

Robinson+Cole

PFAS Update

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October 30, 2019



Please Note

This roundtable is designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

Preliminary Considerations

- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

Presenter



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PFAS Overview

- PFAS (per- and polyfluoroalkyl substances)
- Widespread usage over time in a number of products and processes
- Fate and Transport Challenges:
 - No known natural sources
 - Chemically complex mixtures
 - Stable; resistant to degradation
 - Mobile in groundwater
 - Bioaccumulating

Federal PFAS Regulation

- EPA issued PFAS Action Plan in February 2019
 - Work towards development of MCL
 - Initiate regulatory process to define certain compounds as CERCLA “hazardous substances”
 - Continue PFAS enforcement efforts
 - Expand PFAS monitoring efforts
 - Expand scientific research into PFAS compounds
 - Develop PFAS risk communication toolbox
- In the meantime, 70 ppt health advisory level



State PFAS Regulation

- Various MCLs being developed/implemented in different states for different compounds
- Legal designation as a “hazardous substance”
- Surveys/information gathering to try to identify potential PFAS sites, contamination
- Requirements to test drinking water



Litigation Developments

- **Types of Claims**
 - Personal Injury
 - Property Damage
 - Class Actions
- **Claims Arising From:**
 - Chemical/Manufacturing Facilities
 - Firefighting Foam Sites
 - Landfills

Litigation – Back to the Beginning...

- Parkersburg, WV Litigation filed in 2001
 - Impacts discovered in 6 water districts (West Virginia, Ohio) and numerous private wells
 - Class action – over 80,000 potential class members
 - PFOA, or C8, used at the Facility in the manufacture of Teflon
- Settlement in 2004 involved creation of C8 Health Project that ultimately identified health impacts
- Reserved claims settled in 2017 for \$670 million plus the potential for an additional \$250 million for unknown claims

Litigation – Now...

- PFAS cases being filed nationwide
- Over 100 AFFF-related cases have been consolidated in South Carolina MDL
- Proposed class in a recently filed personal injury case: “All individuals residing within the United States who, at the time a class is certified in this case, have a detectable level of PFAS materials in their blood serum.”

“The only places we’re not finding PFAS are places we’re not looking.”

Heidi Grether, Director Michigan Department of Environmental Quality

Robinson+Cole

Preserving the Attorney-Client Privilege – A Global Perspective

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Why spend our time talking about privilege?

- As attorneys, we exchange confidential communications every day.
- We make assumptions about what is privileged and what will *remain* privileged.
- We work with colleagues (legal and business) abroad. This has serious implications for whether the communications are privileged and will remain privileged.



Agenda:

1. Attorney-Client Privilege – U.S. Law Overview
2. Work Product Doctrine – U.S. Law Overview
3. Privilege in the Global Context
4. Checklist for Training Business Partners About the Privilege
5. Wrap-up: Questions/Discussion

Part 1

ATTORNEY CLIENT PRIVILEGE – U.S. OVERVIEW

Attorney-Client Privilege: Overview of U.S. Law

- To be protected, a communication must be:
 - between a **lawyer** and **her client**
 - in the **course of a professional relationship**
 - for purpose of **obtaining legal advice** (if from client), or for purpose of **facilitating legal advice or services** (if from lawyer)
 - be **confidential**, i.e., not shared with a third party
 - NY CPLR 4503; *Priest v. Hennessey*, 51 N.Y.2d 62 (1980); *Olson v. Accessory Contr. & Equip. Corp.*, 254 Conn. 145 (2000)

Attorney-Client Privilege: Overview of U.S. Law

- Why does the law recognize this privilege?
 - Tension between (1) need for full disclosure in fact-finding process and (2) social good derived from proper performance of the functions of lawyers acting for their clients
 - U.S. Courts acknowledge that the latter outweighs the former but recognize privilege must be applied narrowly because it limits full disclosure of the facts
 - *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981);
Commonwealth v. Goldman, 395 Mass. 495, 502 (1985)

Attorney-Client Privilege: Overview of U.S. Law

- What is **not** protected?
 - Communications seeking / providing business advice
 - *Am. Nat'l Bank & Tr. Co. v. Axa Client Sols.*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 4805, at *10 (N.D. Ill. Mar. 20, 2002)
 - Crime-fraud exception
 - *In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011)
 - Note that it is the client's intent – not the attorney's intent – that governs whether the exception applies.

Privilege vs. Confidentiality

○ **Privilege is Narrow:**

- The attorney-client privilege only protects the communications actually had by the client and lawyer and only extends to information given for the purpose of obtaining legal advice.

○ **Confidentiality is Broad:**

- By contrast, the ethical duty of client-lawyer confidentiality is quite extensive in terms of what information is protected. It applies not only to matters communicated in confidence by the client but also to all information relating to the representation regardless of whether it came from the client herself, or from another source.

Model Rule of Professional Conduct

Rule 1.6 Confidentiality of Information:

(a) A lawyer shall not 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).

...

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Attorney-Client Privilege: Special Considerations for In-House Attorneys

- How does privilege apply to communications between in-house attorneys and employees?
 - U.S. courts generally recognize that in-house counsel's communications are deserving of protection.
 - *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
 - The communications will be more carefully scrutinized for claims of privilege.
 - Courts have acknowledged that in-house counsel sometimes wear other hats – this can cut both ways.
 - *Leazure v. Apria Healthcare Inc.*, No. 1:09-cv-224, 2010 U.S. Dist. LEXIS 105301, at *11 (E.D. Tenn. Sep. 30, 2010) (Court must consider the function an attorney is fulfilling at the time the document was created; documents created by an attorney functioning as a business advisor are not protected unless predominantly legal).

Attorney-Client Privilege: Special Considerations for In-House Attorneys

- Mixed Business and Legal Advice – How Will the Court Decide if it is Privileged?
 - Substance of the communication – WHAT IS WRITTEN
 - Purpose of the communication - WHY IT IS WRITTEN
 - Title of the in-house counsel – WHO WROTE IT
 - Responsibilities of the in-house counsel – WHAT THAT PERSON DOES
 - Parties to the communication and their titles – WHO IS PARTY TO IT
 - Does communication concern “legal rights and obligations”?
 - Does communication evidence “other professional skills such as lawyer’s judgment and recommended legal strategies.”

PRACTICE NOTE: If you get to this point you are already having motion practice on the issue; a Court is conducting an *in camera* review.

Attorney-Client Privilege: Special Considerations for In-House Attorneys

- Who is the “client” of an in-house attorney?
 - Your client is the company
 - Not the individuals in the organization



Attorney-Client Privilege: Special Considerations for In-House Counsel

- **Company is Your Client - Not the Individuals**

Model Rule of Professional Conduct

Rule 1.13 (“Organization as Client”)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

.....

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

PRACTICE TIP: *Upjohn* When in Doubt and Document

Attorney-Client Privilege: Special Considerations for In-House Attorneys

PRACTICE NOTES:

1. **Transactions:** Communications between in-house lawyers representing parties on opposite sides of transactions are not privileged
 - Even when your interests seem aligned.
 - This includes discussions about settling/resolving disputes.
2. **Waiver:** The privilege belongs to the client organization
 - *In re Vargas*, 723 F.2d 1461, 1466 (10th Cir. 1983)
 - The organization has the power to waive its privilege – inadvertently or strategically.
 - Recent Example: *Luna v. Marvell Tech. Grp., Ltd.*, No. C 15-05447, 2017 U.S. Dist. LEXIS 155343, at *1 (N.D. Cal. Sep. 22, 2017) (holding that Marvell had waived ACP and/or work product protection for interview memoranda and KPMG work papers that were created as part of audit committee investigation because findings were presented to SEC and conclusions were published in press release).
 - Your privileged email may still be disclosed.

Attorney-Client Privilege: Special Considerations for In-House Attorneys

Model Rule of Professional Conduct

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

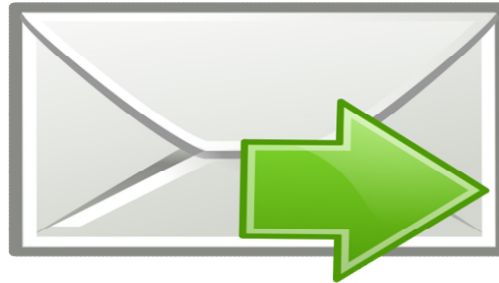
...

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer, and

PRACTICE TIP: Supervise non-attorneys to ensure there is no inadvertent waiver of the privilege.

Mixed Purpose Communications from In-House Attorneys

- **PRACTICE NOTES ON MIXED PURPOSE EMAILS:**
 - Consider sending two e-mails when business and legal advice are both being conveyed



- Carefully review the “TO” and “CC” lines:
 - Does this person need this email?
 - Does he/she have a need to know?
 - Is he/she part of the “control group” on this issue?

Labeling E-mails As Privileged & Other Practice Tips

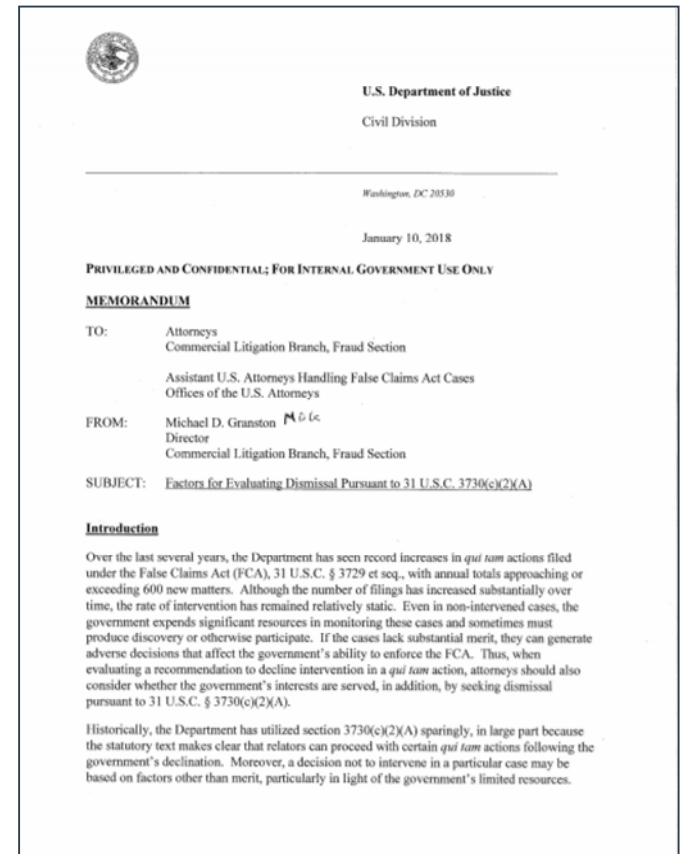
- **Selective Use of ACP Label**

- Stating that an email is “privileged” will not automatically transform that communication into privileged material.
- In fact, over labeling can cut against you in a privilege fight. The label can mean nothing if it is placed on every calendar invite or call-in number.
- Write it as if it will be on front page.

Labeling E-mails As Privileged & Other Practice Tips

Practice Tip: It Happens to the “Best”

- Jan. 10, 2018: DOJ Memo (“Granston Memo”) labeled “**Privileged & Confidential: For Internal Government Use Only**”
- Director of DOJ Commercial Litigation Branch (Fraud Section) directed DOJ attorneys to consider more closely dismissing meritless False Claims Act cases filed by whistleblowers.
- **Leaked – It is Now Out There.**



Protecting Privilege During Negotiations

- Solicitation of legal advice during vs. purely business negotiations
- What skills were being used by in-house attorney?
 - Legal acumen
 - Negotiation skill
- **Practice Tips:**
 - State the Purpose
 - Know the Audience
 - Reference legal issues
 - Identify legal position
 - Be careful when combining business and legal advice
 - Use of **outside** counsel
 - Draft memoranda memorializing the roles of the parties involved

Alex: I'll take ACP Potpourri for \$1,000

- Border entry issues – Is your phone/laptop protected?
- Uniformity of ACP law in U.S. – Recent Delaware decision
- Keep your license active!
- Multiple Hats: The In-house lawyer as chief compliance officer

Part 2

ATTORNEY WORK PRODUCT – U.S. OVERVIEW

Attorney Work Product Doctrine: Overview of U.S. Law

Federal Rule of Civil Procedure 26(b)(3)

protects attorney work product from discovery, including:

“[1] documents and tangible things that are
[2] prepared in anticipation of litigation or for trial
[3] by or for another party or its representative.”

PRACTICE TIP: An attorney should be engaging outside vendors to do work (for the purpose of advice on anticipated litigation) if there is to be any chance of protection. Document the engagement and its purpose in anticipation of litigation.

Attorney Work Product Doctrine: Overview of U.S. Law

- AWP will **not** protect work done for business purposes.

What does this mean....

Attorney Work Product: Special Considerations for In-House Attorneys

- AWP Does **Not** Apply To:

- Materials “assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation”

Fed. R. Civ. P. 26(b)(3).

- “Documents prepared . . . pursuant to regulatory requirements are not classified as attorney work-product.”

Syngenta Crop Prot., Inc. v. U.S. Env'tl Prot. Agency, 2002 WL 31778791, at *5 (M.D.N.C. Nov. 5, 2002) (*rev'd in part on other grounds*).

Attorney Work Product Doctrine: Overview of U.S. Law

- Example:
 - Company A hires an outside law firm to do an investigation.
 - Company A's Board of Directors' documents say investigation is “aimed at ‘formula[ting] and recommend[ing]’ changes to the ‘policies, standards and procedures’ of the Board of Directors . . .”
 - Court considered that a “business – not litigation – goal.”
 - AWP did **not** apply.

Banneker Ventures, LLC v. Graham, No. 1:13cv00391(RMC) (D.D.C. May 16, 2017)

Attorney Work Product & Privilege - Waiver

- **Attorney Client Privilege – Waiver**

- Easier to waive.
- The attorney-client privilege is waived when it is disclosed beyond the attorney/client relationship.

- **Attorney Work Product –Waiver**

- Harder to waive – if done the right way.
- The attorney work product doctrine can still apply even if it is shared with a third party, so long as the third party has a common interest (at least a non-adverse interest).
- Opposing party may access AWP if shows a substantial need.
 - Fed. R. Civ. P. 26(b)(3)(A)(ii)

Attorney Work Product: Special Considerations for In-House Attorneys

- Key Areas of Concern:
 - Audits
 - Litigation reserves
 - Tax reserves
 - Regulatory Filings
 - “Dual function” documents
 - Internal Investigations
 - Waiver of work product privilege to show conclusions of investigation.

First Scenario

EXAMINING DOMESTIC ACP AND AWP ISSUES

Scenario #1:

Facts:

- *Company A is in negotiations to supply engine parts to Company B for Company B's new aircraft.*
- *Company A's in-house attorney, Susan, located in Connecticut, is e-mailing with her internal client, Roger, located in California.*
- *Roger is the business leader at Company A handling the deal with Company B.*
- *Susan sends Roger the following e-mail:*



Scenario #1:

From: Susan.Smith@CompanyA.com
To: Roger.Jones@CompanyA.com
Subject: New Company B Order

Hey Roger,

Hope you and the guys are having a great time on your sales trip. How's business – any new leads? By the way, I finally got around to talking to that OVERPRICED outside counsel, Winthrop Arate, on the contingency clause that Company B requested in the draft agreement. It took him WAY TOO LONG, but Arate's advice is that this would subject us to substantial liability in the event of a supply chain shortage. If they sue us with the agreement as currently drafted, it's likely that a court would interpret the clause *against* Company A, and in favor of Company B. (I don't know if he is right or not – can't trust that Arate on anything these days). But since he's given us the warning, we should take that clause out in the next version of the agreement sent to Company B if your team is on board.

I've looked at the older HORRIBLE agreements. On the price issue, it seems to me that we should not price them more than 5% higher (so we don't get SQUEEZED more than we already ARE!!) than under the agreement for the 2016 deal with Company B. I have a call out to that jerk Jimmy at Company C about agreeing to keep the prices at the same levels to help us land this deal. I'm sure he is going to want his back scratched - so we are going to have to help him on their pending deal with Company B.

Let me know what you think – hope you crush those other guys.

Have fun!
Susie

Part 3

PRIVILEGE IN THE GLOBAL CONTEXT

Privilege in the Global Context

- **GOAL: PAUSE BEFORE YOU HIT SEND**

- Where is this going – literally?
 - Is it going outside of the United States?
 - Do I know the rules?
- **Do not assume** when writing an otherwise privileged or work product communication that will go outside of the United States that the communication will remain privileged, even if it complies with all of the rules we have just discussed.
- Possible that U.S. law will not apply (i.e., government inquiry)
- Importance of advice from local outside counsel on privilege issues.



Attorney-Client Privilege in the Global Context

- In-house counsel advising companies operating in multiple jurisdictions are particularly exposed.
- Competing and frequently contradictory laws on privilege can create unexpected results:
 - Advice that is privileged in the country where it is given may not be protected in other countries where a company operates.
 - Advice produced by a locally-qualified lawyer may be privileged, while the same advice produced by a foreign lawyer practicing in the jurisdiction might not be privileged.

Scary Examples: EU Competition Law

Akzo Nobel Chem. Ltd. v. Comm'n, 2010 E.C.R. I-8301, European Court of Justice (ECJ) holds:

- *“In field of competition law, internal company communications with in-house lawyers are **not covered** by legal professional privilege.”*
- ECJ reasoned in-house counsel were employed by company so they did not have the independence to create an attorney-client relationship.
 - *“The Court considers that an in-house lawyer, despite his enrolment with a Bar or Law Society and the fact that he is subject to the professional ethical obligations, **does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client.**”*



Scary Examples – Cont'd

PRACTICE TIP:

- Some courts in other EU countries (Netherlands and Belgium Supreme Courts (2013)) have held *Akzo* inapplicable and instead upheld privilege for in-house counsel.
- Reasoning includes that *Akzo* should be limited to EU Competition law and should not apply to that individual country's in-house counsel.
- *Still – the case shows the uncertainty of what forum will be deciding privilege issues in the future no matter where you are and where your internal clients are.*

Breaking it Down: Common Law Jurisdictions vs. Civil Law Jurisdictions

- Common law jurisdictions and civil law jurisdictions approach the concept of privilege of communications from very different starting points.

<u>Common Law Jurisdictions</u>	<u>Civil Law Jurisdictions</u>
<ul style="list-style-type: none">• Countries: US, UK, Hong Kong, Australia, Canada• Privilege attaches to confidential documents and communications between client and lawyer that are brought into existence for the primary purpose of giving or receiving legal advice.• The right belongs to the client and only client may waive it• Varies from jurisdiction to jurisdiction, but fundamentally, the nature of privilege is the same throughout common law jurisdictions	<ul style="list-style-type: none">• Countries: Germany, France, Brazil (mainly Western European and Latin American countries)• Do not have a similar system of either transparency or the obligation to provide disclosure• Codes include provisions that impose on a lawyer a duty not to disclose confidential communications between himself and his client.

Privilege Around the Globe

France:

- Civil law system
- No in-house lawyer protection: in-house lawyers (*juristes d'entreprise*) are neither members of the bar nor *avocats* whose communications are afforded attorney-client protection



Brazil:

- Civil law system
- Privilege only extends to lawyers licensed with the Brazilian Bar Association (i.e., not to foreign lawyers)
- Brazilian in-house lawyers are protected by the privilege



China:

- Concept of privilege is not recognized, although a lawyer is required to keep confidential information learned as a result of his professional practice, BUT
- No regulations that entitle a lawyer to refuse to disclose confidential information in court proceedings or pursuant to a request from a government authority



Privilege Around the Globe

Italy:

- Civil law system
- No in-house lawyer protection: in-house lawyers cannot be admitted to the bar for the most part.
- Except for communications with outside counsel, documents not protected.



Sweden:

- Civil law system
- Nordic version
- No in-house lawyer protection: in-house lawyers cannot be admitted to the bar.
- Privilege only extends to communications with an “advokat” or foreign equivalent.



Singapore:

- Statutes protect the privilege for in-house counsel.
- Evidence Act
- Patents Act
- Also protected by common law privilege (*ARX v. Comptroller of Income Tax*)



Role of Foreign Privilege Law in U.S. Litigation

- When a foreign privilege law is implicated, U.S. Court generally apply the “touch base” choice-of-law test
 - The country that “has the most compelling or predominant interest in whether the communications should remain confidential,” (unless the law of that jurisdiction is contrary to U.S. public policy.)
 - *Gucci Am., Inc. v. Guess? Inc.*, 271 F.R.D. 58, 65 (S.D.N.Y. 2010)
 - In most cases, the jurisdiction with the most compelling or predominant interest is either “the place where the allegedly privileged relationship was entered into” or “the place in which that relationship was centered at the time the communication was sent.”
 - *Astra Aktiebolag v. Andrx Pharms., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002)

Role of Foreign Privilege Law in U.S. Litigation

- Recent cases involving communications with non-U.S. in-house counsel in U.S. litigation
 - ***Veleron Holding v. BNP Paribas*, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014)**
 - Communications with Non-U.S. In-House Counsel Held Not Privileged:
 - In securities fraud case against Morgan Stanley, Morgan Stanley moved to compel emails of Plaintiff's in-house counsel based in Russia and Netherlands.
 - Pursuant to the “touch-base” test, the court held that the privilege law of Russia and the Netherlands applied.
 - Under Russian and Dutch law, there is no attorney-client privilege governing in-house counsel communications; as such, the communications were deemed to be discoverable.
 - ***Sebastian Holdings v. Deutsche Bank*, 123 A.D.3d 437 (N.Y. App. Div. 1st Dept. Dec. 4, 2014)**
 - Communications with Non-U.S. In-House Counsel Held Privileged
 - Deutsche Bank sued over improperly reporting exposure of trades; Plaintiff sought communications between employees of Deutsche Bank's Swiss arm and in-house counsel on the grounds that Swiss law (which does not recognize privilege for such communications) warranted disclosure.
 - However, early in the lawsuit, the parties had entered into a stipulation that New York law would apply to the production of documents from Switzerland
 - The court found that under the stipulated orders, the parties agreed that the privilege logs would be created in accordance with the New York law; as such, under New York law such communications with in-house counsel were protected.

Second Scenario

INTERNATIONAL SCENARIO - GERMANY



Scenario #2

Facts:

1. *Norah Carefree is an in-house attorney based in Ohio. Norah is negotiating a contract with Badnews Co., a customer in Germany.*
2. *Norah regularly emails internal business partners working in Germany about the deal – including legal advice.*
3. *Norah also regularly emails Max Price, German outside counsel for Badnews Co.*
4. *The company does not have outside counsel in Germany on this matter yet as the deal is in the initial stages. Norah has been emailing with outside counsel in Ohio about the deal.*
5. *Before the deal closes, a criminal investigation is opened in Germany into Badnews Co. and German authorities demand all emails about Badnews Co., including Norah's emails to company employees in Germany and her emails with outside counsel for Badnews.*

Scenario #2

- Issues to Consider:
 - Are your communications with your internal client in Germany privileged?
 - In a U.S. Court?
 - In Germany?
 - Is it civil or criminal proceeding?
 - Are your communications with the customer's outside counsel privileged?
 - Are your communications with your outside counsel in Ohio privileged?
 - In a U.S. Court?
 - In Germany?

Scenario #2

Tips for Preserving the Privilege in Germany

- German law: Lawyers must keep information they obtain in their professional work confidential.
 - Violation of this duty is a violation of code of professional conduct and criminal law.
- Privilege applies to **in-house counsel** in **civil cases** – **BUT**
 - **NOT in criminal cases**
 - **NOT in cases of European competition law**

Scenario # 2 – Cont'd

Tips for Preserving the Privilege in Germany

- For any privilege to apply in Germany **the attorney must be admitted or be a member of a bar in Germany.**
 - This may include an attorney from another EU country.
- If you are not admitted to the bar in Germany, you cannot assume that your communications to client are going to be protected from disclosure.
 - Especially if you are providing mixed legal/business advice.

Third Scenario

INTERNATIONAL SCENARIO - INDIA



Scenario #3

Facts:

- *Ian Knowright is an in-house attorney for Company A and is based in Connecticut. He was trained in Connecticut and has been a full-time employee of Company A for 15 years.*
- *Aiden Dowrong was trained as an attorney in India and for the past 5 years has been a legal officer for Company A based in India.*
- *Both Knowright and Dowrong advised business leaders in India about a commercial contract with Upsell Inc., a customer in India.*
- *The contract ends up in litigation in India. The negotiations leading up to the contract become an issue in the lawsuit.*
- *The Upsell's attorneys in the lawsuit call Dowrong as a witness to answer questions about the negotiations. They demand all correspondence involving Knowright and Dowrong.*

Scenario #3

- Privilege in India Does Not Extend to In-House
 - In-house counsel's legal advice to corporation is **NOT** protected as privileged under Indian law.
 - Section 126 of the *Indian Evidence Act* (1872) forbids attorneys and barristers from disclosing "Professional Communications" with clients without client's consent.
 - If an attorney receives a document/communication from a client as part of his/her employment as an attorney, attorney cannot disclose it, state its contents, or disclose advice given concerning it.
 - **BUT in-house counsel are not considered attorneys or barristers for this privilege.**

Scenario #3

- Privilege in India (cont'd)
 - Indian law does not consider in-house counsel as “attorneys” for purpose of the privilege because they are employees of the client.
 - In-house counsel are required to give up their law licenses when they are hired in-house as legal officer.
 - *But see* 1982 decision of the High Court of Bombay holding that if a salaried employee advising on legal issues should get same protection as an attorney/barrister under Evidence Act if advice is not for illegal purpose. Still, other courts may hold otherwise. The privilege is not safe.

Part 3

**WRAP UP, CHECK LISTS,
DISCUSSION**

Practice Tips: What to Do in an Uncertain World

- **The Phone Still Works**



- Encourage in-house lawyers' regular use of phone calls / video conference over email or other written correspondence.

PRACTICE NOTE: Text messages, iMessages, WhatsApp – they are all discoverable writings subject to privilege review.

Practice Tips: What to Do in an Uncertain World

- **Protection of Local Outside Counsel**

- Most, if not all, jurisdictions recognize the confidentiality of communications between outside counsel and their corporate clients.
- Hiring and communicating through local outside counsel likely will protect sensitive legal communications.

Practice Tips: What to Do in an Uncertain World

- **When a Writing is Necessary:**



- Restrict distribution to those with “need to know.”
- Discourage forwarding.
- Label, when applicable, “for the purpose of giving legal advice”
- Try to segregate – if possible – legal and business advice.
- Be mindful of what communications are sent overseas.
- Minimize the amount of information sent between in-house counsel and foreign offices.
- Limit the storage of records in locations where the privilege does not exist or is not strong.
- Write the email like it will be on the front page.

Training Your Business Partners: A Checklist

- Pause Before Pressing Send
 - Do I Need to Write or Can I Call?
- Ask Yourself:
 - Am I asking for or receiving LEGAL advice? – **GO**
 - Could I ask a non-lawyer just as well? - **STOP**
 - Am I including anyone outside the company? - **STOP**
 - Am I including anyone within the company who does not NEED to know to make a decision? – **STOP**
 - Am I writing anyone (even attorneys) outside of the country - **STOP**
- If you hit a **STOP** – pick up the phone and ask U.S. counsel what to do before writing.

PRACTICE TIP: See one page outline for educating non-lawyers about privilege.

Questions/Discussion