing on the grounds of privilege. In the US, the party must list every document that it deems privileged. The 'privilege log' must be prepared and provided to the opposition at the same time, or shortly after the exchange of documents. The list is always scrutinised and a party can expect a discovery dispute to arise if the opposition believes the assertions of privilege can be challenged.

In relation to expert witnesses, in the UK, all solicitor communications (bar material instructions) with the expert, including draft expert's reports are protected by litigation privilege. In the US¹, a party is required to disclose the identity of any witness who may be called as an expert, accompanied by a written report signed by the expert. **All materials 'considered' by an expert witness to form his/her opinion are also fully discoverable². This includes all documents or other work product generated by the expert including draft reports.**

Also, labelling documents 'Private & Confidential - Subject 

1. Federal Rules of Civil Procedure Rule 26(a)(2)
2. Federal Rules of Civil Procedure Rule 26(a)(2)(B)

▶ to Solicitor/Client Privilege' is not necessarily determinative of the status of a document, and can be ignored by a court when it considers whether or not that same document is, in fact, privileged. However, at least marking documents 'Legally Privileged and Confidential' may carry some weight and be more persuasive than omitting such a description.

Disclosure to Third Parties

In the UK, selective waiver allows disclosure of legally privileged communications to a third party (eg Insurers) without losing privilege, *provided* the document does not enter the public domain and remains confidential, eg pursuant to a confidentiality agreement. This is a grey area in the US. **The majority view is that disclosure of a privileged document to third parties, eg regulators or Insurers can result in a complete loss of privilege of the entire subject matter of the privileged document.**

Further, despite recognition in the UK and US of the principle of 'Common Interest Privilege', it is not always available to protect documents passing between Insureds and Insurers/their representatives.

What about third party communications when litigation is not contemplated? In the US, attorney-client privilege can apply to communications with third parties for the purpose of assisting the attorney to provide legal advice to the client. The UK provides these communications are not protected unless litigation is reasonably contemplated at the time the documents are produced. This can cause problems where there is a regulatory investigation.

Documents produced in response to a regulatory investigation, even if to provide advice, eg where a financial advisor is hired by a lawyer to assist with the lawyers understanding of the financial information, will not be protected. However, a UK company subject to a regulatory investigation in the US can take advantage of US rules to protect documents where they satisfy the requirements of attorney-client privilege³.

Waiver

In 2001, the SEC commented that cooperation with the regulator eg by agreeing to waive privilege may count as a significant factor in settling charges and a lower monetary fine⁴. The FSA's self-reporting requirements allow it to provide information/documents, to the SEC and other regulators, on request or voluntarily, where it considers appropriate eg where

there is potential for exploitation of any regulatory imbalance that may affect the US and UK alike⁵. As a result, companies can face an awkward dilemma of choosing between the lesser of two evils: waive privilege and co-operate with a regulator to receive a discounted fine/penalty/settlement of enforcement action, and risk disclosure of sensitive materials that can be used by third parties to issue/sustain a derivative/shareholder class action or risk the wrath of the regulatory authority.

Practical Pointers

1. Companies that operate abroad need to be aware that they and their management can be subject to foreign law/regulation, and may not necessarily be able to rely on the safeguards of UK law/regulation.
2. Documents produced in the UK, either in the course of litigation, or to provide legal advice, may not be afforded the same protection in other jurisdictions, outside the UK.
3. Companies should educate staff on the risks involved in document creation/production.
4. Take advice before disclosing documents to third parties, and ensure safeguards are in place, as far as possible, eg by marking documents 'Private & Confidential: Subject to Solicitor/Client Privilege' and/or disclose documents subject to a Confidentiality Agreement.
5. Consider the advantages/disadvantages of waiver of privilege where subjected to a regulatory investigation, the implications of self-reporting, versus the potential for additional scrutiny, and/or increased claims exposure by third parties.

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3. Practical Law Company – Privilege: A World Tour 18 November 2004

4. New York Law Journal, 5 April 2004

5. FSA Supervision Manual Principle 11 and The Enforcement Guide Annex 2

We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours. If you are interested, please contact any one of our lawyers or David Simon at david.simon@robinsimonllp.com.

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