Protecting Privileges in Cross-Border Investigations

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Tuesday morning as you sip your coffee, your telephone rings from your overseas transactional partner, asking if you can assist an ongoing sensitive internal investigation. The client, a publicly traded company with offices on multiple continents, is facing allegations of potential financial accounting irregularities. The client started its own investigation months earlier, prompted by an inquiry from a foreign government. In-house counsel based overseas has spearheaded the investigation to date, but now the company has received an informal inquiry from a United States regulatory agency covering similar topics. Your partner concludes that now is the time to get U.S. defense counsel involved—you.

The primary witnesses are located in several foreign countries. Time is of the essence. On the flight overseas, you are expected to read in-house counsel's interview memoranda, and you are to begin questioning employees as soon as you land. As the plane taxies across the tarmac, you ask yourself: Is it safe to assume that your interviews of the foreign-based employees will be protected by the attorney-client privilege? Should you instead be considering bringing the witnesses to the United States? What about the memoranda of in-house counsel's prior employee interviews; are those protected? If the company ultimately makes a presentation of its findings to foreign authorities, will protections be waived? What if those foreign authorities compel disclosure over the company's objections—will that cause a broader waiver?

The emergence over the past several decades of the truly global economy has driven the practice of law across oceans and sovereign borders. Governments and private litigants alike—through multinational Foreign Corrupt Practices Act (FCPA) investigations, international antitrust disputes, and cross-border intellectual property enforcement, to name only a few—have rapidly expanded the reach of American law and legal practice and stretched the habitat of the American lawyer to virtually every corner of the globe. And yet, one of the core tenets of American law often taken for granted here—the confidentiality protection cloaking communications between client and lawyer—does not necessarily inhabit all those spaces with the same force. So you cannot simply assume your (or in-house counsel's) communications with the overseas employees will be protected by the U.S. courts to the same degree they would be had those discussions occurred in the United States.

You are thus wise to consider, early, how best to protect those communications from compelled disclosure. This article focuses on three issues that are key to analyzing privilege in the international context:

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(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

Restatement (Second) of Conflict of Laws § 139 (Am. Law. Inst. 1971).

The jurisdiction with "the most significant relationship" is typically the one where an oral communication occurred or a written statement was received. On its face, the *Restatement*'s test would dictate that, absent extraordinary circumstances, a communication will be protected only if it is privileged in both the forum where the case is being litigated and the jurisdiction with the most significant relationship to the communication.

In the international context, however, the choice-of-law analysis takes on greater significance than it would in disputes based solely in the United States. Many foreign countries provide litigants with far less access to their opponent's evidence than we do; correspondingly, many countries have never developed discovery carve-outs for privilege or other protections for attorney communications to the degree we have.

Thus, were you to end your research at the *Restatement*, you might very well conclude that—when it comes to certain countries, at least—the best course of action would be to cancel your flight and bring the employees to you for interviews. For example, if you were to interview an employee in Seoul in response to an FCPA investigation by the U.S. Department of Justice, your notes might be discoverable under the *Restatement* even though, had that same communication taken place in Manhattan, it would likely be protected by the attorney-client privilege. However, as an experienced partner responding to the realities of the business world, you appreciate that suggesting to in-house counsel that the employees must all be brought to the States may not go over well with the client.

1. which country's laws will apply;
2. what protections, if any, are afforded by the chosen law; and
3. whether and to what extent limited disclosures (e.g., to foreign authorities) may result in broader waiver.

Because privilege law is relatively uniform (and strongly supported) within our borders, litigators who mostly practice here have the luxury of rarely confronting tricky choices of law governing client confidentiality. Although differences among states' laws of privilege, and between state and federal law, do exist, those distinctions are often minor and rarely require sharp choice-of-law analysis; the choice typically will not change the outcome. Nevertheless, a traditional framework for such disputes does exist, and the *Restatement (Second) of Conflict of Laws* and Federal Rules of Evidence provide starting points. Federal Rule of Evidence 501 decrees that the federal common law of privilege applies in federal question cases, while state law applies in diversity cases.

When there is a choice between the laws of two or more states, the *Restatement* provides:

The "Touch Base" Test

More recent common-law rulings, however, suggest support for a more nuanced strategy. Perhaps in response to the less uniform global legal landscape, courts appear to have found the

Illustration by Traci Daberko

Restatement's preference for disclosure unsatisfactory. Some federal courts have developed an alternative test, often referred to as the "touch base" choice-of-law test, which prefers to apply "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." *See Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 65 (S.D.N.Y. 2010).

Under the "touch base" test, a court will apply American law if the communication relates to legal proceedings in the United States or constitutes advice regarding American law. It will opt for the laws of the foreign country only when assessing communications that relate solely to foreign legal proceedings. Put another way, under the "touch base" test, courts will apply American law so long as the communication bears a more than an incidental relationship to the United States. Only when the communication lacks a substantive tie to American proceedings or legal issues will a court apply a foreign nation's privilege laws. In such instances, courts will look to the locale where the allegedly privileged relationship was entered into or the place where the relationship was centered.

The theory of the "touch base" test might lead you to conclude you can conduct your interviews abroad regardless of the privilege laws of the locale, as long as your purpose is to provide legal advice in connection with the U.S. matter that prompted your involvement in the first place. You should be aware, however, that some of the leading cases establishing the "touch base" test addressed factual contexts dissimilar to yours (and conferred privilege-like protections to foreign communications, even though those communications *did not* touch base with the United States).

In *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992), one party sought to compel production of communications between a nonparty Italian licensee and the licensee's patent agents in Norway, Germany, and Israel. The choice-of-law analysis was vital because, while Norway, Germany, and Israel protected communications between a patent licensee and its patent agents, the United States would protect such communications only where the agent was assisting an attorney in the provision of legal advice. Because the communications in question occurred between a foreign client and its patent agents relating to patent prosecutions in foreign countries, the court held that they did not "touch base" with America and were thus governed by the respective foreign countries' laws. *Id.* at 522. And because those countries did provide privilege-like protections despite the noninvolvement of an "attorney at law," the court found as a matter of comity that they were governed by the privilege law of the country in which the patent application was filed. *Id.* at 524. Thus, the communications were treated as protected, though they might have been discoverable had the law of the jurisdiction—i.e., American federal common law—been chosen. *Id.* at 518.

In another leading case, *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002), the Southern District of New York protected overseas communications from disclosure under the "touch base" test but did so based on the public policy element of the test, not because the communications related to a U.S. legal issue. *See id.* at 102.

Astra addressed a motion to compel in a patent case involving foreign patents. Many of the items sought were litigation documents, drafts, and correspondence that clearly would have been work product protected under U.S. law. Applying a "touch base" analysis, the *Astra* court found that certain document categories would be governed by Korean law, which does not offer protection as robust as American law, although it does provide some protection of secrets imparted to an attorney by a client. *Id.* at 100–01. Moreover, Korean law recognized *no* protection similar to the work-product doctrine. Thus, the court noted that Korean law would not shield the documents from production. *Id.* at 101.

But the *Astra* court took a deeper look at the Korean legal system as a whole and determined that, because that system lacks American-style pretrial discovery, its lack of privilege-like protections paints an incomplete picture of whether the communications would actually be discoverable in a Korean lawsuit. *Id.* at 101–02. Indeed, it determined that production would not be compelled in a Korean civil case, while much of the information would be protected under American law. *Id.* at 102. Accordingly, the court applied American law to the question, though the communications did not "touch base" with the United States, and so safeguarded communications that would likely not have been protected by the foreign (Korean) law.

Most recently, a court applied these principles to a factual situation more closely resembling the hypothetical we started with. In *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013), the Southern District of New York applied the "touch base" test to an internal investigation carried out in the United States and China in the wake of a 2006 terrorist bombing attack in Israel. In January 2008, someone sent a demand letter to the Bank of China's New York office, threatening a lawsuit claiming that the bank provided material support to a terrorist group by processing millions of dollars in wire transfers. The bank conducted an internal investigation in both China and New York but ran the investigation out of its compliance department, not by licensed attorneys, and the investigation served multiple purposes, including preparing to litigate or settle.

Applying the "touch base" test, the court held that American privilege law applied to all documents created after the demand letter and pertaining to it, while Chinese law governed documents created beforehand and those created later that did not relate to the demand letter. *Id.* at 492, 493. The court rejected the bank's argument that American privilege law should apply to documents predating the demand letter because they would

not, in practice, be subject to production in China. "The critical inquiry in *Astra* is not whether the disclosure of attorney-client communications *would* happen, but rather whether it *could* happen." *Id.* at 490 (emphasis in original). Because civil discovery is theoretically available, and nothing in Chinese law would prevent the disclosure, the *Wultz* court declined to limit production on public policy grounds.

The *Wultz* court further rejected privileged treatment of communications involving the bank's unlicensed in-house Chinese "counsel," despite the bank's argument that those employees acted as the "functional equivalents" of lawyers and are permitted to give legal advice under Chinese law. *Id.* at 494–95. The court focused on the Chinese law distinction between licensed lawyers and in-house counsel, who need not be members of a bar nor have any form of legal credential, and the fact that the bank could point to no substantive involvement in the internal investigation by U.S.-based lawyers after the receipt of the demand letter. Nevertheless, the court did hold that U.S. privilege law applied to all documents created after the letter "that do in fact relate to [it] and the subject matter that gave rise to this lawsuit, because those documents pertain to American law 'or the conduct of litigation in the United States.'" *Id.* at 492 (quoting *Astra*).

Taken together, these three decisions should suggest to you that your prospective communications with the clients' employees—which at this point will necessarily relate to the cross-border regulatory investigation you have been brought in to handle—will most likely be governed by American privilege law under the "touch base" test. You should take care, however, to document early and often the purpose of your involvement (i.e., that it pertains to the U.S. investigation) and to make sure that the client's in-house staff makes a record of your involvement and your direction of their efforts going forward.

Work Before Your Involvement

Now that you feel comfortable that at least *your* work is likely to be protected, even if conducted overseas, what of the work that predated your involvement? The *Wultz* decision in particular should put you on alert that, unfortunately, the prior work may very well be subject to discovery if the local law does not independently afford privilege protection to such communications. *Wultz* also strongly suggests significant limitations of the public policy element of the "touch base" test and that the most important factors will likely be the extent to which American lawyers and American legal issues are involved.

If a court determines foreign law applies, you should consider how best to protect that work from unwanted disclosure. And in trying to do this, you will bear the burden of establishing that those communications are protected under the law of that nation. *See, e.g.*, *Cadence Pharm., Inc. v. Fresenius Kabi USA, LLC*, 996 F. Supp. 2d 1015, 1019 (S.D. Cal. 2014). The proponent of the privilege must provide information of sufficient particularity and specificity to allow the court to determine whether the discovery is prohibited by foreign law. This is typically done through academic specialists or local counsel submitting declarations that describe, among other things, the provisions of the foreign law, the basis for its relevance, and the application of the foreign law to the facts of the case.

> You cannot simply assume your communications with the overseas employees will be protected by the U.S. courts to the same degree.

You will need to further keep in mind that, even among nations that recognize the attorney-client privilege, many limit its protections to communications with outside counsel only. Broadly speaking, common-law jurisdictions are more likely to interpret the privilege more expansively than civil-law jurisdictions, although the pattern is far from uniform. *See* Nina Macpherson & Theodore Stevenson III, *Attorney-Client Privilege in an Interconnected World*, 29 ANTITRUST 28 (Spring 2015) (listing countries that recognize different privileges).

Moreover, different American courts may reach varying conclusions regarding whether a given country's law provides a privilege or similar protection, depending on the facts and circumstances of the case before it. Given the practice of using expert testimony to establish whether a given country recognizes a privilege, consider engaging local counsel as soon as practicable to advise on the existence of applicable protections under local law and potentially testify as an expert.

Assuming you have established that your work and the investigatory steps taken prior to your involvement are protected by U.S. and foreign privileges, you or your client may still be called upon to present your findings to prosecutors or regulators. If you have favorable information to proffer, voluntary communications of your findings have the real potential to redirect the government's interest in a direction that benefits your client. But that strategy does not come without significant risk, including

that anything you disclose may waive hard-won protections. Moreover, the risk may go beyond the information you chose to disclose. You may also precipitate a broader waiver covering other details of your work and findings. Typically, the issue of waiver will turn on whether your presentation was made voluntarily or under coercion.

The American law of waiver is fairly settled. A compelled disclosure does not result in waiver of either the attorney-client privilege or the work-product protection so long as disclosure occurs after objection and other reasonable steps to protect the privilege. Conversely, a voluntary disclosure of privileged documents to an adverse party is sufficient to destroy both the attorney-client privilege and work-product protection. Moreover, the majority of courts do not recognize the so-called "selective waiver" doctrine, which would offer an exception to the traditional waiver rules for voluntary disclosures made in cooperation with government investigations. Thus, when a client voluntarily discloses protected material to the government, the waiver of privileges may include both the information actually disclosed as well as still-private undisclosed communications or information on the same subject, such as interview summaries and attorney notes.

One decision that addressed these issues in the international context is *In re Vitamin Antitrust Litigation*, No. 99-197 (TFH), 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002). Vitamin manufacturers communicated with seven foreign governments investigating price-fixing, including the Brazilian Ministry of Justice and the Federal Competition Commission of Mexico. Private plaintiffs then sought production of documents provided to those governments by the manufacturers, arguing that the manufacturers had waived any privilege. The defendants resisted, claiming production had been compelled because a failure to comply with a government request would have resulted in fines or impeded their requests for leniency.

The special master distinguished between disclosures motivated by self-interest and those that are effectively involuntary. The latter, which may succeed in avoiding waiver, requires disclosure in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance. *Id.* at *28–29. Even then, the party involved must assert any available privilege. *See id.* Accordingly, the special master held that only documents given to the Federal Competition Commission of Mexico remained protected because that authority threatened a large fine for noncompliance. *Id.* at *30–31. By contrast, documents submitted to all the other authorities were found discoverable given the lack of sufficient evidence of coercion. *Id.* at *32.

For example, the special master rejected arguments that the Brazilian Ministry of Justice had compelled compliance by stating that it could assume the charges under review were true if the manufactures failed to present a defense. The special master noted the absence of evidence that the manufacturers provided documents pursuant to a court order or that a failure to present a defense in Brazil would result in penalties or sanctions there. *Id.* at *29.

The *Vitamin* special master's analysis generally comports with other opinions. *See, e.g.*, *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 n.14 (3d Cir. 1991). Taken together, these cases suggest that, when foreign governments demand production of privileged or work-product protected materials, attorneys should understand that in the absence of true, demonstrable "compulsion," disclosure may very well result in a waiver of those protections, irrespective of the international flavor of the inquiry.

> Even among nations that recognize the attorney-client privilege, many limit its protections to communications with outside counsel only.

As your flight begins its descent, you should thus be preparing to demonstrate the ways in which the investigation and your advice are tied to advice concerning American law or a possible U.S. lawsuit or official inquiry. You should also focus on memorializing the earliest point in time when that became evident. You will want to consult early and often with local counsel in the foreign jurisdiction to determine, among other things, whether and how local law will protect communications predating your personal involvement and how to handle a request by a foreign government for materials concerning the internal investigation. Regardless of whether the jurisdiction recognizes the attorney-client privilege or work-product doctrine, you should also be prepared to assert the privilege until the foreign government issues an order compelling production. While these steps may not create privilege where none exists, they can be critical in marshaling the protections that do. ■