Legal Professional Privilege and Professional Secrecy in the US (New York and California): Overview

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A Practice Note providing an overview of the laws in the US (New York and California) relating to the protection available to lawyer-client communications and the best practices for preserving the confidentiality, privilege, and secrecy in those communications in business and commercial situations. In the context of privilege and professional secrecy rules, this Note also considers the definition of lawyers and clients, the impact of a common interest or joint representation on the applicability of privilege, and the application of privilege in an internal investigation or an M&A transaction.

This Note provides an overview of the law related to:

- Parties' disclosure obligations.
- The rules related to legal professional privilege and professional secrecy.
- Who are considered to be lawyers and clients for the purposes of legal professional privilege and professional secrecy.
- How local courts consider privilege and professional secrecy issues when clients share counsel or a common interest with a third party.
- How a party can protect privileged documents during an internal investigation or in an M&A transaction.

For information on the different approaches to legal professional privilege, and professional secrecy in common law and civil law jurisdictions, see *Practice Notes, Legal Professional Privilege, Legal Confidentiality and Professional Secrecy: Cross-Border* and *A world tour of the rules of privilege* (Law stated date 20-Jul-2021).

General Disclosure Rules

In the federal system, Title V of the Federal Rules of Civil Procedure (FRCP) governs disclosure of documents and other information. In state court, disclosure is governed by state-specific procedural rules, many of which mirror the FRCP. In general (and unless otherwise limited by court order), a party can obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence and proportional to the needs of the case (*Rule 26(b)(11), FRCP*). The proportionality inquiry is case-specific and considers:

- The importance of the issues at stake in the action.
- The amount in controversy.
- The parties' relative access to relevant information.

- The parties' resources.
- The importance of the discovery in resolving the issues.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

(*Rule 26(b)(1), FRCP*.)

Importantly, because the scope of discovery is generally broader than the scope of admissibility, information within this scope of discovery need not be admissible in evidence to be discoverable.

Parties normally disclose information in response to specific discovery requests. A request for production (RFP) requires the responding party to turn over any responsive, non-privileged document in its possession, custody, or control (*Rule 34(a)(1), FRCP*). An interrogatory requires the responding party to answer a series of targeted questions regarding particular aspects of the case (*Rule 33, FRCP*).

The scope of an RFP or interrogatory is limited by Rule 26 of the FRCP. In response to an RFP or interrogatory, a party can object to the disclosure of the requested information or documents on privilege grounds. Ordinarily, the court conducts an *in camera* review of the putatively privileged material to determine whether and to what extent it is protected. If the court finds that the material is not protected by privilege, the party may be compelled to disclose it.

Legal Professional Privilege and Professional Secrecy Rules

US courts recognize the attorney-client privilege, which protects certain attorney-client communications from disclosure. The privilege attaches to certain communications between privileged persons (for example, attorney and client) that are made in confidence and for the purpose of seeking, obtaining, or providing legal assistance. Unless and until the privilege is waived, the holder of the privilege (for example, the client) can withhold production of privileged communications.

Additionally, US courts also recognize the related doctrine of attorney work product. The work product doctrine protects from disclosure any documents prepared by an attorney or their agent in anticipation of litigation.

There is an important distinction between "fact" and "opinion" work product. Fact work product, or factual information gathered by an attorney in preparation for litigation, may be discoverable on showing of substantial need or undue hardship. By contrast, opinion work product, or work product reflecting an attorney's mental impressions, conclusions, opinions, or theories, is entitled to special protection and is rarely discoverable.

In general, the protections afforded by the attorney-client privilege and the work product doctrine apply regardless of whether the communication occurred in civil litigation, criminal litigation, regulatory proceedings, arbitration tribunals or employment tribunals.

Parties to litigation (as opposed to a lawyer) can refuse disclosure of documents in court if the party asserting privilege is the holder of the privilege being asserted (in other words, the client in the attorney-client relationship). Because the right to assert privilege rests with the client, the client may assert privilege over work product and communications with counsel. Whether the documents are in the possession of the lawyer or the client is immaterial for the purposes of asserting privilege. The right to assert privilege over the communications generally exists in perpetuity (unless otherwise waived), and will exist even after the representation of that particular counsel ends.

Generally, a court will not require the production of a document or communication that is privileged. However, a court may compel production of a document over which there is a dispute regarding privilege. In these cases, the court will generally review the document in camera, and will allow the opposing side to see the documents only if it finds that privilege does not apply, or has otherwise been waived

To claim the attorney-client privilege, the communication must be made to seek, obtain, or provide legal assistance. This applies even if the communication was made in a non-contentious setting, that is, made for the purpose of general legal advice, rather than advice for the purpose of litigation. By contrast, to come under the work product privilege, documents or other work product must be prepared in anticipation of litigation.

Actual litigation need not have begun at the time the work product was prepared to be privileged. Instead, it is generally sufficient if the documents were prepared at a time when there was a risk of litigation, and were not merely prepared in the ordinary course of business. (For more information, see *In-House Lawyers*.)

Scope of Legal Privilege and Professional Secrecy Rules

Communications

The attorney-client privilege can apply to any form of communication, including oral statements, texts, emails, letters, and faxes.

The protection can extend to a document summarizing or otherwise reflecting attorney-client communications, such as a memorandum drafted by an attorney and summarizing a phone call with a client. These communications may also fall under the protection of the work product doctrine, assuming the document was prepared by the attorney in anticipation of litigation.

It is important to note, however, that pre-existing communication does not become privileged merely because it was conveyed to an attorney. To be privileged, the underlying communication must also have an independent privilege basis. For example, an otherwise non-privileged email forwarded to an attorney does not become privileged by result of the transfer. However, the fact that the email was forwarded to the attorney may be privileged to the extent it reveals a request for legal advice or contains legal advice. An email chain is not automatically rendered privileged because an attorney is carbon copied (cc-ed). Rather, emails where an attorney is cc-ed are only privileged if the communication reflects a confidential request for legal advice and the only individuals on the chain are clients.

For more information on the key elements required for the attorney-client privilege, see *Legal Professional Privilege and Professional Secrecy Rules*.

The work product privilege may also attach to documents prepared by an attorney but not communicated to the client.

Unlike the attorney-client privilege, the work product privilege does not require that the privileged material be conveyed to the client. As long as an attorney's notes were prepared in reasonable anticipation of litigation, they likely constitute protected work product, even if they were never circulated to the client.

Third Parties

Under the traditional application of the attorney-client privilege, the communication must pass between the attorney and client, and the presence of a third party on an otherwise privileged communication will waive privilege. However, there are several scenarios in which disclosure to a third party may not waive privilege, as follows:

- The third party was a communicating agent, such as a non-testifying tax expert, whose role is to translate technical or specialised information, and whose purpose is to facilitate the communication of legal advice (known as the translator privilege).
- The third party was an agent of the attorney, whose role was to assist in the representation. This includes not only the attorney's staff (such as paralegals, interns, or assistants), but may also include third-party consultants. Some courts require that the agent be necessary or nearly indispensable for the privilege to attach.

The work product privilege may also attach to documents created by a third party, provided that party was acting under the supervision or at the direction of an attorney.

Confidentiality

For the attorney-client privilege to apply, the communication must be confidential at the time it was made. The presence of third parties destroys the privilege. If this confidential information is subsequently disclosed to a third party, the privilege is ordinarily deemed waived and the information can be discovered or used. However, the effect and scope of waiver is fact-specific. Inadvertent disclosure in the course of discovery can, in some cases, be rectified and the right to confidentiality restored (*Rule 502(b), Federal Rules of Evidence*).

Adverse Inferences

In general, US courts have held that a proper assertion of the attorney-client privilege or work product doctrine cannot result in an adverse inference against that party (see *United States ex rel. Barko v. Halliburton Co., 241 F. Supp. 3d 37, 54–55 (D.D.C. 2017)*). The purpose of the attorney-client privilege is to engender frank and open discussion between an attorney and client. The court held that for that reason, if the assertion of attorney-client privilege could produce an adverse inference, persons would be discouraged from seeking opinions, or lawyers would be discouraged from giving honest opinions. This kind of penalty for invocation of the privilege would have seriously harmful consequences.

Exceptions

US courts have carved out a number of public policy exceptions to the attorney-client privilege, including:

- **Crime-fraud exception.** The crime-fraud exception provides that attorney-client communications in furtherance of wrongdoing (such as the commission of a crime, fraud, or tort) are not privileged (*United States v. Zolin 491 U.S. 554, 562–63 (1989)*).
- **Joint client.** If two parties are represented by the same attorney in a single legal matter, neither party can assert the privilege against the other in a subsequent litigation involving the same subject matter.
- **Fiduciary duty.** In some jurisdictions, a corporation's shareholders can pierce the corporation's attorney-client privilege by showing sufficient need and good faith.

- **Death of a client.** Privilege can be waived following the death of a testator-client if litigation subsequently ensues between the deceased's heirs, legatees, or other parties claiming under the deceased client's will.

The American Bar Association Model Rules of Professional Conduct (ABA Model Rules) permit (but do not require) an attorney to disclose otherwise confidential communications in limited circumstances. An attorney can reveal information relating to the representation of a client to the extent the attorney reasonably believes disclosure is necessary to:

- Prevent death or substantial bodily harm.
- Prevent the commission of a crime.
- Establish a claim or defence in a controversy between the lawyer and the client.

(*Rule 1.6(b), ABA Model Rules*.)

There are other limited exceptions. In all other cases, an attorney could be subject to disciplinary action for intentionally revealing confidential attorney-client communications without the consent of the client.

Defining the Client

A person or entity is a client if they reasonably believe they are consulting an attorney for the purposes of obtaining legal advice. There are several factors that may indicate an attorney-client relationship exists, such as the:

- Payment of fees.
- Degree of the client's sophistication.
- Request for and receipt of legal advice.
- History of legal representation between the attorney and client.

For the avoidance of doubt, parties often sign an engagement letter at the outset of the attorney-client relationship. However, such a document is not strictly necessary, and the privilege could attach even without payment or any formal retainer agreement.

"Client" may also include a corporation, partnership, limited liability company, or association, which means that communications between a company's counsel (including both in-house and outside counsel) and certain employees are entitled to protection. Often, for the attorney-client privilege to apply, courts will require that the employee seeking the advice occupy a position with decision-making authority, or that seeking legal advice is within the scope of their employment duties.

Defining the Lawyer

Lawyers' Employees

In general, an attorney is a person licensed to practise law, or someone the client reasonably believes to be a licensed attorney. For the purposes of privilege, "attorney" typically includes an attorney's employees, such as clerks,

paralegals or intern trainees, or any other persons reasonably necessary to accomplish the purpose for which the attorney was hired. "Attorney" also generally includes agents of the client or agents of the lawyer, such as associate attorneys, paralegals, and legal assistants.

Foreign Lawyers

US courts may recognise communications between foreign lawyers and their clients as privileged. The result often turns on whether the court decides to apply US law or the law of the foreign lawyer's jurisdiction, under the choice of law principles. Provided that the foreign attorney is a member of a bar association (US or otherwise), US law will generally treat the communication as privileged.

In-House Lawyers

Communications between in-house lawyers and a company's employees may be privileged. However, the issue is complicated and fact-intensive, given that in-house counsel often serve both as business and legal advisors. Only communications made to seek or obtain legal advice from in-house counsel are privileged. Purely business advice is not privileged. In cases where the communication is mixed, or contains both business and legal advice, the communication is protected only if its predominant purpose is to convey legal advice. (For more information, see *Note Funding Corp. v. Bobian Invest. Co., No. 93 CIV. 7427 (DAB), 1995 WL 662402, (S.D.N.Y. Nov. 9, 1995)* and *Georgia-Pac. Corp. v. GAF Roofing Mfg. Corp., No. 93 CIV. 5125 (RPP), 1996 WL 29392, (S.D.N.Y. Jan. 25, 1996).*)

Additionally, to whom in-house counsel conveys otherwise privileged legal advice may impact the privilege analysis. For example, in most jurisdictions, disclosing advice to employees not on a "need to know" basis will generally waive privilege. A minority of US jurisdictions follow a more restrictive approach, which limits disclosure to senior management only.

Advice given by an in-house attorney of a parent company to a subsidiary company in the same group may be entitled to protection under the joint client privilege (see *Disclosure to Entities Represented by the Same Counsel*). The US Court of Appeals for the Third Circuit held that communications between employees of corporate affiliates and centralised in-house counsel regarding a matter of common legal interest were entitled to protection (see *Teleglobe Communs. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.), 493 F.3d 345 (3d Cir. 2007)* (Teleglobe)). The Third Circuit reasoned that, because "parent companies often centralize the provision of legal services to the entire corporate group in one in-house legal department," when a company's in-house legal department represents both the parent and a subsidiary on a matter of common interest, the corporate entities are in a joint client relationship with the legal department. Many courts have adopted the *Teleglobe* reasoning, treating a parent and subsidiary as co-clients for the purpose of the attorney-client privilege, particularly if the subsidiary is wholly owned by the parent.

Other Professionals

Communications with, or documents prepared by, other professionals may be privileged if done at the direction or under the supervision of an attorney. For example, under some circumstances, an independent auditor's findings may be privileged if the audit was at the request of, and under the supervision of, an attorney (see *Third Parties*).

Duration of Privilege

The protections of the attorney-client and work product privileges are durable. Communications deemed privileged in a legal matter in which they came into existence remain privileged in a subsequent legal matter.

Loss and Waiver of Privilege

The attorney-client privilege belongs to the client because the client, not the attorney, holds the privilege, and the privilege can only be waived with the client's informed consent.

The attorney-client privilege can be waived by disclosure of otherwise protected communications. For example, if an attorney conveys legal advice to a client by email, but the client subsequently forwards the email to a third party, privilege over the entire email chain will be lost. In general, once waived, privilege cannot be reclaimed.

In some jurisdictions, such as California, privilege is waived if a client sues their attorney (for example, for malpractice or in a fee dispute). In these cases, an attorney is permitted to defend themselves by disclosing otherwise confidential communications.

However, there is a narrow exception to the general rule that disclosure waives privilege. Disclosure of a privileged communication or document may not constitute waiver if:

- The disclosure was inadvertent.
- The holder of the privilege took reasonable efforts to prevent disclosure.
- The holder promptly took reasonable steps to rectify the error.

(*Rule 502, Federal Rules of Evidence*.)

It is increasingly common for parties to enter into "clawback" or non-waiver agreements before engaging in discovery, both in federal and state courts. These agreements usually provide that, in the event of an inadvertent disclosure, a party can claw back the inadvertently disclosed privileged communications, so that they will not lose their protected status.

Unlike the attorney-client privilege, work product privilege is typically only waived where the disclosure would substantially increase the likelihood that an adversary or potential adversary could obtain the work product. Therefore, disclosure of work product to a neutral third party, or to a party with a common interest, may not waive the protection.

Disclosure to even one non-privileged party may waive privilege. However, in the corporate context, information disseminated to a small number of employees (such as the board of directors or key employees) is unlikely to waive privilege. By contrast, dissemination to the company-at-large or to a large number of employees is likely to waive privilege (see *Defining the Client*). In cases where a corporate officer, director, or counsel wishes to disseminate privileged legal advice to a small number of people, best practices are to:

- Limit recipients on a need-to-know basis (such as other directors or those with decision-making authority).
- Clearly label the information as "privileged and confidential."
- Instruct recipients not to forward or otherwise further disseminate the information.

However, dissemination to any number of third parties (such as non-employees who are not agents of the corporation or of the attorney) typically waives the privilege, unless an exception applies.

A party cannot selectively disclose or cherry pick certain privileged communications or documents for its own benefit, for example, documents favorable to their case, while withholding related documents. Doing so would typically constitute "subject matter waiver," allowing the court to compel disclosure of all communications pertaining to that subject matter, and in so doing prevent distortion of the record.

Disclosure to Entities with a Common Interest

An exception to the general rule that disclosure waives privilege is the common interest or joint defence privilege. The common interest privilege protects communications between two or more parties and their respective counsel when the parties share a common legal interest. The common legal interest must be nearly identical, as opposed to merely similar. The party asserting the privilege must generally demonstrate that:

- The communications were made in furtherance of a joint defence effort.
- The statements were designed to further that effort.
- The privilege was not waived.

For more information, see *In re Sealed Case, 308 US App. D.C. 69, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994)* and *Hilsinger Co. v. Eyeego, LLC., No. 13-cv-10594-IT (D. Mass. Aug. 13, 2015*).

By way of example, see the following three scenarios.

Scenario 1: A has sought legal advice from her lawyers about making a claim against her employer for unfair dismissal. She shares the legal advice with her colleague B who has been similarly dismissed.

By sharing confidential advice with her colleague, A likely waived privilege over the advice. The common interest privilege typically is not applicable to mere information-sharing, as there must be some evidence of a co-ordinated effort. If, however, this information was shared as part of a broader joint effort to hold their employer accountable for the same action, they would have a strong argument against waiver.

Scenario 2: In the scenario above, A files a claim for negligent advice against his lawyer X. X, who holds a professional indemnity policy in relation to the proceedings, wishes to share the legal advice he sought regarding the claim with the insurer.

If X shares the legal advice with the insurer, there is a risk that privilege over the advice will be waived. Communications between an insurer and an insured may be entitled to protection under the common interest doctrine, which applies to communications between parties with an identical legal interest. Generally, where the insurer has approved coverage, the interests of the insurer and the insured are clearly aligned and the common interest doctrine likely applies. Where the insurer has denied coverage, their interests are clearly divergent and the doctrine likely does not apply. However, because the insurer has not decided whether to indemnify the attorney, there is a risk that the insurer will subsequently decline coverage and that the common interest doctrine will not protect communications between the attorney and the insurer, resulting in waiver of privilege over the legal advice.

It is likely that the attorney may nonetheless elect to waive privilege over the legal advice, notwithstanding the application of the common interest doctrine. Many states, such as California, permit an attorney to waive privilege over confidential communications to defend themselves against a lawsuit filed by a former client.

Scenario 3: Co-defendants in a personal injury claim, who have a common interest in defeating the claims of the claimant, wish to disclose confidential communications to each other and their respective lawyers.

The common interest privilege would likely apply. Unlike the parties in Scenario A, the parties in this scenario are co-defendants and share an identical legal interest in defeating the claims of the claimant. Provided that the disclosure is made in the course of, and for the advancement of, their joint defence effort, it will remain privileged.

It is not necessary that the parties execute a joint defense agreement (JDA) to invoke the common interest privilege. However, the existence of an executed JDA may increase the likelihood that a claim of the common interest privilege will succeed. A JDA is evidence that a joint defense effort exists (a prerequisite to invoking the common interest privilege).

Disclosure to Entities Represented by the Same Counsel

The joint client privilege applies where one attorney represents two or more clients on a matter of common interest. It is distinct from the common interest privilege, which applies where separate attorneys represent separate clients who share a common legal interest. The joint client privilege protects communications between the multiple clients and the attorney, unless and until the joint clients become adverse to one another. In that case, privilege is waived for the co-client. In other words, a co-client cannot invoke the privilege in litigation against another co-client.

Otherwise, the joint client privilege is governed by ordinary privilege rules. That is, the party claiming the privilege must demonstrate that the communication occurred between privileged persons (for example, attorney and client) and was made in confidence, and to seek, obtain, or provide legal assistance.

Partially Privileged Documents

Where a document contains both privileged and non-privileged information, the privileged information may be protected from disclosure. This is commonly done by redacting the privileged information.

Privilege in Unique Contexts

Privilege Against Self-Incrimination and Spousal Privilege

The Fifth Amendment to the US Constitution creates a right against self-incrimination. While a person cannot be compelled to testify against themselves, in the civil context, the fact-finder may draw an adverse inference from a party's refusal to testify (see *Baxter v. Palmigiano, 425 US 308, 318 (1976)*). Most US courts recognize two distinct spousal privileges:

- **Communications privilege.** This safeguards confidential communications between married persons, and enables either spouse to prevent the disclosure of confidential communications.
- **Witness privilege.** This enables a spouse to refuse to testify against the other spouse in a criminal proceeding. However, although the witness-spouse may refuse (and the court may not compel them) to testify, if the witness-spouse elects to testify, the defendant-spouse cannot invoke the witness privilege to prevent it.

Internal Investigation

It is likely that the contents of interviews or the final report in an internal investigation would not be privileged under either the attorney-client privilege or the work product doctrine if, at the time the interviews were conducted and the report was prepared, legal advice was not sought or litigation contemplated. The fact that the board of directors subsequently decides to obtain legal advice is immaterial.

Interviews conducted or a report prepared after a decision to obtain legal advice or pursue litigation are much more likely to be privileged. However, the timing of the decision is not outcome-determinative, as the communication must still satisfy all other elements of privilege.

The presence of counsel is a necessary but not sufficient factor for privilege. The communication must still satisfy the necessary requirements (see *Legal Professional Privilege and Professional Secrecy Rules*).

The following are good practices to preserve privilege and avoid inadvertent loss:

- Draft a formal investigation plan that clearly articulates the reasons for and goals of the investigation. Clearly state whether an investigation is being conducted in anticipation of litigation.
- Clearly label privileged materials. However, be careful not to over-label so that the label loses its meaning.
- In-house counsel should sequester privileged communications from ordinary business advice. For example, unrelated business matters should be discussed in separate emails.
- Counsel should conduct witness interviews and other fact-gathering. Counsel should provide the ***Upjohn warning*** (also known as the "corporate Miranda warning," originally set out by the US Supreme Court in *Upjohn Co. v. United States, 449 U.S. 383 (1981)*) at the outset of the interview, advising the interviewee that:
    - the interviewers represent the company, not the interviewee;
    - the interview is confidential and covered by the attorney-client privilege; and
    - the corporation has the sole prerogative whether to ultimately disclose any of the information discussed in the interview.
- Interview memoranda should not only memorialise information discovered during the interview, but also reflect counsel's mental impressions, thoughts, and analysis. Memoranda should be preceded by a statement to that effect.
- Share the results of the investigation only on a need-to-know basis, such as only with the board of directors or others with decision-making authority. In some cases, reporting the results of the investigation to the public, or even to the company at large, may waive privilege in the underlying materials (see *Banneker Ventures, LLC v. Graham, No. 13-391 (RMC) (D.D.C. 2017)*).

M&A Transactions

In M&A transactions, privileged materials disclosed between the parties may retain their protected status under the common interest doctrine (see *Disclosure to Entities with a Common Interest*). In the M&A context, whether a

communication is privileged is likely to hinge on whether the buyer and the target share a common legal interest. Although the scope of the doctrine varies between jurisdictions, most courts agree that communications regarding business or commercial issues do not constitute a common legal interest. However, documents and communications disclosed to a buyer in connection with a pending transaction may nonetheless retain their privileged status if the buyer and target share a legal interest in the potential legal risk of accepting the transaction. The court held in *In re Quest Software Inc. Shareholders' Litigation, No. 7357-VCG (Del. Ch. July 3, 2013)* and *Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616 (Ct. App. N.Y. 2016)* that the common interest privilege applied to pre-closing communications between the target and underwriter where the parties had signed a confidentiality agreement and needed the shared advice of counsel "to accurately navigate the complex legal and regulatory process involved in complete the transaction."

Although the fact that the parties sign a contractual undertaking, such as a confidentiality agreement or common interest agreement, does not automatically render the communications privileged, it is nonetheless recommended as doing so may increase the likelihood that privilege will remain intact.

Following a merger, the attorney-client privilege is generally treated as an asset purchased during the transaction, meaning that the acquiring corporation may waive privilege in pre-closing communications with the target corporation (see *Shareholder Representative Services, LLC v. RSI Holdco, LLC, C.A. No. 2018-0517-KSJM (Del. Ch. May 29, 2019)*). If the seller of the target corporation wishes to retain privilege in the pre-merger communications, the target's management often must negotiate a retention clause in the merger agreement. The retention clause may (among other things) provide that:

- The privilege in pre-closing communications survives closing.
- The privilege is assigned to a representative of the target corporation.
- The acquiring corporation will not use the privileged communication in post-closing litigation against the target.

Cross-Border Matters

Generally, federal courts presiding over a cross-border investigation or dispute apply the privilege law of the state in which the federal court sits (the law of the forum state), particularly in diversity of citizenship cases (for example, where damages exceed USD75,000 and the parties are citizens of different states). Federal courts may also apply the federal common law of privilege, usually to federal question cases arising under federal law.

A party may argue that the court should apply a foreign jurisdiction's privilege law instead of the forum state's law. To be successful, the party must show that:

- The foreign privilege law conflicts with the law of the forum state.
- The foreign jurisdiction has the most significant relationship with the communications at issue.

Usually, the jurisdiction with the most significant relationship is the jurisdiction in which the communication took place.

A conflict between domestic and international privilege laws is usually resolved by the "most significant relationship" test. However, some courts apply a "touch base" test and US privilege law to communications that have more than

an incidental connection with the US. In *Gucci Am., Inc. v. Guess? Inc., 271 F.R.D. 58 (S.D.N.Y. 2010)*, the New York court held that communications with Italian counsel, and maintained on an Italian server, touched base with the US because they related to a company's legal strategy to prosecute trade mark infringement actions in both Italy and the US.

As a practical matter, applying international privilege laws may be disadvantageous to non-US litigants, because US privilege laws tend to be more robust than those of other jurisdictions. It is certainly possible that a document that is not privileged in the country in which it was created could be considered privileged in the US, and vice versa.

Recent Developments

The fundamentals of privilege are well established and have not changed significantly over the years. However, new forms of communication, namely email or instant or text message (collectively, e-communications), have led to different applications of US privilege law. For example, e-communications are often stored in servers that third parties may monitor or otherwise access, potentially waiving privilege in accessed communications. In a recent case analysing this issue, the US Bankruptcy Court for the Southern District of New York applied a four-factor balancing test, assessing whether:

- The corporation banned personal or objectionable use of the company's email server as a matter of policy.
- The company monitored the use of the employee's computer or email.
- Third parties had a right of access to the computer or emails.
- The corporation notified the employee, or the employee was otherwise made aware of the monitoring policies.

(*In re Asia Global Crossing, 322 B.R. 247 (Bankr. S.D.N.Y. 2005)*.)

As a result, many companies have begun segregating privilege communications from non-privileged communications and restricting access by third parties.

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