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Practical Guidance for Maintaining Privilege and Work Product Protection in Cross-Border Internal Investigations

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I. Introduction: The Paramount Importance of Privilege

Maintaining attorney-client privilege, attorney work product protection, and other applicable confidentiality protections is critical from the very outset of any investigation. Cross-border investigations pose special difficulties. Successfully navigating those difficulties can mean the difference between, on the one hand, shielding communications with counsel and attorney work product from discovery and subpoenas and, on the other hand, damaging or embarrassing disclosures.

Due heed must be paid to these considerations from the earliest days of any investigation. The actions and omissions of counsel, auditors, and company executives and employees throughout an investigation—including at the beginning—can secure or imperil privilege or work product protection and cause reverberations years down the line. American attorneys, in their role guiding and overseeing cross-border investigations, should work to ensure that privilege and work product protection remain intact from the outset.

Every investigation has its own wrinkles. Some privilege issues, however, arise uniquely or with more frequency in cross-border investigations. This Article explores—and provides practical tips about—privilege and work product protection related to four circumstances: (1) when privilege applies in one country but not another; (2) compelled searches of law firm files;

(3) when crossing international borders; and (4) in investigations involving the U.K. Serious Fraud Office.[1]

Before examining those issues, this Article provides a brief overview of the specific elements of attorney-client privilege and attorney work product protection. After its exploration of those issues, it provides an overview of common privilege traps to keep in mind.

II. What Exactly Are Privilege and Work Product Protection?

The term "privilege" is ubiquitous in legal practice. Lawyers stamp it on their documents. They state their reliance on it in depositions, hearings, and meetings. And most attorneys' email signatures include boilerplate invocations of it.[2]

A valid legal privilege or work product protection shields the contents of a communication or document against compelled disclosure.[3] In other words, where a valid legal privilege exists, a party can generally resist a subpoena or other call for documents or testimony.

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[1] For a background resource on privilege in internal investigations more generally, *see* Steven E. Fagell, Benjamin S. Haley, and Anthony Vitarelli, *Practical Guidance for Maintaining Privilege Over an Internal Investigation*, Practicing Law Institute Corporate Law and Practice Course Handbook (2014).

[2] For the sake of brevity, when this article makes reference to "privilege" or "privileges" as a set of legal protections, it includes the work product doctrine among those protections. This comports with published decisions from many courts, which have referred to "work product privilege" and that have included work product protection among a set of legal "privileges." *See, e.g*., *Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998) ("Petitioners sought review in this Court on both the attorney-client privilege and the work-product privilege."); *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 70 ("Exemption 5 [for FOIA requests] is most commonly invoked to protect the deliberative-process privilege, the attorney work-product privilege, and the attorney-client privilege."). That said, work product protection is often thought of as related to—but, strictly speaking, distinct from—legal privileges. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1417 n.1 (3d Cir. 1991) ("Although some writers refer to a work-product 'privilege,' we prefer the term 'doctrine,' for the doctrine encompasses both a limited immunity from discovery and a qualified evidentiary privilege."); Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L. J., 917 (1983) (arguing that the work product doctrine operates as a protection for the adversary system, not as a privilege for a particular party).

[3] *Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981) ("[Privileged] communications must be protected against compelled disclosure."); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) ("[T]he public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege.") (internal quotation marks and citation omitted).

There are many kinds of privilege or similar protections from disclosure. Attorney-client privilege and attorney work product protection are the two most widely applicable doctrines that protect communications and legal work from discovery related to internal investigations and are the focus of this Article.

A. The Elements of Attorney-Client Privilege

There are four basic elements to attorney-client privilege. The privilege protects:

1. communications;

2. that are confidential;

3. and that are "made for the purpose of facilitating the rendition of professional legal services"; **and**

4. that occur between:
    a. (1) a client or his or her representative and (2) the client's lawyer or the lawyer's representative;
    b. (1) the client's lawyer and (2) the lawyer's representative;
    c. (1) the client or the client's lawyer and (2) a lawyer representing another in a matter of common interest;
    d. representatives of the client;
    e. (1) the client and (2) a representative of the client; **or**
    f. lawyers representing the client.[4]

Attorney-client privilege does not apply unless each of those four elements is met. The third element—that the communications be for the purpose of rendering legal services—is frequently

[4] Proposed Fed. R. Evid. 503(b), 56 F.R.D. 183, 236 (1972); *see also U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (stating that proposed-but-rejected Rule 503 is recognized "as a source of general guidance regarding federal common law principles"); *U.S. v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011) ("The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.").

at issue in internal investigations. In-house counsel often provide business advice. But business advice is not privileged, even if rendered by an attorney.[5]

B. The Elements of Attorney Work Product Protection

There are two elements necessary for attorney work product protection. The protection shields from discovery documents and other tangible things that were:

1. Prepared in anticipation of litigation or for trial; **and**
2. Prepared by a party or its representative.[6]

Attorney work product can be discoverable in some circumstances, but an attorney's mental impressions are generally not discoverable. Unlike the attorney-client privilege, which is almost inviolable, a party can obtain material otherwise protected by the attorney work product doctrine if it can show a substantial need and no other way to obtain the material or the information therein without undue hardship.[7] A party generally cannot, however, discover work product that contains an attorney's mental impressions about a case or its underlying factual and legal issues. The Federal Rules of Civil Procedure require that "[i]f the court orders discovery of [work product] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[8]

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[5] *Matter of Walsh*, 623 F.2d 489, 494 (7th Cir. 1980); *Olender v. U.S.*, 210 F.2d 795, 806 (9th Cir. 1954).
[6] Fed. R. Civ. P. 26(b)(3); *see also* Fed. R. Crim. P. 16(a)(2), 16(b)(2) (applying work product protection to criminal cases). Note that work product protection shields documents and other tangible things, while the attorney-client privilege shields communications.
[7] *See* Fed. R. Civ. P. 26(b)(3)(A)(ii).
[8] *Id*. at 26(b)(3)(B); s*ee also Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974) ("We hold that such [attorney] opinion work product material, as distinguished from material not containing mental impressions, conclusions, opinions, or legal theories, is immune from discovery although the litigation in which it was developed has been terminated.").

III. Considerations when Privilege Applies in One Country But Not Another

Cross-border investigations, by their very nature, implicate the privilege laws of multiple countries. It almost goes without saying that different countries vary in the legal privilege and confidentiality protections available in the context of an investigation. Less obvious is that the privileges and protections available in one country can have an impact on the continuing validity of privilege and protections in others.

A. Privilege Discrepancies

In many instances, a privilege or protection that would protect documents or communications in the United States would not protect similar documents or communications abroad. For example, in the United States, attorney-client privilege protects communications between company personnel and in-house counsel, so long as the other criteria for protection are met.[9] In the European Union, by contrast, communications between a company's management and its in-house counsel generally are not privileged.[10] Similarly, in Russia, attorney-client privilege does not protect internal communications with in-house attorneys.[11]

When a discrepancy between rules related to privilege or work product protection in different countries is present, courts must determine which country's privilege law to apply. American courts have taken different approaches to addressing this issue. Some courts apply a "touch base" test, under which the court determines which country has the "predominant or the

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[9] *See*, *supra*, § II.A.
[10] *See Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, Case C-550/07 P at 84 (Opinion of Advocate General Kokott, Apr. 29, 2010) ("[I]t is not appropriate to extend legal professional privilege to internal company or group communications with enrolled in-house lawyers.").
[11] Brent A. Benoit and Scott L. Friedman, *International Compliance and Privilege Issues Confronting the Oilfield Services Industry*, 28 Int'l Law Practicum 108, 111 (2015).

most direct and compelling" interest in the confidentiality of the communications.[12] The court then applies that law, absent a showing that doing so would be contrary to public policy.[13] Under the test, "American law typically applies to communications concerning legal proceedings in the United States or advice regarding American law, while communications relating to foreign legal proceeding[s] or foreign law are generally governed by foreign privilege law."[14]

Other courts have applied a similar test termed the "most significant relationship" test, which is found in the Restatement (Second) of Conflict of Laws. Under the Restatement:

> 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.[15]

One court wrote,

> Courts that have analyzed conflicting privilege laws, however, tend to favor application of the most significant relationship test found in section 139 of the Second Restatement or of a similar test favoring application of the law of the state with the most significant relationship with the privileged communication—such as the law of the state where the communication is centered.[16]

Still other courts have looked to whether or not someone in a foreign country was acting at the direction of an attorney based in the United States. For example, in *Baxter Travenol Laboratories, Inc. v. Abbott Laboratories*,[17] the court ruled that where a foreign patent agent acts "primarily [as] a functionary" of an American attorney, communications with the agent are

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[12] *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 486 (S.D.N.Y. 2013).
[13] *Id*.
[14] *Id*. (internal citation and quotation marks omitted); *see also Tulip Computers Intern., B.V. v. Dell Computer Corp*., 210 F.R.D. 100 (D. Del. 2002) (applying the "touch base" test in Delaware).
[15] Rest. 2d Conflict of Laws, § 139(1) (1971).
[16] *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, 2011 WL 1375011 at *8 (S.D. Ill. Apr. 12, 2011).
[17] 1987 WL 12919 (N.D. Ill. 1987).

"privileged to the same extent as any communication between an attorney and a non-lawyer working under his supervision."[18]

B. Practical Guidance

At the outset of a cross-border investigation, attorneys should actively work to prevent issues that might arise from having privileges and work product protections that may apply in one country but not another. Among the steps attorneys should take are:

- First, attorneys should be aware that privileges that apply in the United States may not apply abroad and should be careful about relying on privileges in foreign countries.
- Second, attorneys should consider working with local counsel to determine the scope of the legal privileges that apply in each relevant jurisdiction.
- Third, if relevant privileges apply in one country but not another, attorneys should consider ways to protect preemptively their communications and work product within the scope of each relevant privilege. For example, where applicable, American attorneys can make clear in each document, email, or other communication that they are providing that communication or document for purposes of advising on American law. Alternatively, or in addition, attorneys could at the outset draft a memorandum memorializing the purpose of the investigation and its relation to the United States.

[18] *Id*. at *8.

IV. Compelled Searches of Law Firm Files

Cross-border investigations can raise issues related to any country in the world. Clients involved in such investigations might need counsel knowledgeable about each relevant country, counsel that is often found in those countries, whether members of local firms or American firms. Recently, law enforcement officials in some countries have raided law firms, including at least one foreign office of an American firm. These raids have the potential to compromise privileged materials both in that country and in the United States.

A. Raids Abroad

In 2017, German authorities raided the Munich office of Jones Day, a law firm headquartered in the United States.[19] At the time, Jones Day was conducting an internal investigation on behalf of its client, Volkswagen ("VW"), related to the company's allegedly deceptive emissions testing.[20] In response to the raid, Jones Day and VW filed challenges to the warrant that allowed the search and, later, to the lower court ruling that upheld the search.[21] The next year, the Bundesverfassungsgerichts, Germany's federal constitutional court, issued three orders that blocked VW and Jones Day's constitutional complaints ("Verfassungsbeschwerden") that had sought to prohibit review of the seized material. The court held that the material was not subject to protection based on attorney-client privilege.[22] The court found that Jones Day, as

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[19] Jack Ewing and Bill Vlasic, *German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry*, The New York Times (Mar. 16, 2017) available at https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html.
[20] *Id.*
[21] Bundesverfassungsgerichts Press Release No. 57/2018 (July 6, 2018), available online at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-057.html.
[22] *Id.*

an American law firm, was not entitled to invoke the protection of Germany's fundamental rights.[23]

The Jones Day raid and other recent searches of law firms abroad illustrate that privileges applicable in the United States will not necessarily protect materials abroad and may weigh in favor of keeping privileged material in the United States where practicable. Such raids on large law firms are almost unheard of in the United States. And when authorities search law offices, they do so pursuant to search warrants granted in light of specific allegations of misconduct by the searched firm's attorneys. Additionally, American law enforcement agencies will often employ "taint teams" consisting of government attorneys and agents not involved in the underlying investigation to remove privileged material from sets of seized documents and to handle any court matters related to potentially privileged materials.[24]

American judges have cautioned that such raids must be undertaken with care and that authorities should return privileged materials they seize. For example, in a Third Circuit case,

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[23] *Id.* The Jones Day raid is not the only recent incursion on a major law firm. In June 2018, South African authorities raided the head office of Webber Wentzel, a 450-lawyer South African firm that has a formal alliance with the London-based Magic Circle firm Linklaters. Joseph Evans, *Linklaters' South Africa Alliance Firm Raided by Police Amid Client Dispute*, The American Lawyer International (June 18, 2018), available at https://www.law.com/international/2018/06/18/linklaters-south-africa-alliance-firm-raided-by-police-amid-client-dispute-396-4157/ (last accessed January 10, 2019); Webber Wentzel, "Who we are," online at http://www.webberwentzel.com/wwb/content/en/ww/ww-who-we-are (last accessed January 10, 2019). Authorities seized documents and equipment "amid a dispute involving one of the firm's clients." Evans, "Linklaters' South Africa Alliance Firm Raided by Police Amid Client Dispute." In November 2018, South Korean prosecutors raided Kim & Chang, that country's largest law firm. John Kang, *Korea's Kim & Chang Raided by Prosecutors*, The American Lawyer International (Dec. 5, 2018), available at https://www.law.com/international/2018/12/05/koreas-kim-chang-raided-by-prosecutors/. Authorities alleged that attorneys at the firm colluded with the judiciary to delay trials.

[24] *See, e.g.*, Office of Legal Education, Executive Office for United States Attorneys, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS at p. 110 (2015).

the court affirmed a preliminary injunction commanding the return of documents and records seized in the search of a law office that had been conducted pursuant to a warrant, finding that the warrant was overbroad.[25] The court made clear, though, that the issue was not simply that the search had been conducted inside a law firm; the court acknowledged that a search of a law firm could be conducted if conducted properly. The court clarified that the correct approach to searches of law offices "is not to immunize law offices from searches, but to scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure."[26]

B. Privilege in the United States After Compelled Disclosure Abroad

Raids of international law offices are important not only because foreign authorities can obtain privileged documents through them. American authorities can, in some instances, obtain from foreign authorities documents that a legal privilege or constitutional protection could have otherwise shielded from disclosure in the United States. The United States has Mutual Legal Assistance Treaties and Mutual Legal Assistance Agreements with dozens of foreign countries under which it can obtain evidence that is in the possession of law enforcement in those countries.[27]

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[25] *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955 (3rd Cir. 1984).
[26] *Id*. at 959.
[27] *See, e.g.*, Mutual Legal Assistance, U.S.-E.U., June 25, 2004, Treaties and Other International Acts Series 10-201.1; Mutual Legal Assistance, U.S.-Japan, Aug. 5, 2003, Treaties and Other International Acts Series 06-721.3; *see also* International Narcotics Control Strategy Report, Vol. II, U.S. Dept. of State, p. 20 (Mar. 2012), available at https://www.state.gov/documents/organization/185866.pdf (last accessed Jan. 16, 2019) (listing extant Mutual Legal Assistance Treaties and Mutual Legal Assistance Agreements).

The United States government can sometimes obtain—and use in civil and criminal proceedings—evidence even where the seizure that led to it could have violated the Fourth Amendment had it been effected in the United States. The remedy for a Fourth Amendment violation is generally suppression of improperly seized evidence.[28] When, however, the United States government obtains evidence not through its own unreasonable search or seizure, but from a search by a foreign government, courts have held that such evidence is not necessarily subject to suppression.

The U.S. Supreme Court ruled on a related issue in *U.S. v. Janis*, 428 U.S. 433 (1976). In *Janis*, the Court held that "the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[29] In so holding, the Court noted that "[i]t is well established, of course, that the [Fourth Amendment's] exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act."[30]

Applying that principle, the Second Circuit has held that an American court must consider whether or not a foreign search compels suppression under the Fourth Amendment only in two circumstances.[31] The first is where the foreign government's conduct is extreme and shocks the conscience.[32] The second is where constitutional restrictions are implicated because foreign officials acted as agents of the United States or where the United States used foreign

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[28] *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").
[29] *Janis*, 428 U.S. at 459–60 (making this holding where the two sovereigns at issue were (1) California and (2) the United States).
[30] *Id*. at 455 FN 31.
[31] *U.S. v. Maturo*, 982 F.2d 57 (2d Cir. 1992).
[32] *Id*. at 60–61.

officials in a manner designed to evade constitutional protections.[33] In *Maturo*, the defendant-appellant had been convicted in the United States based on evidence the Turkish government seized via wiretap and shared with American authorities.[34] He argued that the wiretap evidence should have been obtained "in compliance with the Fourth Amendment."[35] The court found that it was not necessary to even reach the issue.[36] The court held that because the Turkish government "acted of its own accord, we need not reach [the Defendant-Appellant's] claims that the wiretap surveillance did not comport with Fourth Amendments standards and decline to do so."[37]

In addition to United States law enforcement obtaining documents from foreign authorities generally, at least one court has stated that privileged documents seized in a foreign raid might not remain privileged in the United States if the aggrieved party does not vigorously attempt to protect its rights. In *In re Parmalat Securities Litigation*, Italian authorities seized purportedly privileged documents from a Bank of America location in Italy and transmitted them, not to United States law enforcement authorities, but directly to a plaintiff in American litigation.[38] A judge in the United States held the documents would retain their privileged status in the United States because (1) the disclosure in Italy was involuntary and (2) Bank of America—the party from whom Italian authorities seized the documents—took "a course of

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[33] *Id*. at 61.
[34] *Id*. at 58–59.
[35] *Id*. at 59.
[36] *Id*. at 62.
[37] *Id*. at 62; *see also U.S. v. Lee*, 723 F.3d 134, 143 (2d Cir. 2013) (holding, similarly to the court in *Maturo*, that the "defendant had no basis upon which to suppress evidence that was the fruit of a foreign search").
[38] *In re Parmalat Securities Litigation*, 2006 WL 3592936 (S.D.N.Y. Dec. 1, 2006).

action 'reasonably designed' to preserve its privilege over the seized documents."[39] The judge noted, however, that "[e]ven when the initial disclosure of privileged documents is involuntary, waiver may, nevertheless, result if the party asserting the privilege fails to take steps reasonably designed to protect and preserve the privilege."[40]

C. Practical Guidance

In light of the protections available in the United States and the potential for documents to be seized from law firms by foreign authorities, counsel seeking to maintain privilege in cross-border investigation should consider the following steps:

- Where practicable, attorneys should consider maintaining privileged materials and information in the United States. The United States has strong, clear attorney-client privilege and attorney work product protections, as well as the Fourth and Sixth Amendments, which all reduce the risk of a raid on law firm files.
- If not possible to maintain privileged materials in the United States, attorneys should consider keeping the materials in the custody of attorneys barred in the United States who reside in the foreign country. [41]
- If a raid abroad compromises privileged files, an attorney should take all available steps to attempt to protect the privilege and applicable protections, and object as necessary. Those steps could include: obtaining documents related to the raid, such as a warrant; working with authorities to ensure the search is no broader than

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[39] *Id*. at *4, *7.
[40] *Id*. at *4.
[41] If it is not practical to maintain privileged materials in the United States, parties involved in cross-border investigations related to the United States should consider maintaining such materials in the custody of lawyers admitted to the bar in the United States who are stationed abroad. Doing so will, if needed, help support an argument that the United States has the most direct and compelling interest in the confidentiality of the materials, as discussed *supra*, in Section III.

necessary; seeking judicial review in the country of the raid; segregating privileged and non-privileged materials; and documenting all actions related to the raid. Even if these steps do not prevent use of the seized materials abroad, they will assist the attorney in presenting a record to a United States court that demonstrates a vigorous attempt to protect the privilege.

V. Privilege at the Border

Border patrol and customs officials have extremely broad power to examine virtually anything crossing American borders, including documents and electronic files. In 2016, U.S. Customs and Border Protection ("CBP") agents searched 23,877 electronic devices.[42] All of an attorney's diligent work in creating and maintaining privilege can be jeopardized if customs agents search and seize privileged materials at a border crossing, such as at an international airport.

A. The Wide Latitude U.S. Customs and Border Protection Officials Hold To Search and Seize

At borders and their "functional equivalent[s]," government agents have broad authority to search and seize persons and property without a warrant or individualized suspicion.[43] This authority extends to searches at international airports. The Supreme Court has stated that a search at an international airport is "clearly [] the functional equivalent of a border search."[44]

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[42] Brian Naylor, *More Travelers Entering U.S. Are Being Asked For Their Cellphones And Passwords*, National Public Radio (April 11, 2017) available at https://www.npr.org/2017/04/11/523313829/more-travelers-are-being-asked-for-their-cellphones-and-passwords-entering-u-s (last accessed Jan. 28, 2019); Gillian Flaccus, *Electronic media searches at border crossings raise worry*, Associated Press (Feb. 18, 2017) available at https://apnews.com/6851e00bafad45ee9c312a3ea2e4fb2c (last accessed Jan. 28, 2019).
[43] *Almeida–Sanchez v. U.S.*, 413 U.S. 266, 272–73 (1973); *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).
[44] *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 273 (1973).

Several circuit courts of appeals have held that the broad authority for border searches extends to people and objects leaving the United States, as well as to people and objects entering.[45]

In January 2018, U.S. Customs and Border Protection issued a directive on border searches of electronic devices.[46] The directive made clear CBP's view that it has broad authority to search electronic devices at border crossings:

> Border searches of electronic devices may include searches of the information stored on the device when it is presented for inspection or during its detention by CBP for an inbound or outbound border inspection. The border search will include an examination of only the information that is resident upon the device and accessible through the device's operating system or through other software, tools, or applications.[47]

Under CBP's claim of authority, it can look through anything on any device crossing the border.

CBP's directive also states that it can search privileged materials on electronic devices, so long as such material "is handled appropriately while also ensuring that CBP accomplishes its critical border security mission."[48] According to the directive, such appropriate handling requires coordination with the CBP Associate/Assistant Chief Counsel office.[49] Despite the requirement to liaise with CBP attorneys, the directive does not place any concrete limitation on searches implicating privileged materials.

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[45] *See, e.g.*, *U.S. v. Odutayo*, 406 F.3d 386, 391-92 (5th Cir. 2005); *U.S. v. Duncan*, 693 F.2d 971, 977 (9th Cir. 1982); *see also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974) ("[T]hose entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment.").

[46] CBP Directive No. 3340-049A (Jan. 4, 2018).

[47] *Id*. at 5.1.2. Note that the directive does not purport to govern procedure for searches of commercial shipments of electronic devices. *Id*. at 2.4.

[48] *Id*. at 5.2.1.2.

[49] *Id*.

The CBP's broad claim of authority and tens of thousands of electronic device searches at the border notwithstanding, the circuit courts of appeals are split on the extent to which government agents can search electronic devices at border crossings without reasonable suspicion, even in the wake of the Supreme Court's decision in *Riley v. California*.[50]

In *U.S. v. Touset*, 890 F.3d 1227 (11th Cir. 2018), the Eleventh Circuit held that the Fourth Amendment does not require reasonable suspicion for searches of electronic devices at the border.[51] The court noted that travelers crossing a border are "on notice that a search may be made."[52] The court also asserted that *Riley* does not apply to border searches and wrote, "we fail to see how the personal nature of data stored on electronic devices could trigger [the] kind of indignity [that would weigh against the constitutionality of a search] when our precedent establishes that a suspicionless search of a home [i.e., a crewmember's cabin on a ship] at the border does not."[53]

The Fourth and Ninth Circuits, by contrast, have held that forensic examination of a computer or mobile phone seized at a border crossing requires a showing of individualized or reasonable suspicion.[54] The Fourth Circuit wrote that "in light of the Supreme Court's decision in *Riley*, a forensic border search of a phone must be treated as nonroutine, permissible only on a showing of individualized suspicion."[55] The forensic search at issue yielded "a nearly 900–page

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[50] *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that law enforcement officials generally may not search an electronic device incident to arrest without a warrant).
[51] *U.S. v. Touset*, 890 F.3d 1227 (11th Cir. 2018).
[52] *Id*. at 1235 (internal citation omitted).
[53] *Id.* at 1234; *citing Alfaro-Moncada*, 607 F.3d 720, 729, 732 (11th Cir. 2010).
[54] *U.S. v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018); *U.S. v. Cotterman*, 709 F.3d 952, 961, 968–70 (9th Cir. 2013).
[55] *Kolsuz*, 890 F.3d at 144.

report cataloguing the phone's data."[56] While the Fourth Circuit held that search required a showing of individualized suspicion, the court explicitly did not consider the level of suspicion needed for a less intrusive manual search of smartphone at the border.[57] Similarly, the Ninth Circuit equated a forensic examination to "a computer strip search" and held that, even at the border, such a search requires a showing of reasonable suspicion.[58] Note that neither the Fourth nor the Ninth Circuit held that a warrant is necessary for forensic searches at the border. They merely require heightened suspicion.

B. Practical Guidance for Crossing Borders with Privileged Materials

Attorneys traveling internationally should proactively consider how to transport privileged materials in light of the tremendous power government agents at borders and international airports wield to search and seize. Additionally, given that clients and clients' employees involved in cross-border investigations often travel internationally, attorneys should advise them on the risks related to border searches. Neglecting this issue when traveling could lead to the unnecessary disclosure of privileged materials. When traveling abroad, attorneys should consider the following and advise their clients to do the same:

- Consider traveling with no more privileged material than necessary—including electronically stored privileged material.

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[56] *Id*. at 136.
[57] *Id*. at 141 ("Kolsuz does not challenge the manual search of his smartphone, undertaken on-site at the airport as he tried to depart for Turkey. We thus have no occasion to consider application of the border exception to manual searches of electronic devices, conducted at the border and roughly contemporaneously with an attempted crossing.").
[58] *Cotterman*, 709 F.3d at 966, 968.

- Consider uploading privileged material to a secure online network accessible only to law-firm personnel and relevant in-house personnel, where it can be accessed abroad, rather than traveling with it, which might subject it to search or seizure.
- When subjected to a search or seizure of privileged material, state clearly that you are carrying legally privileged material or material protected by the work product doctrine and that you object to the search. Even if that objection does not halt the search—and given the state of the law and of federal regulations, government agents may not let it—the objection should help to preserve your argument to later reclaim or suppress the privileged material as improperly—or at least involuntarily—seized.

VI. Recent Privilege Law Developments Related to the U.K. Serious Fraud Office

Privilege law in the United Kingdom is worth examining here for two reasons. First, cross-border investigations frequently implicate British law. Second, a recent ruling from the Court of Appeal in London adverse to the U.K. Serious Fraud Office strengthened the legal privilege protections available in England and Wales.[59]

Cross-border investigations can, of course, implicate privilege issues in any country in the world. One of the countries whose privilege law is most often relevant is the United Kingdom. This is not surprising given the UK's strong ties to its former colonies and protectorates in Africa, Asia, and the Middle East. One think tank ranked London second—behind only New York—in its Global Financial Centres Index, a quantitative ranking of world financial centers.[60]

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[59] *See The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited*, [2018] EWCA Civ 2006.
[60] Mark Yeandle et al., The Global Financial Centres Index 24 (Sep. 2018), available at https://www.zyen.com/publications/public-reports/global-financial-centres-index-24/.

A. Privilege in the United Kingdom

In the United Kingdom, there are two kinds of privilege that mirror American attorney-client privilege and attorney work product protection, though the precise metes and bounds of each iteration of these privileges vary between the two countries. The first is called "legal advice privilege" or "legal professional privilege" in the UK. It protects confidential communications between an attorney and client from discovery.[61] The second is called "litigation privilege." It protects from disclosure documents drafted and communications made by anyone—lawyer or not—when litigation is pending or in the offing and for a "dominant purpose" related to litigation.[62] It was this second type of privilege that the Court of Appeal addressed in its recent ruling.

B. The Recent Decision in *Serious Fraud Office v. ENRC*

The Serious Fraud Office is a U.K. authority that investigates and prosecutes large and complex fraud, bribery, and corruption cases with a nexus to England, Wales, or Northern Ireland.[63] It was established in 1988.[64]

In September 2018, the Court of Appeal of England and Wales issued a judgment clarifying the scope of privilege as related to corporate investigations.[65] In the case, *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited*, the

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[61] Aubrey Roberts, *Legal Professional Privilege in the United Kingdom*, 7-SPG Int'l L. Practicum 15 (1994).
[62] Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide for American Attorneys*, 4 Loy. U. Chi. Int'l L. Rev. 51, 58–59 (2006).
[63] "About Us," U.K. Serious Fraud Office, https://www.sfo.gov.uk/about-us/ (last accessed January 16, 2019).
[64] *Id*.
[65] *See The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited*, [2018] EWCA Civ 2006.

U.K. Serious Fraud Office had issued notices compelling the production of documents that the Eurasian Natural Resources Corporation ("ENRC")—a London-based mining company—contended were privileged.[66]

The matter began with a whistleblower complaint in 2010.[67] ENRC engaged an outside law firm to conduct an internal investigation.[68] In August 2011, the Serious Fraud Office wrote to ENRC about the allegations.[69] In late 2011, ENRC began the process of self-reporting to the Serious Fraud Office.[70] In 2013, the Serious Fraud Office issued its notice compelling the production of documents related to the alleged corruption.[71] The documents demanded included notes prepared by outside counsel regarding 184 interviews related to the allegations and documents prepared during the course of a books-and-records review.[72] ENRC fought the notice on the grounds that the documents were privileged.[73] A lower court sided with the Serious Fraud Office, and found that the office was entitled to most of the documents at issue.[74]

The Court of Appeal of England and Wales—the decisions of which are reviewed only by the Supreme Court of the United Kingdom—overturned that ruling and extended the litigation privilege to the documents at issue. The Court of Appeal determined that the documents were prepared in "reasonable contemplation" of a criminal prosecution once the Serious Fraud Office

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[66] *Id*. at 41–42.
[67] *Id*. at 8.
[68] *Id*.
[69] *Id*. at 17.
[70] *Id*. at 23 *et seq*.
[71] *Id*. at 41.
[72] *Id*. at 1, 46.
[73] *Id.* at 42.
[74] *Id*. at 57.

had written to ENRC about the allegations in August 2011.[75] The Court of Appeal disagreed with the lower court, which had found the relationship between the Serious Fraud Office and ENRC to be "collaborative" during the investigation.[76] "[T]he whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement."[77] Thus, the litigation privilege could apply.

Additionally, the Court of Appeal found that litigation was the "dominant purpose" of the documents at issue, which is one of the elements of the litigation privilege in the UK.[78] The Court of Appeal stated that the dominant purpose test included documents prepared for the purpose "of resisting or avoiding contemplated criminal proceedings."[79]

The Court of Appeal did not address whether legal advice privilege also protected the documents because its ruling on litigation privilege mooted the issue.[80] It nonetheless invited the U.K. Supreme Court to revisit the controlling law on the issue, which the Court of Appeal described as "out of step with the international common law" in limiting certain protections to communications with high-ranking "control group" personnel only.[81]

C. Practical Guidance

After the *ENRC* ruling, attorneys can be more confident that U.K. law will protect documents prepared in anticipation of litigation. Counsel should, however, be wary of when litigation is reasonably contemplated such that the protection attaches. The Court of Appeal's

[75] *Id*. at 90–91.
[76] *Id*. at 55, 93.
[77] *Id*. at 93.
[78] *Id*. at 119.
[79] *Id*.
[80] *Id*. at 130, 132.
[81] *Id*. at 129.

ruling did not protect documents prepared after the whistleblower's complaint but before the Serious Fraud Office wrote to ENRC regarding the allegations. Additionally, while the decision clarified the scope of the litigation privilege, the legal advice privilege remains limited in the UK. Counsel should continue to tread carefully in communications about U.K.-related matters when litigation is not contemplated as defined by the *ENRC* court.

VII. Privilege Traps and Conclusion

This Article examined four issues related to attorney-client privilege and attorney work product protection in cross-border investigations. Rather than offering a concluding summation of those issues, this final Section briefly outlines five "privilege traps" against which attorneys involved in cross-border investigations should be on guard. A privilege trap is a problem to which an unwary lawyer can fall victim that will impact a privilege or work product protection the attorney's client may otherwise have held. The privilege traps discussed below could affect the issues discussed in the preceding sections of this Article.

A. Mixing Legal Advice with Business Advice

One common privilege trap is mixing legal advice with other types of communications, such as business advice. American attorneys conducting cross-border investigations should advise foreign clients and in-house attorneys on the scope and limits of attorney-client privilege in the United States, and, in particular, the fact that it does not protect communications focused on business issues—as opposed to legal issues. As discussed in Section II.A, *supra*, the attorney-client privilege protects communications "made for the purpose of facilitating the

rendition of professional legal services."[82] It does not protect the rendition of business advice or other types of communications, even if an attorney makes the statements at issue. The Fifth Circuit summarized the issue succinctly: "An attorney who acts as his client's business advisor . . . is not acting in a legal capacity."[83] Communications from someone acting as a business advisor—even an attorney—are not privileged.[84] Courts determining whether or not attorney-client privilege applies to communications containing both legal advice and other topics typically apply the "predominant purpose" test. If the communication is predominantly legal in nature, the attorney-client privilege should protect it.[85]

Attorneys in cross-border investigations should—as all attorneys should—take two steps to avoid falling into this trap. First, attorneys should ensure that communications they hope to keep privileged do not stray from "the purpose of facilitating the rendition of professional legal services." Second, attorneys should also advise the in-house employees and auditors with whom they work on cross-border investigations to keep communications related to legal matters confidential and separate from communications related to business advice.

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[82] Proposed Fed. R. Evid. 503(b), 56 F.R.D. 183, 236 (1972); *see also U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (stating that proposed-but-rejected Rule 503 is recognized "as a source of general guidance regarding federal common law principles"); *U.S. v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011) ("The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.").
[83] *U.S. v. Davis*, 636 F.3d 1028, 1044 (5th Cir. 1981).
[84] *Id.*
[85] *See Alomari v. Ohio Dept. of Public Safety*, 626 Fed. Appx. 558, 570 (6th Cir. 2015)("When a communication involves both legal and non-legal matters, we 'consider whether the predominant purpose of the communication is to render or solicit legal advice.'"); *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("So long as the predominant purpose of the communication is legal advice" a communication may be privileged.).

B. Involving Third Parties in Otherwise Confidential Communications

Another trap into which attorneys and in-house personnel sometimes fall and break the attorney-client privilege is through the involvement of third parties in otherwise confidential communications. As discussed in Section II.A, *supra*, to retain attorney-client privilege, communications must occur between only limited parties—namely attorneys, clients, a party with a common interest, or a representative of one of those parties.[86] There are limited exceptions to this general rule. For example, involvement of a third party engaged to assist an attorney in legal advice should not break privilege.[87]

Cross-border investigations add a wrinkle to this privilege trap. An attorney conducting a cross-border investigation will often be based in the United States, not on the ground in the subject country, and thus unable to assess whether a given third party is a representative of a client, a party employed to assist in the provision of legal advice, or someone who would not be covered by attorney-client privilege.

To avoid falling into this trap, attorneys conducting cross-border investigations should follow three steps. First, make sure that clients understand, at least at a high level, what privilege means, what it protects, and that communications will be discoverable if a third-party is involved. Second, attorneys conducting cross-border investigations should work with their clients to understand the third parties who are connected to the investigation. Conversely, attorneys should not blindly accept that third parties copied on emails or present in meetings have an appropriate place there. Third, where third parties are involved, attorneys should make

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[86] *See Cavallaro v. U.S.*, 284 F.3d 236, 246 (1st Cir. 2002) ("The presence of third parties during an attorney-client communication is often sufficient to undermine the 'made in confidence' requirement . . . or to waive the privilege.") (internal citations omitted).
[87] *Id.* at 247; *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

sure they have an articulable basis under which privilege will cover that third party or segregate communications accordingly.

C. Making Assertions Regarding the Content of Legal Communications

Attorneys should be careful about making assertions—or allowing their clients to make assertions—regarding the contents of privileged communications lest they waive privilege over those documents. This issue may arise in cross-border investigations where, as discussed *supra* in Section III, there is a discrepancy in privilege law between the jurisdictions at issue. For example, in a jurisdiction where communications with in-house counsel are not privileged, one might think there is no need to keep such communications confidential to maintain privilege. But, as discussed in Section III.A, American courts protect such communications under United States privilege law to the extent that they relate to American proceedings or legal advice.

Attorney-client privilege protects the contents of communications between an attorney and his or her client.[88] It does not, however, provide a blanket protection for the underlying factual information incorporated into those communications.[89] Attorneys—and clients—can refer to those facts in pleadings, at hearings, in meetings with opposing counsel, and elsewhere. Referring to those facts specifically in the context of the privileged communications in which they appeared or referring to them falsely, however, runs the risk of breaking the privilege.

In one case, a criminal defendant's attorney sent him two letters advising on the legality of certain conduct.[90] The defendant made assertions about the contents of those letters to his

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[88] *U.S. v. Walker*, 243 Fed. App'x 621, 623 (2d Cir. 2007).
[89] *Id.*
[90] *U.S. v. Jacobs*, 117 F.3d 82 (2d Cir. 1997), *abrogated on different grounds by Loughrin v. U.S.*, 573 U.S. 351 (2014).

customers.[91] The Second Circuit held that "[p]ublic, even extrajudicial, disclosures constitute a waiver of the privilege for the communications or portions of communications disclosed."[92]

D. Failing to Timely Object to Demands for Privileged Documents

In most cross-border investigations it will take months or years to gather the subpoenaed documents and review them for privilege. In many cross-border investigations—and in domestic corporate investigations—prosecutors are willing to accept rolling document productions in response to subpoenas so long as a communication line stays open between the prosecutor and the corporation's attorney.

In light of that fact, when served a subpoena, an attorney should respond within the allotted time period and make a generic objection to the subpoena to the extent that it calls for documents or anything else protected by attorney-client privilege, work product protection, or any other valid legal privilege. Throughout the document production process, the attorney team should also remain vigilant about privilege and actively seek to claw back any privileged or protected documents inadvertently produced. Most prosecutors will comply with reasonable claw-back requests if made as soon as the mistake has been discovered.

E. Reporting Privilege Breaches to Clients

Finally, privilege breaches can occur despite an attorney's diligence. This is particularly true in cross-border investigations because such investigations will necessarily involve multiple countries' privilege laws and additional opportunities—or, at least, additional fora—for breaches of privilege.

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[91] *Id*. at 89.
[92] *Id*. at 91 (internal citation and quotation marks omitted).

Attorneys have an ethical obligation to keep clients informed about matters related to their representation. Additionally, the governing rules of professional responsibility may require client notification after a potential breach related to privileged material or material protected by the work product doctrine. The American Bar Association's Model Rules of Professional Conduct require attorneys to "keep the client reasonably informed about the status of the matter."[93] Most, if not all, states have similar requirements in their rules of professional conduct.[94] Those requirements can be read as imposing an ethical obligation on attorneys to inform clients when there has been a breach, or a potential breach, involving their privileged materials.

In 2018, the ABA's Standing Committee on Ethics and Professional Responsibility issued a formal opinion in which it stated, "[i]f a lawyer errs and the error is material, the lawyer must inform a current client of the error."[95] The opinion defined a "material error" as one that is either "(a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."[96]

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[93] ABA Model Rules of Professional Conduct 1.4(3) available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/ (last accessed January 22, 2019).

[94] *See, e.g.*, New York Rules of Professional Conduct 1.4(d) (2009) available at https://www.nysba.org/DownloadAsset.aspx?id=50671; California Rules of Professional Conduct 1.4(a)(3) (2018) available at http://www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf (last accessed January 22, 2019).

[95] ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 481, "A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error," 1 (Apr. 17, 2018) available at https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2018_cpr_meetings/2018conf/materials/session6_information_governance/session6_all_materials.pdf (last accessed January 22, 2019).

[96] *Id*. at 2.

In light of those requirements, an attorney should, in most circumstances, promptly inform his or her clients after a breach of privilege or work product protection. Similarly, in a cross-border investigation, an attorney should promptly inform his or her clients when the attorney believes there is a danger that different privilege protections in different countries may differently govern the threshold question of whether a breach has occurred at all. Depending on the controlling ethics rules and interpretations of them, an attorney may be required to do so.