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BY DON R. BERTHIAUME & JEFF ANSLEY

In this last year of the first decade of the twenty-first century, many of the signatories to the Organization for Economic Co-Operation and Development’s Convention on Combating Bribery of Foreign Officials (OECD Convention) are investigating and prosecuting cases involving the bribery of foreign officials for business purposes. They are doing so in conjunction with and the support of the United States. This is particularly true of the United Kingdom, which, after years of criticism from the OECD, is poised to adopt sweeping legislation that will give it the power to prosecute foreign corruption cases “irrespective of whether the acts or omissions, which form parts of such offenses takes place” within its borders.

Similar to the U.S. Foreign Corrupt Practices Act (FCPA), these powers will lead to more parallel criminal investigations by U.S. and U.K. authorities. Parallel investigations by different criminal authorities acting in multinational jurisdictions can cause logistical and legal nightmares for the subjects of the inquiries. This is certainly the case when it comes to the legal privileges afforded to attorneys and clients. While both the United States and the United Kingdom provide for attorney-client protections, they do not share the same views on how those privileges and doctrines apply to corporations. Consequently, if a corporation is required to turn over documents in one jurisdiction, it will most likely waive the protections it is afforded in the other, leaving the corporation exposed to criminal sanctions it might not have faced but for the conflict between the two nations’ laws.

Legal Privilege in the United Kingdom Generally

There are two attorney-related legal privileges in the U.K.: the “legal advice privilege” and the “litigation privilege.” The legal advice privilege protects communications made for the purpose of obtaining or receiving legal advice. This includes advice and assistance in relation to public law rights, liabilities and obligations, and private rights—including cases where the attorney assists his or her clients in preparing to appropriately present evidence and materials for non-adversarial inquiries within a relevant legal context. The litigation privilege, on the other hand, protects from disclosure “documents created with the dominant purpose of use in existing or contemplated litigation, whether or not such documents are created by third parties.” These U.K. privileges are similar to the U.S. attorney-client privilege and work-product protection.

Scope of the Privilege in the Corporate Context

The most striking difference between the legal privileges in the United States and the United Kingdom is not in what the privileges protect from disclosure, but rather, in the corporate context, to whom the privileges apply. In the United States, since the Supreme Court’s 1981 decision in United States v. Upjohn Co., the corporate attorney-client privilege belongs to the corporation. As such, “it is not dependant on a certain organizational structure or a specific group of people within the organization.” Instead, because a corporation is fluid, it will continue to exist through its “members, directors, officers, employees, and shareholders.” Thus, the corporation retains the privilege regardless of who occupies which position in the organizational structure, and the privileges apply equally to corporate directors and management as they do to low-level employees.

The United Kingdom, on the other hand, has adopted the “control group” test in determining to whom the corporate legal privileges apply. The control group test bases the application of the legal privileges on whether the corporate employee speaking with counsel has authority to control the decision, has an ability to take substantial part in the decision-making process, or has membership in a group that had authority to prescribe the corporate action based on the attorney’s advice. Thus, the legal advice privilege does not extend to documents obtained from a third party to be shown to an [attorney] for

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advice, and that, although a corporation can only act through its employees, information obtained from an employee stands in the same legal position as information obtained from an independent agent.

Thus, the court declined to extend the legal advice privilege to the documents prepared by the Bank's employees or ex-employees. In short, because the employees and ex-employees were not members of the control group, the legal advice privilege did not attach to their communications with outside counsel.

Applicability to Foreign Bribery Prosecutions

Typically, corporations respond to foreign bribery allegations by launching internal investigations and interviewing all officers, directors, and employees involved in the alleged transgressions. In the United States, these interviews are generally conducted by counsel so that the statements made by the interviewees are protected by the attorney-client privilege and any subsequent interview memorandums are protected by the attorney-client privilege and work-product doctrine. However, the likelihood of parallel multinational investigations conducted by the United Kingdom and the United States changes this paradigm, because employee interviews and interview memorandums derived from such interviews may not be privileged under U.K. law.

U.S. courts narrowly construe the attorney-client privilege and work-product protection because they "obstruct the search for the truth." Consequently, in the United States, the duty of confidentiality associated with the attorney-client privilege requires the parties to whom the privilege applies "to refuse to disclose and to prevent others from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Simply put, litigants must "jealously guard" these legal protections or they will be waived because, if "the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies." In situations involving parallel U.K. and U.S. investigations of foreign bribery allegations where U.K. authorities compel access to employee interview memorandums, the corporation will not be able to refuse to turn over such materials on privilege grounds unless the employees are members of the control group. Under most circumstances, this will not be the case. If the corporation affirmatively responds to the request, it will be waiving its attorney-client privilege and work-product doctrine rights in the U.S. because it voluntarily turned over privileged materials and failed to prevent the disclosure of confidential information. Therefore, U.S. authorities will argue that the corporation waived its attorney-client privilege and work-product doctrine rights and claim that they are entitled to access the confidential materials.

Similarity to Parallel U.S. Congressional Investigations

The situation presented by the conflict between U.S. and U.K. privilege rules is analogous to the conflict that occurs when there are parallel investigations involving the U.S. Congress and either civil litigants or criminal authorities. Congress does not recognize the attorney-client privilege or work-product doctrine.

In situations where a party is under the threat of contempt or similar punishment (such as in Congress or a foreign governmental body) and forced to turn over privileged materials, the party must make efforts to protect its rights. This involves more than merely objecting to the legal requirement requiring production of privileged documents; the party must make "some serious effort" to convince the governmental body to recognize the legal privilege.

The tobacco litigation cases of the late 1990s and early 2000s provide great insight into the steps U.S. corporations should take when trying to protect the legal privileges under duress. In Haines v. Liggett Group, Inc., for example, the administrator of Haines's estate brought an action against Liggett seeking to recover damages for her father's death due to decades of tobacco use. Prior to the commencement of the suit, Liggett was engaged in a separate action in which arguably privileged documents were turned over to the court after a determination that the attorney-client privilege did not apply to the documents in question. Despite this ruling, Liggett continued to argue the documents were privileged, and appealed the court's decision.

At the same time, the Commerce Committee, which was investigating the possibility of a master tobacco litigation settlement, issued subpoenas "demanding production of all documents" that the court held were not protected by the attorney-client privilege and/or work-product doctrine. This request was followed by a letter stating that the committee would not recognize any attorney-client privilege claims, and that if Liggett did not immediately produce the documents, the committee would seek a contempt charge against Liggett. In response, Liggett provided the committee with approximately 37,000 documents along with a letter in which it stated that it did "not waive any claims of privilege" and was producing them "solely under the threat of contempt of Congress for non-compliance with the subpoena." The administrator in Haines v. Liggett argued that when Liggett produced the documents to Congress, it waived any privileges. While the court agreed with Liggett that "production may be deemed compulsory," it held that "there must be, at a minimum, serious resistance and a firm indication that Congress intended to proceed with a contempt resolution."

Further, the court held that there must be strong assertions of privilege to sustain it, and the minimal effort undertaken by Liggett did not suffice. Thus, the court found that Liggett waived the attorney-client privilege and work-product protection.

Steps to Take in Parallel U.S. and U.K. Investigations

The Haines case is instructive as to what corporations should do during parallel U.S. and U.K. criminal investigations involving allegations of foreign bribery. For example, in scenarios where U.K. authorities issue compulsory document requests, corporations must strongly assert the privilege, even if it is ultimately rejected by those authorities. The efforts corporations can undertake include: (i) negotiating with
U.K. authorities to respect the protections afforded by the U.S. attorney-client privilege and work-product protection; (ii) supplying U.K. authorities with a privilege log outlining the basis for the privilege; and (iii) taking the privilege claims before U.K. courts and obtaining a final judgment regarding the privileges applications. In effect, the corporation must exhaust all possible remedies available to preserve its privilege claims in the United States. Failure to do so may result in the waiver of both the attorney-client privilege and work-product protection and, as a result, important and confidential materials may be available to U.S. prosecutors for use against the corporation in its case in chief.

**Conclusion**

With international enforcement of anti-bribery laws espoused in the OECD convention on the rise, U.S. law firms must not only concern themselves with U.S. laws, but also the laws of other foreign jurisdictions that may also be investigating their clients. While many areas of the law must be considered, such as privacy and labor laws, the possibility of privilege waiver must be at the forefront of any criminal practitioner’s mind. This is because nothing can negatively impact a corporate client more than having its confidential privileged information concerning potentially criminal activity exposed for all to see.

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**Endnotes**

6. Id.
7. Id.
13. Neither house has ever explicitly accepted that the attorney-client privilege or work-product protection applies to it. This is because of the doctrine of separation of powers—the protections are judicially created, not legislated. “Generally, a party seeking to preserve a claimed privilege, must challenge such a subpoena by standing in contempt of Congress.” Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972).
16. Id. at *3.
17. Id. at *8.
18. Id. at *21.