
THE ENGLISH LAW OF LEGAL PROFESSIONAL PRIVILEGE: A GUIDE FOR AMERICAN ATTORNEYS

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I. Introduction

It is an old cliché that England and the United States are two countries divided by a common language.¹ So it is with a discussion of attorney-client privilege. The concept is certainly familiar to attorneys in both countries, and there are many similarities in the law, but significant differences lurk just beneath the surface to catch the unwary practitioner.

This article is intended as an introduction to the English law² of legal professional privilege³ for lawyers who are more familiar with the U.S. concepts of attorney-client privilege and the work-product doctrine. It offers a description of the law and its development plus a discussion of the areas that remain uncertain, are of particular current interest, or are strikingly different to the U.S. position.

Any American attorney acting for or against persons or businesses with operations in England should know about the English law of privilege. It will be particularly relevant if litigation ensues in either the United States or England, but should also be of consideration in non-contentious transactions because of the risk of litigation at a later date. English parties who get involved in U.S. litigation will tend to be unpleasantly surprised to discover that attorney-client privilege is generally more tightly circumscribed and more readily lost in the United States. Early advice from a well-informed American attorney may successfully counter many problems. Conversely, if acting against an English party, then knowing how and where to apply pressure in discovery may reap rich rewards.

Part II briefly describes the historic origins of the English law and considers its continuing evolution. Even today, controversy surrounds the proper reach of privilege and the reasons why it is given effect. The section is divided into two parts because English law has not developed a work-product doctrine but has, instead, recognized a concept of litigation privilege that covers much of the same territory. Litigation privilege and attorney-client privilege, generally referred to

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¹ Attributed, variously, to George Bernard Shaw, Oscar Wilde, and Winston Churchill.

² Strictly, it is the law of England and Wales. Reference is made to England alone for simplicity but no disrespect to the Welsh is intended.

³ English lawyers prefer the description legal professional privilege over attorney-client privilege and use it to embrace the twin concepts of legal advice privilege and litigation privilege, explained *infra* Part II.

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in England as legal advice privilege, are so closely interwoven in English law that no discussion of legal professional privilege would be complete without some reference to both.

Part III focuses more closely on particular issues that arise in considering privilege. These include questions such as who is a lawyer and who is a client for the purposes of privilege. The latter, in particular, is a topic of much debate in England given a recent appellate court decision. There is also discussion on the effect of communications being passed outside the traditional lawyer-client relationship. U.S. law considers such actions to result in a loss of privilege far more readily than English law. Unless forewarned, English clients may often find that their normal distribution of documents prevents them from claiming privilege in U.S. proceedings for even the most sensitive legal documents that were clearly covered by privilege when originally created.

Part IV offers some practice pointers. Included within the section is the important conflicts of law question as to what law will be applied to foreign privilege questions in English and U.S. courts. There are also suggestions as to how differences in the law should be taken into account in both English and U.S. proceedings.

II. A General Overview of the Law's Development

This section discusses the development of legal professional privilege in England from its earliest manifestation to the present. It considers the principles that have shaped the privilege and identifies some theoretical aspects that remain controversial. In particular, it challenges the view that the protection offered by privilege must be absolute to be effective. Schematically, this section is arranged in two parts dealing first with legal advice privilege and then with litigation privilege.

A. Legal Advice Privilege

Some concept of legal professional privilege has existed in English law since at least 1577, during the reign of Queen Elizabeth I.⁴ The date of the decision is noteworthy since, until 1562, no general power existed to compel the attendance of witnesses.⁵ In other words, a privilege preventing lawyers from being compelled to give evidence arose almost as soon as it could provide any benefit.

The reporting of the early cases includes little by way of reasoning, so it is difficult to know with any certainty why privilege was first recognized. Dean Wigmore and other commentators suggest that it was meant to uphold the honor of lawyers, who would have suffered were they forced to breach their solemn oaths of secrecy to their clients.⁶ Others with a more cynical bent may suggest

⁴ *Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (Ch.) (not requiring the solicitor in case to testify on matters relating to present cause) *cited in*, *R v. Derby Magistrates' Court*, *ex parte* B, [1996] A.C. 487, 504 (noted to be the earliest case cited in a leading text on the subject).

⁵ Perjury Act, 1562, 5 Eliz., c. 9 (Eng.).

⁶ 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (John T. McNaughton rev., 3d ed. 1961).

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that it stands as an example of judges looking after their legal brethren.⁷ No equivalent privilege has ever been afforded in England to doctors⁸ or other professionals whom one might think would be subject to the same considerations of honor.⁹

Whatever the original basis for legal professional privilege, a more coherent logic emerged by the early nineteenth century: privilege was necessary to promote the free and frank consultation of legal advisors. The classic description of the policy remains that of Lord Brougham L.C. in the 1833 case of *Greenough v. Gaskell*:¹⁰

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counselor half his case.¹¹

Consistent with this rationalization, the courts previously recognized that ownership of the privilege vested with the client alone. Thus, where a lawyer in the late eighteenth century voluntarily sought to testify to the confidences he had

⁷ Some may take as support that the reasoning in *Harvey v. Clayton*, (1674) 2 Swan 221, 36 Eng. Rep. 599 (Ch.) (that if the lawyer were made to testify “no man could hereafter employ him. . . .”)

⁸ The existence of a privilege for doctors was rejected out of hand by the House of Lords in the *Duchess of Kingston’s Case*, (1776) 20 How. St. Tr. 355, [1775–1802] All E.R. 623 (1776). A doctor (or, indeed, any other witness) may, in the discretion of the judge, be excused from answering a question that will disclose a confidence; whether or not the judge adopts this course is likely to depend in large part on the importance of the evidence. *Hunter v. Mann*, [1974] Q.B. 767, 769. It has, however, been confirmed in modern times that there is no privilege as such. *See, e.g.*, *Nuttall v. Nuttall*, (1964) 108 SJ 605 (Special Comm. 1964) (requiring psychiatrist to testify in divorce action as to what wife told him); *R v. Gayle*, unreported (Crim. App. 22 February 1994) (admitting evidence of admitted statements to doctor by defendant in attempted murder prosecution).

⁹ *Russell v. Jackson*, (1851) 9 Hare 391, 68 Eng. Rep. 558 (V.C.) (noting that no privilege had ever extended to priests in England); *Butler v. Moore* (1802) (an Irish case in which a priest was imprisoned for refusing to answer questions about what a testator said on his death bed) reported in LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 253 (1802).

¹⁰ *Greenough v. Gaskell*, (1833) 1 My. & K. 98, 39 Eng. Rep. 618 (Ch.) (denying disclosure of solicitor’s notes and correspondence with client denied in action against solicitor alleging complicity in a fraud). The decision was recently referred to by Lord Rodger, in the House of Lords, as the “*fons et origo*” of the modern law of privilege. *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 6), [2004] UKHL 48, [90]; [2005] 4 All E.R. 948; [2005] 1 A.C. 610, 669 (appeal taken from Eng.) (U.K.).

¹¹ *Greenough*, 39 Eng. Rep. at 103.

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heard from his former client, he was strongly rebuked.¹² In an earlier case, by contrast, the lawyer had discretion. If he was prepared to bear the betrayal of secrets on his conscience, then the court would not intervene on behalf of the client to stop him.¹³

The need for clients to be sure that they can safely confide in their lawyers remains a driving force behind the development of the privilege in English law.¹⁴ English courts have taken the view that the necessary assurances for the client exist only if she can be sure that what she tells her lawyer will *never* be revealed without her consent. English courts even held that the privilege continues to exist after the death of the client,¹⁵ vesting in her successor in title.¹⁶ Thus, as early as 1846, it was said that a client's communications with her lawyer must take place in "a condition of perfect security."¹⁷

This absolutist approach was reconfirmed in the late twentieth century in the case of *R v. Derby Magistrates' Court, ex parte B*.¹⁸ The case, described as one where "the public interest in overriding the privilege could scarcely have been higher,"¹⁹ illustrates the harsh consequences that can follow from the imposition of an absolute immunity. *Derby Magistrates* involved an application for discovery made on behalf of the accused in a murder trial. The stepson of the accused, previously tried and acquitted of the same murder, was a key witness for the prosecution. While the stepson was now giving evidence that the stepfather was responsible, he had previously made and retracted two confessions in which he had claimed sole responsibility. The confessions themselves were referred to in cross-examination of the stepson, but presumably bore only limited weight given that a previous jury had accepted they were unreliable. The defense team wanted to go further and use the factual instructions given by the stepson privately to his defense lawyer. These were likely to bear considerable weight since there could be no doubt they were voluntary, and it may have been anticipated that they would include detail that might only have been consistent with the stepson being the murderer.

Defense counsel urged the court to apply a balancing test, weighing the value of maintaining privilege to the stepson and society generally against the cost to

¹² See *Wilson v. Rastall*, 4 Term Rep. 753, 759, (1792) 100 Eng. Rep. 1283 (K.B.) (Buller J. expressing just indignation that anyone would wish to disclose information provided to them in confidence, but noting that confidentiality alone did not entitle a witness to refuse to answer).

¹³ *Winchester v. Fournier*, (1752) 2 Ves. Sr. 445, 447, 28 Eng. Rep. 284, 285 (Ch.).

¹⁴ See *Three Rivers (No. 6)*, [2004] UKHL at 30–34.

¹⁵ *Bullivant v. A-G for Victoria*, [1901] A.C. 196, 205–06 (H.L.) (appeal taken from Vict.) (correspondence with solicitors remained privileged in action alleging evasion of taxes despite death of client); *Curtis v. Beaney*, [1911] P. 181, 184 (denying disclosure of deceased's letters to lawyers in action alleging deceased was of unsound mind when she made her last will and testament).

¹⁶ *Calcraft v. Guest*, (1898) 1 Q.B. 759, 761 (Eng. C.A.) *following*, *Minet v. Morgan*, (1873) 8 Ch. App. 361 (Eng. C.A.); *Schneider v. Leigh*, (1955) 2 Q.B. 195, 203 (Eng. C.A.).

¹⁷ *Pearse v. Pearse*, (1846) De G. & Sm. 12, 28–29, 63 Eng. Rep. 950, 957 (Knight Bruce V.C.).

¹⁸ *R. v. Derby Magistrates' Court*, [1996] A.C. 487 (H.L.) (appeal taken from Eng.).

¹⁹ Commentary on the case in *B v. Auckland Dist. Law Soc'y*, [2003] UKPC 38, 48, (2004) 4 All E.R. 269 (appeal taken from N.Z.) (per Lord Millett).

the stepfather.²⁰ Defense counsel argued that the stepson had no recognizable interest in asserting the privilege because he had been acquitted²¹ and could not be tried again for the same crime even if the instructions tended to show he was guilty.²² By contrast, if the evidence was not made available to the stepfather, then an innocent man might be wrongly convicted of a most serious crime.

The House of Lords rejected entirely the idea of a balancing test and refused to order disclosure. Noting the need for clients to be sure that what they say will remain confidential, Lord Taylor C.J., giving judgment for the House, expressed the view that “once any exception to the general rule is allowed, the client’s confidence is necessarily lost.”²³ He went on, “if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client’s individual merits.”²⁴

The House of Lords in *Derby Magistrates* described attorney-client privilege as “a fundamental condition on which the administration of justice rests” necessary to give effect to the citizen’s right of access to justice, and questioned whether legal professional privilege might even be a human right protected by the European Convention of Human Rights.²⁵ Subsequent House of Lords authority²⁶ observed that the privilege is such a right, falling within the concept of the right to respect for private and family life, home, and correspondence.²⁷ Interestingly, though the denomination of it as a human right appears to imbue privilege with a superior quality, the approach of the House of Lords in *Derby Magistrates* goes further than the European Court of Human Rights cases cited as authority in the later decision.²⁸ The European Court of Human Rights cases do

²⁰ Some lower court authorities (cited in the case) had applied such an approach. *Derby Magistrates*, [1996] A.C. at 492. Canadian courts had also allowed privilege to be set aside to allow an accused to defend himself where the beneficiary of the privilege no longer has any interest to protect: *R. v. Dunbar and Logan*, (1982) 68 CCC (2d) 13 ¶ 104 (Ont. C.A.).

²¹ There had also been prior civil proceedings, so there was no question of it giving rise to any new legal liability, civil or criminal.

²² Ironically, though it was true at the time that he could not be tried a second time, it is no longer true. The 800 year-old rule against “double jeopardy” has since been revoked in England and Wales for murder and certain other crimes with retrospective effect: Sec. 75 of the Criminal Justice Act 2003, which took effect on Apr. 4, 2005.

²³ *Derby Magistrates*, [1996] A.C. at 508.

²⁴ *Id.*

²⁵ *Id.* at 507. European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS Doc. No. 5, Rome, Nov. 4 1950, T.S. 71 (1953) [hereinafter European Convention of Human Rights]. It now has direct effect in England and Wales by virtue of the Human Rights Act 1998.

²⁶ *R v. Special Comm. of Income Tax, ex parte Morgan Grenfell*, [2002] UKHL 21, [2003] 1 A.C. 563 (appeal taken from Eng.) (rejecting suggestion that tax statute could have implicitly overridden privilege, human rights only being capable of limitation by express language).

²⁷ European Convention of Human Rights, *supra* note 25, art. 8.

²⁸ See *Foxley v. United Kingdom*, (2001) 31 E.H.R.R. 25 (concluding, but only on a proportionality analysis, that it was not lawful for a trustee-in-bankruptcy to review correspondence between the bankrupt and his personal lawyers); *Campbell v. United Kingdom*, (1993) 15 E.H.R.R. 137, 162 (stating that, if there was a suspicion that correspondence with lawyers was being used to smuggle illicit material into prison, then proportionality required the correspondence to be opened in the presence of the prisoner and not read by the prison authorities).

not say that legal professional privilege is an absolute right. They recognize that interference with the privilege can be justified where such interference is proportionate and in furtherance of other legitimate aims.²⁹ Arguably, the proportionality analysis implies that there should be a balancing exercise, contrary to the conclusion reached in *Derby Magistrates*.³⁰ However, despite British academic criticism³¹ of the rigidity of the rule imposed by the House of Lords in *Derby Magistrates* and decisions of other Commonwealth courts declining to follow it,³² English courts have so far held that it remains good authority.³³

As one would expect with the greater volume of privilege litigation in the United States, there have been a number of counterparts to *Derby Magistrates* this side of the Atlantic. The Supreme Court, under the Federal Rules of Evidence, has held that the English common law approach abjures with the result that privilege survives in its absolute form even after the death of the person entitled to benefit from it,³⁴ although the Court expressly did not reach the question of what would happen if privilege conflicted with a criminal defendant's constitutional rights.³⁵ At least one state court had previously tempered the absolute rule so as to at least allow a balancing exercise where the holder of the privilege had died.³⁶

The reasoning in *Derby Magistrates*, and the traditional English justification for legal professional privilege as a whole, assumes that clients would not seek legal advice or would not be candid in doing so unless they were assured by the law that their discussion would remain secret. This assumption has always had its critics.³⁷

Many point out that the absence of privilege does not seem to have deterred clients from seeking advice from other, non-legal professionals. An example commonly given in the UK is that of clients seeking tax advice from accountants.³⁸ Tax advisory work is a field in which accountants compete directly with lawyers. Normally, advice on tax issues received from a lawyer will be privileged, while the same advice from an accountant will not be privileged. A UK

²⁹ See *Foxley*, 31 E.H.R.R. ¶ 43–45.

³⁰ See *obiter* comments to this effect in *Medcalf v. Mardell*, [2002] UKHL 27, [60], [2003] 1 A.C. 120, 145 (appeal taken from Eng.) (per Lord Hobhouse, suggesting, controversially, that it may not violate legal professional privilege for a court to review a client's documents in proceedings by a third-party against the lawyer).

³¹ A.A.S. Zuckerman, *Legal Professional Privilege—the Cost of Absolutism*, 112 L.Q.R. 535 (1996); Colin Tapper, *Prosecution and Privilege*, 1 E. & P. 5 (1997); Colin Passmore, *The Legal Professional Privilege*, 3 E. & P. 71 (1999).

³² Notably Canadian courts: *Smith v. Jones* (1999) 169 DLR (4th) 385 (Can. S.C.).

³³ See, e.g., *Gen. Mediterranean Holdings v. Patel* [1999] 3 All E.R. 673, 696 (Q.B.).

³⁴ *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998).

³⁵ *Swidler & Berlin*, 524 U.S. at 409, n.3.

³⁶ *Cohen v. Jenkintown Cab Co.* 357 A.2d 689, 693 (1976).

³⁷ The renowned philosopher and jurist Jeremy Bentham questioned why an innocent man would fear disclosure of what he told his lawyer and how it benefited society to allow the guilty a better opportunity to construct their defenses. As Wigmore notes in responding to these arguments, rarely is guilt and innocence a matter of black and white. WIGMORE, *supra* note 6, § 2291.

³⁸ See, e.g., Colin Tapper, *Privilege, Policy and Principle*, 121 L.Q.R. 181, 184–185 (2005).

Office of Fair Trading report on competition in the professions in 2001³⁹ concluded that legal professional privilege *did* represent an advantage that distorted competition in favor of tax lawyers over accountants. However, the government found, following a public consultation, that there was no evidence of any significant distortion and the rules were therefore left unchanged.⁴⁰ It seems, anecdotally, that tax accountants continue to prosper despite the lack of privilege.

Perhaps more pertinent than the reference to tax advisors is the observation that patients continue to impart confidences to doctors and penitents to clergymen despite the lack of privilege in those professions under English law. This may be because the need for assistance from the relevant professionals exceeds any concern about possible subsequent disclosures.⁴¹ A similar argument could be made regarding the consultation of lawyers. Moreover, the lawyer cannot offer the promise of absolute secrecy considered to be necessary by Lord Taylor. There have always been certain exceptions and limitations to privilege, yet no one suggests that these have unduly inhibited the candor of clients.⁴² Although *Derby Magistrates* remains good authority and the House of Lords has continued to support the broad availability of attorney-client privilege,⁴³ some judicial voices have dissented in recent years.

The just recently concluded litigation against the Bank of England (“BoE”) in connection with the collapse of the Bank of Credit and Commerce International (“BCCI”) provides the best examples of this dissent.⁴⁴ As will be discussed further below, the Court of Appeal, in one judgment on privilege, took the opportunity to greatly restrict the application of privilege in the corporate context.⁴⁵ In another judgment, overturned by the House of Lords, it sought to tightly restrict

³⁹ OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS (March 2001) O.F.T. 328.

⁴⁰ DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, GOVERNMENT CONCLUSIONS—COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET—A REPORT FOLLOWING THE CONSULTATION “IN THE PUBLIC INTEREST?” ¶ 56 *et seq.* (July, 2003).

⁴¹ See *Wheeler v. Le Marchant*, (1881) 17 Ch. D. 675, 681 (Eng. C.A.) about the many classes of communications which are ‘absolutely necessary because without them the ordinary business of life cannot be carried on. . . ’ but which are not privileged.

⁴² A point noted by, amongst others, by Lindsay J. in *Saunders v. Punch Ltd.*, [1998] 1 W.L.R. 986, 996 (Ch.). Many of the limitations are covered in Section B but there are also a number of statutory exceptions and the common law “crime fraud” exception that excludes communications made in furtherance of a crime or fraud, even if the lawyer was oblivious to the client’s intentions.

⁴³ See, in particular, the judgment of Lord Scott in *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 6), [2004] UKHL 48; (2005) 4 All E.R. 948 ¶¶ 24–35 (appeal taken from Eng.).

⁴⁴ The claimant liquidators abandoned their claims on November 2, 2005, after 256 days of trial, with the action having been one of the most expensive ever pursued in the English courts. It is probably only because the litigation was on such an unusually grand scale, for England, that the litigants had the appetite to pursue so many privilege issues in the appellate courts. Privilege and discovery are the subject of much less litigation in the UK than in the U.S. The decision to bring and continue with the substantive action has recently been the subject of trenchant public criticism by the trial judge who heard the case, who essentially concluded early on that the case was hopeless and a waste of legal fees. *Three Rivers Dist. Council v. Bank of England*, [2006] EWHC 816 (Comm.) (April 12, 2006).

⁴⁵ *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 5), [2003] EWCA (Civ) 474, [2003] Q.B. 1556. See *infra* notes 84–98.

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privilege to advice on private legal rights and obligations.⁴⁶ The Court also questioned whether there was any justification for attorney-client privilege extending beyond advice in relation to matters that might subsequently be the subject of litigation, harking back to debates that raged in the early nineteenth century.⁴⁷ In another case, the Court of Appeal allowed the examination of a tobacco company's UK lawyer on advice regarding document handling and retention because it was not satisfied in the abstract that all such advice would be covered by privilege.⁴⁸ Although not applying any new legal principles, the decision was controversial because in English courts adversaries rarely seek oral testimony from opposing lawyers, except under unusual circumstances.

While English courts have historically been some of the most strident supporters of privilege, practitioners should expect that English Courts will scrutinize claims of privilege more keenly in the future. There is a sense among some members of the judiciary and the wider legal profession in England that attorney-client privilege has been abused in the past.

B. Litigation Privilege

One difference between U.S. laws on privilege and those in England and Wales is the latter's recognition of a distinct privilege in connection with litigation. To be sure, as many commentators have noted, there are similarities between this privilege and the U.S. work-product doctrine,⁴⁹ but the analogy is inexact. The U.S. concept is appropriately described as a "doctrine" rather than a "privilege" because at least some material it protects by it can be made subject to discovery if the facts thereby concealed cannot be ascertained from other sources.⁵⁰ By contrast, litigation privilege is a true privilege. If it applies, then there is immunity from discovery in legal proceedings to the same extent as where legal advice privilege applies.

Though pre-dating the work-product doctrine, litigation privilege is a more recent phenomenon than advice privilege. Much of its development occurred only in the late nineteenth and early twentieth centuries. Its defining characteristic is that it affords protection from disclosure of certain documents created and communications made by third parties—persons other than the attorney, his client, and their respective agents.

Litigation privilege applies to all documents created and communications made by any person at a time when litigation was pending, in reasonable contem-

⁴⁶ *Three Rivers Dist. v. Governor and Co. of the Bank of England* (No. 6), [2004] EWCA (Civ) 218, [2004] Q.B. 916, 933.

⁴⁷ *Three Rivers* (No. 6), [2004] Q.B. at 935.

⁴⁸ *United States of America v. Philip Morris Inc.*, [2004] EWCA (Civ) 330.

⁴⁹ *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁵⁰ *Id.* at 511. For a user-friendly summary of the U.S. law, see generally, EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* (4th ed. ABA Section of Litigation, Chicago 2001).

plation and for the dominant purpose⁵¹ of obtaining legal advice as to the litigation, or evidence for use in the same.⁵² The test of “reasonable contemplation” is much more a motivational than a temporal test, though it does encompass both elements to a degree. The cause of action need not have accrued,⁵³ let alone any intimation of a claim made. The communication need only be made in the bona fide belief or under a reasonable apprehension that litigation may ensue, and for that purpose.⁵⁴ This is not to say that it is enough to have some generalized fear of litigation. The belief that specific proceedings are anticipated, and a court will likely be circumspect of claims that particular litigation was reasonably anticipated many years before it actually eventuated. Thus, a court recently refused to accept the plea of a tobacco company that advice on its document retention policies necessarily fell within litigation privilege whenever it was given, because such advice related to litigation that it considered all along would inevitably ensue from one quarter or another.⁵⁵

An issue that commonly arises is whether or not litigation privilege attaches to an investigation of the facts of a matter. Where the investigation is made predominantly for another purpose, such as to decide how to improve safety in order to avoid a similar accident in the future,⁵⁶ the resulting report will not be privileged. English law has tended, though, to afford privilege to factual investigations much more readily than U.S. courts. An insurer who procures expert reports on a casualty in order to obtain advice from lawyers on whether or not it is obliged to pay a claim will likely be able to claim litigation privilege over the reports. Such is the case because it is all but inevitable that the insurer will be sued if it denies coverage. Privilege is afforded notwithstanding the fact that the insurer would have had to complete the same investigation in order to decide whether it would pay the claim.⁵⁷

Once litigation privilege is established it continues to attach to the document after the end of the relevant litigation or even if the threatened litigation never

⁵¹ *Wagh v. British Rys. Bd.*, [1980] A.C. 521 (H.L.) (appeal taken from Eng.) (reports prepared by a railway on an accident were not privileged because they were procured as much to avoid future accidents as to provide information for lawyers involved in litigation on the present accident).

⁵² *Sec’y of State for Trade and Indus. v. Baker (In re Barings plc)* (No. 2), [1998] Ch. 356 (administrators’ report to Secretary of State on possible disqualification of directors not privileged because where a document is prepared pursuant to a statutory duty it cannot be said to have been prepared for the dominant purpose of contemplated litigation and is not privileged).

⁵³ *Alfred Crompton Amusement Machs. Ltd. v. Customs and Excise Comm’rs* (No. 2), [1974] A.C. 405 (H.L.) (appeal taken from Eng.) (commissioners entitled to assume that any assessment they made would be challenged after company gave notice of intention to seek arbitration and communications were therefore privileged even though no cause of action could arise until the assessment was actually made).

⁵⁴ *Alfred Crompton (No. 2)*, [1974] A.H. 405. See also *Jarman v. Lambert and Cooke (Contractors) Ltd.*, [1951] 2 K.B. 937 (Eng. C.A.) (accident report not privileged where victim completing form expressly noted that he did not expect to make a claim against anyone, litigation was to be considered “anticipated” where it was reasonably probable to occur).

⁵⁵ *United States of America v. Philip Morris Inc.*, [2004] EWCA (Civ) 330, [47] (Eng. C.A.), [2004] 1 C.L.C. 811, 827–28 (Q.B.D. Comm.) (U.K.).

⁵⁶ *Wagh*, [1980] A.C. at 521–22.

⁵⁷ *In re Highgrade Traders Ltd.*, [1984] BCLC 151 (Eng. C.A.) (appeal taken from Eng.) (report to insurers on cause of warehouse fire privileged).

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occurs.⁵⁸ Commentators have debated whether litigation privilege enjoys the same “substantive right” status as advice privilege or of a mere rule of evidence.⁵⁹ In principle, if it is only a rule of evidence, it should be unavailable to resist seizure by the police or other regulatory investigators, since rules of evidence only apply within legal proceedings, but this does not appear to have been an issue in practice.

The origins of litigation privilege are not easy to understand, but it is important to consider them in order to discuss what, if any, continuing justification exists for it. Its history is intimately connected with the adversarial approach that distinguishes common law systems from the civil law systems of continental Europe.⁶⁰ Adversarial trial was seen as a contest, and each litigant was left to his own devices in seeking out evidence. To prevent a litigant from taking advantage of his opponent’s investment in preparing his case, courts of law, as opposed to equity, developed a rule prohibiting access to opposing counsel’s “brief” the information on the evidence gathered by the party, and the submissions counsel proposed to make in the course of the trial.

So pervasive was this concern for fair play during the preparation for trial that there was a period during which it was thought that the same concerns lay behind the existence of advice privilege. Some courts accordingly restricted advice privilege to communications in connection with the proceedings at bar.⁶¹ It was only the decision in *Greenough v. Gaskell*,⁶² already referred to above, that clarified the position by affirming that advice privilege was more widely available.

The development and application of the rule against access to the brief then became entangled and confused with advice privilege when, after 1873–1875, the courts of law and equity were unified so that all courts, in theory, applied the same rules.⁶³ Thus, in *Anderson v. Bank of British Columbia*,⁶⁴ in 1876, the first instance court⁶⁵ approached the issue in dispute as though it were simply a question of advice privilege, but the Court of Appeal, reaching the same end result, focused much more on the legal rule prohibiting viewing the brief. Ironically, though the courts decided that the communication⁶⁶ fell within neither rule so as

⁵⁸ The “Aegis Blaze” [1986] 1 Lloyd’s Rep. 203, 210 (Eng. C.A.) (appeal taken from Eng.) (ship survey report prepared for one action was still privileged in later separate, later action).

⁵⁹ See Joan Loughrey, *Legal Advice Privilege and the Corporate Client*, 9(3) INT’L J. OF EVIDENCE & PROOF 183, 186 n.17 (2005) and citations therein including the Canadian decision of *R. v. Trang* (2002) 168 C.C.C. (3d) 145, [66] (Alta. Q.B.).

⁶⁰ Loughrey, *supra* note 59 at 185 n.7, 189–90 n.32–35 and accompanying text.

⁶¹ See cases cited in *Greenough v. Gaskell*, (1833) 1 My. & K. 98, 39 Eng. Rep. 618 (Ch.).

⁶² *Greenough*, 1 My. & K. at 102–03.

⁶³ Supreme Court of Judicature Acts 1873, 36 & 37 Vict. Ch. 66, Repeal (Eng.) and Supreme Court of Judicature Acts, 1875, 38 & 39 Vict., Ch. 77, Repeal.

⁶⁴ (1876) 2 Ch. D. 644, 656 & 658 (Eng. C.A.) (Appeal taken from Eng.).

⁶⁵ Confusingly, to modern eyes, the first instance judge was actually the most senior civil judge, the Master of the Rolls, Sir George Jessel, who ordinarily sat as a member of the Court of Appeals.

⁶⁶ The communication was from the bank’s London head office to its Canadian branch seeking information to deal with the claim against it.

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to require protection, it is uncontroversial that it would fall within the modern definition of litigation privilege.⁶⁷

In decisions after *Anderson*, it is often unclear whether the courts were intending to apply advice privilege, litigation privilege, or both, and this undoubtedly made the development of litigation privilege less coherent. *Southwark and Vauxhall Water Company v. Quick* illustrates the case in point.⁶⁸ *Southwark* held that communications between a third party and the client for the purpose of obtaining material to put before a lawyer for his advice were privileged even though the client had no prior direction from the client's attorney or any prior attorney involvement at all. It was enough that there was the intention to put it before a lawyer when the material was procured.⁶⁹ The Court of Appeal has recently stated that this was a case on litigation privilege⁷⁰ yet counsel for the party seeking privilege expressly conceded that it was not enough that litigation was pending.⁷¹ Further, the documents held to be privileged would never have been protected under the rule preventing access to the brief because, without the lawyer's involvement, they never would have been within the brief.

This short history of litigation privilege demonstrates at least two problems with the concept as it exists today. First, its development since 1875 has become increasingly unprincipled, arguably losing sight of the justification that originally existed for it without developing a clear alternative justification. Second, the original rule owed much to how litigation was practiced in England in the eighteenth and nineteenth centuries. The English civil litigation system is now very different from what it used to be and from how civil litigation is practiced in the United States.

English procedural law as it exists today does not offer the same scope for intrusive discovery as it did formerly and as U.S. law arguably still does. Depositions are all but unheard of, and written interrogatories are rare. Parties are under an obligation to disclose and produce documents, but this is restricted, in the first instance, to documents directly supporting or detracting from the cases advanced by the parties.⁷² Courts can order specific disclosure of additional documents, although this is narrowly interpreted.⁷³ As such, there is arguably a less acute need for privilege as a protection against unreasonable discovery tactics.

⁶⁷ See *Ventouris v. Mountain*, [1991] 1 W.L.R. 607, 612H (Eng. C.A.) (Appeal taken from Eng.) (per Bingham L.J.).

⁶⁸ *The Southwark & Vauxhall Water Co. v. Quick*, (1878) 3 Q.B.D. 315, 320 (Eng. C.A.) (Appeal taken from Eng.).

⁶⁹ This is a difference from the bright-line rule for work-product doctrine endorsed in many United States federal jurisdictions that there must at least have already been a lawyer involved. *Thomas Organ Co. v. Jadranska Slobodna Plovidba* 54 F.R.D. 367, 372–74 (N.D. Ill. 1972); *Cf. Fontaine v. Sunflower Beef Carrier*, 87 F.R.D. 89 (E.D. Mo. 1980).

⁷⁰ *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 5), [2003] EWCA (Civ) 474 (U.K.), [2003] Q.B. 1556, 1571–72 (Eng. C.A.).

⁷¹ *Southwark*, 3 Q.B.D. at 317.

⁷² Civil Procedure Rules, 1998, S.I. 1998/3132, Rule 31.6 (as amended) (U.K.).

⁷³ Civil Procedure Rule 31.12.

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At the same time, there has been a movement to make litigation more cooperative and less adversarial. Trial by ambush is, today, strongly deprecated. Parties to English litigation will be, at a minimum,⁷⁴ criticized if they hold back any evidence or legal arguments until a final trial on the merits. Parties to English litigation must now provide to their opponents, months, if not years before trial, not only all documentary evidence on which they rely, but also statements of the evidence to be given by both their fact witnesses⁷⁵ and experts.⁷⁶ This is not merely a summary of the evidence expected to be given, but stands as the evidence-in-chief unless otherwise directed by the court.⁷⁷ The witnesses only attend to be cross examined. Further, English judges are now required to adopt a much more active case-management style,⁷⁸ limiting the power of the parties to decide what is presented.

These developments, significantly diminishing the ability of parties to play their cards close to their chest in litigation, have caused doubt about whether there is any continuing justification for litigation privilege in its present form. Lord Scott, giving judgment in the House of Lords, has suggested that it should be re-assessed:

As to the justification for litigation privilege, I would respectfully agree that the need to afford privilege to the seeking or giving of legal advice for the purposes of actual or contemplated litigation is easy to understand. I do not, however, agree that that is so in relation to those documents or communications which although having the requisite connection with litigation neither constitute nor disclose the seeking or giving of legal advice. Communications between litigant and third parties are the obvious example. This House in *In re L (a minor) (police investigation: privilege)* [1996] 2 All ER 78, [1997] AC 16 restricted litigation privilege to communications or documents with the requisite connection to adversarial proceedings. Civil litigation conducted pursuant to the current Civil Procedure Rules is in many respects no longer adversarial. The decision in *In re L* warrants, in my opinion, a new look at the justification for litigation privilege. But that is for another day. It does not arise on this appeal.⁷⁹

Lord Scott's views on this topic, previously canvassed some years before in another judgment,⁸⁰ are controversial. Another judge in the same case, Lord Rodger, disagreed with them. Interestingly, Lord Rodger cited approvingly to

⁷⁴ The Court could prevent the evidence being adduced or could impose a costs order on the party.

⁷⁵ Civil Procedure Rule 32.4.

⁷⁶ Civil Procedure Rule 35.5.

⁷⁷ Civil Procedure Rule 32.5(2).

⁷⁸ Civil Procedure Rule 1.4.

⁷⁹ *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 6), [2004] UKHL 48, [29], [2005] 1 A.C. 610.

⁸⁰ *Sec'y of State for Trade and Indus. v. Baker (In re Barings plc)* (No. 2), [1998] Ch. 356, 362–71 (U.K.).

comments on the work-product doctrine in *Hickman v. Taylor*.⁸¹ He may not have appreciated the irony that he was supporting a strict rule of privilege by reference to a much more qualified doctrine.

Lord Rodger's reference to *Hickman* raises an interesting point. Certainly, there are justifications for some kind of protection to the extent that litigation remains adversarial, as has been recognized in the United States in the context of the work-product doctrine, but, as has also been recognized in relation to the work-product doctrine, those justifications may not require the absolute protection afforded by privilege.

III. Focus on Particular Issues

This section is arranged in five parts each dealing with a different discrete aspect of privilege. The first part considers who is treated as the client entitled to claim privilege and, specifically, how this applies in the context of a corporate client. The second part addresses the question of which practitioners are accepted to be lawyers with whom discussions will attract privilege. There is particular discussion of the position of in-house and foreign legal advisers. In the third part, the analysis focuses on the subject matter of the communication (or other document) for which privilege is sought and, specifically, whether privilege is strictly confined to legal advice. The fourth part addresses the availability of privilege when communications go beyond the original lawyer and client. As will be seen, English law is surprisingly generous in this regard. Finally, the last part deals with the issue of waiver.

A. Who Is a Client?

Outside the context of litigation, legal professional privilege only protects communications between an attorney and his client. Communications are considered to be made with a client if they are made to an appropriate agent of the client. Agent for these purposes has been defined narrowly as "a person employed as an agent on the part of the client to obtain the legal advice of the solicitor."⁸² As it appears that it may be an issue in the United States,⁸³ it should be noted that the use of agents is permissible not only for corporate clients, but also for individuals without any requirement to show that the involvement of the agent was "necessary." Hence, for example, a wealthy entrepreneur can obtain personal legal advice not only directly but also through his "man of affairs."

The question of who is the client rarely causes difficulties in the context of clients who are natural persons. Of course, questions may arise about whether there is a client at all, because the mere fact that one party to a communication is

⁸¹ *Three Rivers (No. 6)*, [2004] UKHL 48, at [52].

⁸² *Wheeler v. Le Marchant*, (1881) 17 Ch. D. 675, 684 (Eng. C.A.) (appeal taken from Eng.).

⁸³ "Corporations can only speak through authorized representatives. Individuals, as a general rule, cannot, but must confide in an attorney personally." EPSTEIN, *supra* note 50, at 99. Cf. WIGMORE, *supra* note 6 at §2317, "A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege" (emphasis in the original); *see also*, *Mileski v. Locker*, 14 Misc. 2d. 252, 256 (N.Y. Sup. Ct., 1958) to same effect.

a lawyer does not create an attorney-client relationship. This issue is considered below.⁸⁴

More problems arise in the context of advice to corporations and other legal persons. While the corporation itself is clearly the ultimate client for whose benefit advice is provided, all communications with it and decisions by it must necessarily be made by agents because the corporation is a legal construct without its own human personality. All employees of the corporation are agents of the corporation for at least some purposes, as are many independent contractors. The question then arises, which agents have the right to make and receive communications protected by privilege?

If the communications are made in the course of preparing for litigation, then there should be no difficulty. Litigation privilege can be claimed for all corporate communications directly or indirectly made with the lawyer without any need to assess whether the particular employee (or, indeed, ex-employee) could be considered a proper agent of the client. Communications outside the context of litigation are another matter and have been the subject of recent controversy in English law because of the Court of Appeal decision in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 5)*.⁸⁵

Three Rivers was a claim for damages for misfeasance in public office against the BoE. It followed from the collapse of the BCCI, due to fraud. The claimants, depositors with BCCI who had lost their savings, alleged that BCCI failed because the BoE failed to adequately exercise its statutory duties of supervision over the operation of BCCI.

The collapse of BCCI was a national scandal in the United Kingdom. The government of the day ordered a judicial inquiry into the BoE's supervision of BCCI. This investigation, known as the "Bingham Inquiry," was led by a senior judge, Lord Justice Bingham. The BoE was required to provide evidence and make submissions to the Bingham Inquiry. To that end, the BoE established a unit of three employees, the Bingham Inquiry Unit ("BIU"), to manage the process and determine what would be presented on behalf of the BoE.

The Bingham Inquiry report was ultimately critical of the BoE's supervision and those criticisms undoubtedly fortified the claimants in their pursuit of litigation against the BoE. Unsurprisingly, the claimants wanted to obtain disclosure of all the documents that the BoE (through the BIU) had provided to the Bingham Inquiry. These were provided by the BoE. However, the claimants also sought disclosure of communications between the BIU and other BoE employees and ex-employees. It anticipated, quite reasonably, that draft witness statements prepared by relevant current or former BoE employees prior to the receipt of legal advice might be more incriminating than the final versions that were ultimately presented to the Bingham Inquiry.

The BoE resisted disclosure of these documents, claiming legal advice privilege. Lawyers had advised throughout on what should be presented to the Bingham Inquiry.

⁸⁴ See *infra* n.106–108 and accompanying text.

⁸⁵ *Three Rivers Dist. Council v. Governor and Co. of the Bank of England (No. 5)*, [2003] EWCA (Civ) 474 (U.K.), [2003] Q.B. 1556 (Eng. C.A.) (appeal taken from Eng.).

ham Inquiry as well as how it would be presented. The claimants accepted, for the purposes of the proceedings in *Three Rivers (No. 5)*, that any communications between the lawyers and the BIU were privileged, but argued that the same could not be said of communications between the BIU and other BoE employees or ex-employees.⁸⁶ All parties acknowledged that litigation privilege was irrelevant, because the Bingham Inquiry was non-adversarial and the House of Lords had previously restricted litigation privilege to adversarial proceedings.⁸⁷ All questions raised therefore focused on advice privilege.

The position of counsel for the BoE was that “any document prepared with the dominant purpose of obtaining the solicitor’s advice upon it came within the ambit of the privilege, whether or not it was actually communicated to the solicitor.”⁸⁸

This “dominant purpose” test, which prevailed in the court below, was rejected by the Court of Appeal. It held that only communications⁸⁹ between the BIU and the lawyers were privileged and not communications between the BIU and other BoE employees or ex-employees. This conclusion depended to a large extent on the Court’s reading of three Victorian cases already referred to, namely *Anderson*,⁹⁰ *Southwark*,⁹¹ and *Wheeler*.⁹² Its interpretation of these cases by one commentator has been referred to as “something of a judicial sleight of hand.”⁹³ Certainly, none of the cases are clear authority for the proposition by the Court of Appeal that communications between (non-lawyer) employees cannot give rise to privilege even if ultimately intended to be communicated to a lawyer.

The decision of the Court of Appeal in *Three Rivers (No. 5)* has been criticized as applying an unduly restrictive definition of the client for the purposes of privilege. One comment in the judgment that has drawn much attention was the conclusion that privilege would not have applied had there been a relevant communication from the Governor of the BoE, effectively the CEO, to the BIU.⁹⁴

Whatever may be said of the conclusions reached by the Court of Appeal, it is necessary to make a preliminary point about what was actually decided. Contrary to popular belief, the decision says nothing directly about which employees

⁸⁶ The concession was later withdrawn. *Three Rivers (No. 6)*, [2004] EWCA (Civ) 218 (appeal taken from Eng.) was an attempt by the claimants to obtain access to communications admitted to be between lawyer and client on the grounds that they were not made for the purpose of obtaining legal advice. See *infra* Part III.C.

⁸⁷ *In re L (a minor)* (police investigation: privilege), [1997] A.C. 16, 16–17 (H.L.) (appeal taken from Eng.) (report obtained by parent from chemical pathologist in care proceedings was not privileged from production to police in considering future prosecution given that care proceedings are non-adversarial).

⁸⁸ *Three Rivers (No. 5)*, [2003] Q.B. at 1562–63.

⁸⁹ Or intended communications not actually sent. See *Three Rivers (No. 5)*, [2003] Q.B. at 1575.

⁹⁰ *Anderson v. Bank of British Columbia*, (1876) 2 Ch. D. 644 (Eng. C.A.).

⁹¹ *The Southwark and Vauxhall Water Company v. Quick*, (1878) 3 Q.B.D. 315 (Eng. C.A.).

⁹² *Wheeler v. Le Marchant*, (1881) 17 Ch. D. 675 (Eng. C.A.).

⁹³ See Loughrey, *supra* note 59.

⁹⁴ *Three Rivers (No. 5)*, [2003] EWCA (Civ) 474 at [31].

will be treated as the client for the purposes of privilege. Instead, it expressly stated that, on these particular facts, communications *between* employees did not give rise to advice privilege and the fact that the communications may have been for the ultimate purpose of providing information to a lawyer for his advice, was insufficient to ground a claim for privilege.⁹⁵

The decision leaves at least two important questions unanswered. First, would the communications have been privileged if they had occurred between two “client” employees, such as two members of the BIU? The comment about the Governor hints that the answer might be “no,” as normally one would think that the most senior manager of a corporation would qualify as a client. But this was an unusual situation. The Court was proceeding on the basis of a stipulation that the BIU was to be treated as the client and so did not devote any, or any significant, analysis concerning whether others in the BoE might also be clients. The Court may well have taken the view that, on the particular facts of this case, the Governor was not a client because the BoE had specifically delegated all relevant powers to the BIU. Creation of a special corporate unit for that purpose, to the exclusion of more senior managers, is a rare occurrence and *Three Rivers (No. 5)* may not stop board communications falling within privilege in more typical cases.

The second unanswered question asks what, if any, additional requirements have to be met for an employee to qualify as a “client” if he has corresponded directly with lawyers? This was not explicitly addressed in *Three Rivers (No. 5)* because of the stipulation that the BIU was to be treated as the client. From discussion in a later House of Lords judgment, the parties to *Three Rivers (No. 5)* appear to interpret the decision as requiring the BoE to disclose communications directly between the BoE’s lawyers and BoE employees and ex-employees outside the BIU,⁹⁶ and their Lordships appeared to concur in that interpretation.⁹⁷ Such an interpretation suggests that communication with a lawyer alone is not enough and that some additional test does apply. Unfortunately, *Three Rivers (No. 5)* provides little guidance on what that test might be.

There exists relatively little prior authority on this question. With reference to the U.S. jurisprudence, at least two possibilities exist. The “subject matter” test focuses on the purpose of the communication, but this appears to have been disapproved by the Court of Appeal in *Three Rivers (No. 5)*. The “control group” test limits privilege by reference to whether or not the communicant has relevant decision-making powers on behalf of the corporation. At least one English case has suggested that the latter approach might be appropriate, albeit this was in contradistinction to a proposed narrower test limiting privilege to communications with the board of directors.⁹⁸ A different test may ultimately be developed.

⁹⁵ This contrasts with the position reached in some U.S. jurisdictions, affording privilege at least where the information was first requested by counsel. See *Santrade Ltd. v. Gen. Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993).

⁹⁶ *Three Rivers (No. 6)*, [2004] UKHL 48, [21]–[22], [2005] 1 A.C. 610 (appeal taken from Eng.).

⁹⁷ *Id.* at [46]–[47].

⁹⁸ *In re British & Commonwealth Holdings plc*, (Ch. 4 July 1990) (Q.B.D. Comm.) (U.K.) (unreported) (Gatehouse J.). “The client is in my view each of the persons through whom the company acts

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Taken at a broader level of generality, *Three Rivers (No. 5)* may stand as authority for the proposition that information gathering will not be covered by privilege where litigation is not a prospect. This has caused considerable concern for companies conducting internal investigations and inquiries. While channeling communications through a lawyer may improve the prospect of being able to claim privilege, this tactic may not succeed unless the communicating employee can be clearly placed within the class of individuals best described as “the client.”

As yet, the decision in *Three Rivers (No. 5)* has not been subject to much judicial consideration. It was raised in a subsequent *Three Rivers* appeal to the House of Lords on a different privilege question, and hopes were high in the legal community that their Lordships would clarify the position to the benefit of corporations. While their Lordships were quick to recognize the profession’s concern that the Court of Appeal had gone too far, they declined to rule on the issue because they concluded it was not necessary for their decision and a non-binding view would only serve to cause further confusion.⁹⁹

As a final addendum to this discussion, it should be noted that the concern to correctly identify employees constituting the client only assumes its full importance in English law as regards communications *from* employees *to* the lawyer. Where one is concerned with the existence of privilege in advice given by the lawyer, English law adopts a liberal approach. It has long been acknowledged that legal advice for a corporation would be of little practical utility unless it were possible to pass that advice to those who need to act upon it.¹⁰⁰ Consequently, a communication from one employee to another quoting¹⁰¹ or paraphrasing¹⁰² advice from a lawyer to the employer does attract advice privilege. Despite the logic for the rule, there is actually no need to show that the purpose of the communication was to allow the advice to be acted upon. Indeed, as will be seen below, English law permits privilege in a document, once established, to be retained as against the rest of the world even if the document or a summary of it is provided to a stranger, as long as it was provided on confidential terms and has not subsequently entered the public domain.¹⁰³

B. Who is an Attorney?

For the most part, the definition of who is an attorney for the purposes of legal professional privilege causes few problems in English law. A broad definition has been adopted by the English courts. Privilege extends to communications

and who are responsible for taking decisions. It may be in most cases the Board of Directors, but in this case the members of the Credit Committee.”

⁹⁹ *Three Rivers (No. 6)*, [2004] UKHL at [46]–[48], [49], [63] and [118].

¹⁰⁰ *The Good Luck*, [1992] 2 Lloyd’s Rep. 540, 540 (Q.B. Comm.)(U.K.).

¹⁰¹ *The Good Luck*, [1992] 2 Lloyd’s Rep. at 540–41; *The Sagheera*, [1997] 1 Lloyd’s Rep. 160 (Q.B.D. Comm.).

¹⁰² *U.S.P Strategies Plc v. London Gen. Holdings Ltd.*, [2004] EWHC 373, [20] (Ch.), (Transcript, 8 March 2004) (Mann J.).

¹⁰³ *Gotha City v. Sotheby’s*, [1998] 1 W.L.R. 114 (Eng. C.A.). See *infra* n.173 and accompanying text.

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with all members of the English legal profession including barristers, solicitors, licensed conveyancers, and legal executives.¹⁰⁴ Importantly, it does so whether these legal advisers are in private practice or employed full-time as salaried legal advisers by government departments or by commercial concerns, provided they act with capacity as legal advisers.¹⁰⁵

Two important caveats must, however, be added. First, communications are only protected by privilege if made to or by the legal adviser in that capacity¹⁰⁶ and while the relationship of client and legal adviser subsists.¹⁰⁷ Thus, for example, privilege does not attach to discussions with a lawyer if the discussion with the lawyer was as a friend rather than as a client. Where a person speaks with a lawyer in contemplation of becoming his client, then that conversation will be privileged even though the relationship of client and lawyer does not yet exist.¹⁰⁸

The second important caveat is only relevant to communications with an in-house legal adviser. While English law treats communications with in-house lawyers as privileged, European Community law currently does not.¹⁰⁹ This has most significance in the field of antitrust law. The European Commission has powers to investigate allegedly anti-competitive behavior¹¹⁰ having an effect on trade between member states.¹¹¹ It exercises these powers by way of inspections on premises, often referred to as “dawn raids.” When a similar raid is conducted by English authorities on the basis of English law the privilege applying to communications with in-house lawyers prevents inspection or seizure of such communications. When, on the other hand, the inspection is conducted to determine whether there has been a breach of European competition law, the provisions of

¹⁰⁴ It does not ordinarily extend to patent or trade mark agents: *Moseley v. Victoria Rubber Co.*, 55 L.T. 482, 485 (Ch. 1886) (communications with patent agent not privileged); *In re Dormeuil Trade Mark*, [1983] R.P.C. 131, 136 (Ch. D.) (communications with trade mark agent not privileged). However, in relation to proceedings pending or contemplated before the Comptroller or the Patents Appeal Tribunal, a patent agent is in the same position as a solicitor in relation to proceedings in the High Court and is therefore accorded privilege. See *The Patents Act, 1977*, Eliz. 2, c. 37, § 102A (as substituted) (U.K.).

¹⁰⁵ *Alfred Crompton Amusement Machs. Ltd. v. Customs and Excise Comm’r (No. 2)*, [1972] 2 Q.B. 102, 129 (Eng. C.A.) (Appeal taken from Eng.) (communications with government in-house legal advisers privileged). This principle was not challenged on appeal to the House of Lords in the same case. See [1974] A.C. 405 (H.L.) (U.K.).

¹⁰⁶ *Wilson v. Rastall*, 4 Term. Rep. 753, 759; 100 Eng. Rep. 1283 (K.B. 1792) (U.K.) (witness was an attorney but not acting in his capacity as such, having expressly declined to act).

¹⁰⁷ *Cuts v. Pickering*, 1 Vent. 197 (Ch. 1672) (proposed erasure to will disclosed to lawyer before retainer subsisted, ordered disclosed); see also, *Greenough v. Gaskell*, 1 My. & K. 98, 104 (Eng. C.A. 1833) (Appeal taken from Eng.) (privilege does not exist before the retainer starts nor after it ends).

¹⁰⁸ *Minter v. Priest*, [1930] A.C. 558, 568 (H.L.) (Appeal taken from Eng.) (discussion between solicitor and prospective clients would have been privileged even though no retainer eventuated except that the true intent of the particular conversation was to concoct a scheme to defraud a third party rather than to consider establishing a solicitor-client relationship).

¹⁰⁹ *Australian Mining & Smelting Europe Ltd. v. EC Comm’n*, [1982] E.C.R. 1575, [21], [24] and [27] (E.C.J.) (English company ordered to disclose in antitrust investigation communications with in-house lawyer).

¹¹⁰ E.g. activity proscribed by Arts. 81 and 82 of the EC Treaty (as amended) and rules thereunder: see, Treaty Establishing the European Community, Nov. 10, 1997 O.J. (C340) Art. 81 and 82 [hereinafter EC Treaty].

¹¹¹ Formerly under Article 14 of EC Council Regulation 17/62 and now under Articles 17 to 21 of EC Council Regulation 01/03 (2002).

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European Community law apply ahead of English law, and the Commission will consider itself empowered to seize communications with in-house lawyers.

The failure of European Community law to recognize privilege in communications with in-house lawyers has been the subject of much criticism by English lawyers and also by lawyers in other European countries, many of which now recognize privilege in communications with in-house lawyers when formerly they did not. The European Court of Justice ("ECJ") is currently seeking to overturn the old rule and secure privilege for in-house lawyers.

Akzo Nobel Chemicals Limited v. The Commission concerned an investigation by the Office of Fair Trading and the Commission into alleged anti-competitive practices by Akzo Nobel Chemicals Ltd.¹¹² The investigation led to a raid on Akzo Nobel offices in Manchester, England, in which documents were seized and copied. Akzo Nobel claimed that some of these documents containing handwritten notes by members of its in-house legal team were privileged. The Commission rejected Akzo Nobel's claims, and Akzo Nobel appealed this decision to the Court of First Instance ("CFI").

In October 2003, the CFI granted interim measures preventing the Commission from using some of the relevant documents.¹¹³ On September 27, 2004, the President of the ECJ overturned the order of the CFI on the grounds that there was not the urgency or risk of irreparable harm necessary to obtain interim measures.¹¹⁴ The logic of this decision may be thought questionable by lawyers in common law countries, because it supposes that there is no irreparable harm from an opponent's review of privileged documents but only by their use as evidence in proceedings. As it is, the decision of the President of the ECJ says nothing about whether or not the documents themselves are privileged. This remains to be determined.

Akzo Nobel has become something of a *cause celebre* in Europe. The Netherlands Bar Association and the European Company Lawyers Association have both been granted permission to intervene in support of Akzo Nobel, and the International Bar Association Dispute Resolution Section also sought, but was refused, permission to intervene.¹¹⁵ They argue that the position in Europe has changed considerably since the 1982 *AM & S* decision¹¹⁶ rejecting privilege for in-house lawyers. In particular, they argue that member states, Belgium and the Netherlands in particular, have adopted rules designed to protect written communications with in-house lawyers, provided that the in-house lawyer is subject to certain rules of professional conduct. The CFI acknowledged that, increasingly, there is no presumption that the link of employment between a lawyer and a business will affect the independence necessary for the effective exercise of the courts' administration of justice if the lawyer is bound by strict rules of profes-

¹¹² Joined Cases T-125/03 R and T-253/03 R, [2003] E.C.R. II-4771, [2004] E.C.R. II-315, [2004] E.C.R. II-1603 and [2004] E.C.R. I-8739.

¹¹³ [2003] E.C.R. II-4771.

¹¹⁴ [2004] E.C.R. I-8739.

¹¹⁵ [2004] E.C.R. II-315.

¹¹⁶ *Australian Mining & Smelting Europe Ltd. v. EC Comm'n*, [1982] E.C.R. 1575.

sional conduct. Akzo Nobel maintained at the CFI hearing, without being clearly contradicted by the Commission, that its in-house lawyer was in fact bound by strict professional rules.

The Commission's position, by contrast, is that member states do not unanimously recognize the principle that written communications with in-house lawyers must be covered by professional privilege, and that it is necessary to ensure that an extension of professional privilege cannot facilitate abuses of withholding evidence of an infringement of competition rules. It considers that the employment relationship that exists in the case of in-house lawyer creates an inherent conflict of interest. This conflict is not sufficiently counteracted by existing professional conduct rules or their enforcement, or lack thereof, by independent bar associations.

After the interim order of the CFI in October 2003, hopes were raised that privilege for advice from in-house lawyers might be acknowledged. The reversal of the CFI's order lowered these hopes, because it may indicate a less receptive stance on the part of the ECJ, but the final outcome remains to be seen.

In addition to recognizing privilege for English lawyers in private practice and in-house, English law is also generous in its application of privilege to communications with foreign lawyers. Where a communication would otherwise satisfy the English requirements of privilege, it does not lose the entitlement to protection by the English courts simply because the lawyer concerned, though practicing in England,¹¹⁷ is a member of a foreign bar. This is true whether the client is in England¹¹⁸ or elsewhere,¹¹⁹ and whether the advice is in relation to foreign proceedings¹²⁰ or transactional.¹²¹ Indeed, privilege has been recognized even when the foreign lawyer was advising on English law rather than the law of the jurisdiction in which she was admitted.¹²² Whether English courts would also afford privilege to an English lawyer advising on foreign law¹²³ has yet to be considered in any reported case.

It should be noted that the European Commission may take a less generous view. Historically, it considered that privilege did not extend to communications

¹¹⁷ See *infra* Part III.B.6 for the position where the lawyer was practicing overseas.

¹¹⁸ *In re Duncan*, deceased, [1968] p. 306 (correspondence with foreign lawyers and documents prepared in connection with foreign litigation, all held privileged in English proceedings concerned with the validity of a will).

¹¹⁹ *Lawrence v. Campbell*, 4 Drew 485, 62 Eng. Rep. 186 (V.C. 1859) (communications between Scotsman living in Scotland with Scottish solicitors practicing in London about debts due in England were privileged in English proceedings).

¹²⁰ *In re Duncan*, deceased, [1968] p. 306.

¹²¹ *Great Atlantic Ins. Co. v. Home Ins. Co.*, [1981] 1 W.L.R. 529, 534 (Eng. C.A.) (memorandum from American lawyer concerning conduct of insurance business before litigation was in contemplation would have been privileged but for subsequent inadvertent waiver).

¹²² *IBM Corp. v. Phoenix (Int'l) Computers Ltd.* [1995] All E.R. 413, 429 (Ch.) (advice from U.S. qualified attorney on English trademark and antitrust legal issues held privileged).

¹²³ COLIN PASSMORE, PRIVILEGE 24 (1998).

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with lawyers who were only admitted outside the European Community.¹²⁴ It has recently indicated informally, however, that its practice now is to consider communications with any external lawyer as privileged, whether admitted inside or outside the Community.¹²⁵

C. What Is Legal Advice?

It should be noted that in England, unlike in some U.S. jurisdictions,¹²⁶ privilege extends not only to communication from the client but also to communication from the lawyer, irrespective of whether the lawyer's communication reveals anything the client has told him. The logic of privilege is to facilitate the giving and receiving of candid legal advice. While frankness on the part of the client is essential, English law takes the position that the desired end result would still not be achieved unless the lawyer felt equally able to be frank.

The identity or capacity of the parties alone does not dictate whether privilege will apply. Advice privilege does not necessarily extend to all discussions between a lawyer and client, but only to those involving a request for or provision of advice on the law. The decision most frequently cited on this issue is the Court of Appeal's judgment in *Balabel v. Air India*.¹²⁷ While noting that the scope of services provided by attorneys to their clients is, today, much greater than it was in the past and that it would not therefore be appropriate to cloak all dealings with privilege, the Court concluded that privilege was not restricted only to specific requests for advice or responses to the same. Giving judgment for the Court, Taylor L.J. put it as follows:

In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do.' But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will

¹²⁴ Following comments of the ECJ in *Australian Mining & Smelting Europe Ltd. v. EC Comm'n*, [1982] E.C.R. 1575, [21], ¶25, only referring to privilege existing in communications with lawyers admitted in one of the Member States.

¹²⁵ Comments of M. Emil Paulis, Director of DG Competition at the European Commission on the occasion of a "Debate On The Position Under European Law Of The Confidentiality Of Communications With Company Lawyers" at the International Bar Association Conference in Prague, Czech Republic (Sept. 26, 2005).

¹²⁶ See, e.g., cases cited in EPSTEIN, *supra* note 50, 53–56.

¹²⁷ *Balabel v. Air India*, [1988] Ch. 317 (communications with solicitors and their notes and memoranda discussing an underlease were privileged even if they did not include any specific legal advice but only information provided by the client).

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at each stage, whether asked specifically or not, tender appropriate advice.¹²⁸

As such, in English law, advice privilege can extend to communications of information or facts rather than just advice. Further, Taylor L.J. took an expansive view of what constitutes “legal” advice: “Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.”¹²⁹ English lawyers arguably took these statements as a license to claim privilege in virtually all client communications but this view has been challenged in the *Three Rivers* litigation. The issue arose as a by-product of the case referred to above, challenging the claim of privilege for communications between the BIU and other BoE employees.¹³⁰ Counsel for the claimants seeking discovery in that case conceded that the BIU was a client and therefore they could not seek discovery of the communications with the lawyers. The Court of Appeal, though, made a remark in its judgment that put into question the appropriateness of this concession. It expressed the view that advice on how to put factual material before an inquiry in an “orderly and attractive fashion” amounted to presentational advice, not legal advice.¹³¹

Counsel for the claimant then withdrew his concession, and his clients sought discovery of the communications between the BIU and its lawyers. The claimants’ argument, accepted by the first instance court and the Court of Appeal,¹³² was that advice to the BIU on how to present arguments to the Bingham Inquiry was not legal advice because the BIU report could not affect the BoE’s legal rights and liabilities. The BIU might criticize the BoE, but it could not impose fines or award damages.

This approach caused concern in the English profession. Lawyers frequently advise, especially in the field of public and administrative law, on how to present arguments to avoid criticism or influence policy. Looked at narrowly, this advice does not normally concern exposure to litigation or similar actions. It does, however, involve a client’s legal rights, because clients have public law rights to fair and impartial proceedings and to reasonable decision making. These can be enforced by way of a claim for judicial review against the government or other public body.

The House of Lords accepted this argument.¹³³ If the BIU report had been unfairly critical, the BoE could have sued to block the report. Advice on that litigation would have been plainly privileged, so it followed that advice on presentation designed to deflect criticism and avoid the need for such litigation logically ought also be privileged. The approach taken by the House of Lords still

¹²⁸ *Balabel*, [1988] Ch. 317 at 330.

¹²⁹ *Id.*

¹³⁰ *Three Rivers Dist. Council v. Governor and Co. of the Bank of England* (No. 5), [2003] EWCA (Civ) 474, [2003] Q.B. 1556. *See also* n.85–99 and accompanying text.

¹³¹ *Three Rivers* (No. 5), [2003] EWCA (Civ) at [37].

¹³² *Three Rivers* (No. 6), [2004] EWCA (Civ) 218, [2004] Q.B. 916.

¹³³ *Three Rivers* (No. 6), [2004] UKHL at [37].

focuses on the need for advice relating to rights and obligations and thus has not completely allayed fears about narrowing the availability of privilege. On the other hand, the discussion and examples provided by the Lords suggest that English law will continue to be generous in its definition of legal advice.

Closely related to the definition of legal advice lies the issue of whether privilege is restricted to communications or not. Since privilege is ultimately concerned with, and predicated on the desirability of, the giving of legal advice and requests for the same, it is traditionally formulated as applying to communications between attorney and client. Only in a communication can there be a request for advice or provision of it. Once again, though, English law adopts a generous approach. For example, while there exists little direct precedent regarding this approach, it appears that a lawyer's internal memoranda and working papers will be protected routinely by advice privilege.¹³⁴ This contrasts with the U.S. position generally confining such protection, under the work-product doctrine, to documents created in anticipation of litigation unless the documents would tend to reveal the client's confidential communications.¹³⁵ It is unlikely that an English court would confine privilege to documents disclosing the details of client communications. An English court will likely afford a lawyer's papers a broad measure of protection. Similarly, as noted above, English law protects not only the actual communication to the client but also any internal client documents recording or paraphrasing the advice, provided they are kept confidential.¹³⁶

Copies of non-privileged, pre-existing documents may also be privileged in the hands of a lawyer if obtained from a third party rather than the client.¹³⁷ This is quite remarkable as the documents are neither a communication between client and lawyer nor anything prepared in order to obtain legal advice or further litigation. The rule has been the subject of criticism¹³⁸ but has not been overruled.¹³⁹ Its logic was, at least originally, that one party should not be able to free-ride on the other's investigative efforts.¹⁴⁰ The same approach, though, has not been

¹³⁴ The plaintiff's application for discovery included an application for discovery of lawyers' internal memoranda, attendance notes and similar that it does not appear were created in anticipation of litigation. *Balabel v. Air India*, [1988] Ch. 317 (Eng. C.A.). This application was evidently refused but the judgment includes no reasoning specific to this issue. *Balabel*, [1988] Ch. 317.

¹³⁵ See, e.g., *In re Fischel*, 557 F.2d 209, 212–13 (9th Cir. 1977); *Jordan v. Dep't of Justice*, 591 F.2d 753, 775–76 (D.C. Cir. 1978).

¹³⁶ See *supra* notes 100–103 and accompanying text.

¹³⁷ *The Palermo*, [1884] LR 9 P.D. 6 (Eng. C.A.) (solicitors for the owners of one ship in a collision were not required to provide to owners of the other ship copies of depositions taken from crew members by a government-appointed agent) (*followed in* *Watson v. Cammell Laird & Co. (Ship Builders and Engineers) Ltd.*, [1959] 1 W.L.R. 702 (Eng. C.A.)).

¹³⁸ *Ventouris v. Mountain*, [1991] 1 W.L.R. 607, 614 (Eng. C.A.); *Buttes Gas and Oil v. Hammer* (No. 3), [1981] Q.B. 223, 244 (Eng. C.A.); *Lubrizol Corp. v. Esso Petroleum Ltd.*, [1993] FSR 64, 68; *Robert Hitchin Ltd. v. Int'l Computers Ltd.*, [1997] C.L.Y. 467 (Eng. C.A.).

¹³⁹ See, e.g., *Grupo Torras v. Al-Sabah* (Eng. C.A. Feb. 6, 1998) (accepting *The Palermo* still to be binding and ruling that copies of non-privileged documents need not be disclosed).

¹⁴⁰ *The Palermo*, [1884] LR 9 P.D. 6.

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followed regarding original documents in the hands of a lawyer¹⁴¹ or copies of documents now or formerly in the hands of the client.¹⁴²

A more coherent logic for granting privilege is that a lawyer's selection of documents may betray the trend of the legal advice.¹⁴³ The latter has been considered the more valid objection in modern times.¹⁴⁴ The idea of the selection betraying advice has even been applied to selections from a client's own documents,¹⁴⁵ but this has been heavily criticized and probably would not be applied in the future because it could reward a litigant for its own failure to retain documents, and would make documents privileged that otherwise would have been required to be produced.¹⁴⁶

For similar reasons, it has been held not a breach of privilege for an attorney to be required to give evidence as to the identity of a person who happens to be his client. The evidence sought is whether a particular person on trial was the same person who had been tried on a different occasion. While the attorney had knowledge of the previous appearance because he had been there as the legal representative of the person on trial, the evidence sought was not of any communication with the client and would not betray any legal advice. The attorney was simply being asked to give evidence as a witness of fact of what he and any other person at the hearing would have observed.¹⁴⁷ The attorney did not obtain that knowledge in his character as attorney. In the same way, evidence that a person visited an attorney on a particular date has been held not privileged.¹⁴⁸

Another issue that sometimes arises is whether a communication can be privileged where it is made between client and attorney but in the presence of a third party. English law takes the position that privilege cannot exist if the communi-

¹⁴¹ *Ventouris*, 1 W.L.R. at 611–612.

¹⁴² *Dubai Bank v. Galadari*, [1990] Ch. 98, 106–107 (Eng. C.A.) (if a client previously had, or had the right to, the documents and those obtained are therefore replacements for ones which would have been subject to disclosure but for subsequent loss or destruction, then they are not privileged).

¹⁴³ *Lyell v. Kennedy*, (1884) 27 Ch. D. 1, 25–27 (Eng. C.A.) (copies of public records, tombstones and similar obtained by a solicitor for the purposes of defending his client in the instant inheritance litigation were privileged because they would tend to disclose the lawyer's views on the case).

¹⁴⁴ *Ventouris*, 1 W.L.R. at 615–616, 621 (though criticizing the rule on copies generally, recognizing that there could exceptionally be a valid objection if the copies were selected by a lawyer and would disclose the trend of legal advice).

¹⁴⁵ *Dubai Bank (No. 7)*, [1992] 1 W.L.R. at 110.

¹⁴⁶ *Sumitomo Corp. v. Credit Lyonnais Rouse Ltd.*, [2001] EWCA (Civ) 1152, [2002] 1 W.L.R. 479, 497 (Eng. C.A.) (ordering disclosure of translations of a client's own documents notwithstanding that it would show which documents a lawyer thought were important, indicating that *Dubai Bank v. Galadari* was wrongly decided as the same considerations ought to apply to copies from a client's own documents).

¹⁴⁷ *R (on the application of Howe) v. South Durham Magistrates' Court*, [2004] EWHC (Admin) 362, [30], [2005] R.T.R. 55 (D.C.) (defendant charged with driving while disqualified was to be proved to have been previously disqualified by solicitor's evidence on what happened in earlier public court proceedings).

¹⁴⁸ *R v. Crown Court at Manchester, ex parte Rogers*, [1999] 1 W.L.R. 832, 839 (Q.B.) (solicitor ordered to disclose if and when murder accused attended their offices in circumstances where a witness taxi driver said he had taken an unidentified man to the offices with blood on his hands at a time immediately following when the attack was thought to have occurred).

cation is not confidential or has lost its confidential character.¹⁴⁹ Unlike the position taken in U.S. jurisdictions, however, it does not consider confidentiality necessarily to have been lost where the communication takes place in the presence of others. It is not possible to maintain privilege against those others who were present¹⁵⁰ but it can be maintained against the rest of the world so long as all present were subject to obligations of confidentiality, express, or implied.¹⁵¹

D. Outside the Traditional Relationship

The general rule is that privilege can only be claimed by a person who was actually a client in the attorney-client relationship. This may be one person or a number of people where there is a joint retainer. A joint retainer exists where multiple parties retain a single lawyer, or firm of lawyers, to advise them all on the same subject matter. During the retainer, the joint clients pursue the same objectives in relation to the subject matter of the advice. Joint retainers commonly come into existence in property transactions where a single lawyer may act both for mortgagee and purchaser or in litigation where the defendant is indemnified by insurers.¹⁵² In England the insurer and assured often retain the same lawyer.¹⁵³ English professional conduct rules are generally construed by English law firms as not preventing a solicitor from acting, unless an actual conflict of interest exists or the potential for a conflict has risen to a significant level.¹⁵⁴ The public benefit argument thus unfolds: where coverage is accepted, the insurer need pay for only one set of lawyers rather than two and therefore the costs of policy premiums are lessened.

Where a joint retainer exists, all communications between either party and the lawyer are subject to advice privilege in the case of an application by a third party for disclosure from either party. Similarly, communications with third par-

¹⁴⁹ See *Anderson v. Bank of British Columbia*, (1875–1876) LR 2 Ch. D. 644, 649 (Eng. C.A.) (The purpose of privilege is to maintain the confidentiality of the discussion. See further the discussion on waiver at section B5).

¹⁵⁰ *NRG Holdings v. Bacon & Woodrow*, [1995] 2 Lloyd's Rep. 77, 81–82 (Q.B. Comm.) (in suit against non-legal advisers to a transaction, privilege could not be claimed for documents provided to the advisers previously by the lawyers advising on the transaction but could be maintained for other documents not provided to the non-legal advisers).

¹⁵¹ *Gotha City v. Sotheby's*, [1998] 1 W.L.R. 114, 118 (Eng. C.A.). See *infra* note 173 and accompanying text.

¹⁵² PROFESSIONAL CONDUCT GUIDE § 25.01 (2006), <http://www.lawsociety.org.uk/professional/conduct/guideonline/view=index.law> [hereinafter PROFESSIONAL CONDUCT GUIDE]. This is expressly permitted, subject to conditions, by English professional conduct rules: Section 25.01 (also known as Practice Rule 6) of the Professional Conduct Guide of the Law Society of England and Wales. Arguably, there are two separate retainers, because interests of the parties are always opposed in this situation, but there will probably still be a joint retainer at least as regards (some) communications with the vendor.

¹⁵³ See Nigel Jones, Paul Reed & James Watthey, *Commercial and Chancery Bar: Take Cover*, LEGAL WEEK, Sept. 15, 2005, at 7(33), 34, available at <http://www.legalweek.net/ViewItem.asp?id=25560>.

¹⁵⁴ SOLICITORS' PRACTICE (CONFIDENTIALITY AND DISCLOSURE) AMENDMENT RULE 2004 R. 16D(2)(b)(ii), http://www.lawsociety.org.uk/documents/downloads/PE_ConflictRules.pdf (last visited Feb. 22, 2007). In fact, Rule 16D(2)(b)(ii) provides that solicitors should not act where there is an actual conflict of interest or "a significant risk of a conflict." See Conflict Rules in the Professional Conduct Guide,

ties that attract litigation privilege do so for both parties regardless of whether the communications were with the attorney, one of the parties, or both of them. Not only can joint privilege be claimed by each party in all the documents, but where it exists, it cannot be waived by either without the consent of both.¹⁵⁵ Further, where a communication is made within the scope of a joint retainer, neither of the joint clients can maintain privilege against the other.¹⁵⁶ This is so even though the particular communication may have been made between just one of the parties and the lawyer. Indeed, the lawyer probably has a duty to pass on the information to the other client.¹⁵⁷ Significantly, parties that may once have shared the same interests might not do so in the future.

A classic example of this situation arises in the context of indemnity insurance. So long as the insurer intends to honor the policy and provide indemnity, there is an identity of interest between insurer and assured in resisting the third party's claim. If, however, something happens to cause the insurer to believe that it can avoid the policy, then a conflict arises. Once an actual conflict arises, the waiver of privilege between joint clients ceases and can only again take effect if both clients choose to affirm the joint retainer after being fully informed of the conflict.¹⁵⁸ In practice, the question arises whether professional conduct rules could ever permit the joint retainer to continue.¹⁵⁹ Importantly, however, communications generated prior to the actual conflict of interest are not privileged as between the former joint clients. The insurer could use these earlier communications between the assured and the lawyer as evidence in its action to avoid the policy.¹⁶⁰

¹⁵⁵ See, e.g., *In re Konigsberg*, [1989] 1 W.L.R. 1257, 1262–1263 (Ch.) (even if husband had waived joint privilege, wife could maintain it against third parties, but the husband's trustee-in-bankruptcy was to be considered the alter ego of the husband and not a third party).

¹⁵⁶ It is questionable whether or not a separate sole retainer may exist between one of the clients and the lawyer in addition to the joint retainer. Professional conduct rules appear to strongly imply that this would be inappropriate. *But see* *TSB Bank plc v. Robert Irving & Burns*, [2000] P.N.L.R. 384, 390 (Eng. C.A.) (noting without adverse comment the judge's finding that there were simultaneous joint and separate sole retainers).

¹⁵⁷ SOLICITORS' PRACTICE R. 16E; see also Holwill and Ager, *Double Trouble*, *LAWYER*, June 28, 2004, at 18(25), 37, available at <http://www.thelawyer.com/cgi-bin/item.cgi?id=110614>.

¹⁵⁸ *TSB Bank*, [2000] 2 All E.R. at 394–395 (jointly retained solicitors realized that what they were being told by the assured might give the insurer grounds to avoid the policy). Counsel was instructed to cross-examine the assured partly to obtain information for the defense of the underlying dispute but partly also to assess whether the insurer could avoid the policy. *Id.* The assured was unaware of the ulterior motive and was consequently very frank in his answers. *Id.* Held that the insurer could not use the answers given because the actual conflict brought to an end the waiver of privilege between joint clients. *Id.* It was averred that both solicitors and counsel might well have been in breach of professional conduct rules. *Id.*

¹⁵⁹ SOLICITORS' PRACTICE R. 16D(4) (providing that where an actual conflict arises the solicitors should cease acting for both former clients). Under Rule 16D(3)(a)(i) & (ii), a solicitor should not act for clients with conflicting interests even if both clients give informed consent to the arrangement. As noted in *Jones, Reed & Wathley*, *supra* note 153, the evidence is that these rules are not strictly obeyed in practice.

¹⁶⁰ *TSB Bank*, [2000] 2 All E.R. at 394; See *Brown v. Guardian Royal Exch. Assurance plc*, [1994] 2 Lloyd's Rep. 325 (Eng. C.A.) (albeit that the case was decided on the basis of the particular policy provisions rather than general principles).

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Closely related to, but subtly different from,¹⁶¹ the concept of joint privilege is the concept of common-interest privilege.¹⁶² As with joint privilege, common-interest privilege applies whether the source of privilege is advice privilege or litigation privilege.¹⁶³ For common-interest privilege to arise it is not necessary that a single lawyer or firm of lawyers be retained by all concerned or that there be a complete identity of interests regarding the subject matter of the advice. It also represents an exception to the principle that privilege can only be claimed by the client in the attorney-client relationship. If common-interest privilege applies, then privilege can be claimed not only by the client but also by a third-party recipient of the relevant communication.¹⁶⁴ Thus, for example, if one co-defendant obtains advice from his lawyer and passes this to another co-defendant, then the second co-defendant can claim privilege, even though he is separately represented or has no legal representation at all.

One difference between common-interest privilege and joint privilege is that the original recipient of the advice (i.e., the client) does not require the consent of the other party (i.e., the third-party recipient) in order to waive privilege. If the client waives privilege, then the third-party recipient cannot itself claim privilege. On the other hand, the third-party recipient cannot unilaterally waive privilege.¹⁶⁵ There have been various judicial descriptions of the circumstances in which common-interest privilege will apply. In one case, privilege applied where one could liken the relationship between the parties to that of departments in a single company or partners in a partnership.¹⁶⁶ In another, it was said that the test should be whether the parties could have retained the same lawyer to act for both of them.¹⁶⁷ Even this test may be too strict, though. It seems that common-interest privilege may apply wherever different parties share a common goal as to the subject matter of the advice, even though their interests may otherwise diverge.

¹⁶¹ The *Sagheera*, [1997] 1 Lloyd's Rep. 160, 167 (Q.B. Comm.) (noting the difference between joint and common-interest privilege, and that there is no need to rely on common interest if there is a joint retainer of solicitors).

¹⁶² Probably the first case to apply the concept was *Jenkyns v. Bushby*, [1866] LR 2 Eq. 547 (V.C.) (correspondence between defendant's predecessor in title and counsel was privileged in the hands of the defendant because it addressed the same issues as arose in the present litigation).

¹⁶³ *Svenska Handelsbanken v. Sun Alliance* (No. 1), [1995] 2 Lloyd's Rep. 84, 88 (Q.B.) (correspondence transmitting legal advice obtained by the insurer to its reinsurer was privileged in action against the insurer by the insured and it was immaterial whether litigation was in reasonable contemplation or not when the advice was sought).

¹⁶⁴ *Buttes Gas & Oil v. Hammer* (No. 3), [1981] Q.B. 223, 243 (Eng. C.A.) (foreign sovereign, not a party to the action, obtained advice from English solicitors and passed it to plaintiff; plaintiff was entitled to assert privilege). Followed in *Svenska*, [1995] 2 Lloyd's Rep. at 84 (insurer not required to hand over documents provided to it by reinsurer) and *Guinness Peat Properties v. Fitzroy*, [1987] 1 W.L.R. 1027, 1039-44 (Eng. C.A.) (assured not required to hand over documents provided to it by insurer).

¹⁶⁵ *Winterthur Swiss Ins. Co. v. AG (Manchester) Ltd.*, [2006] EWHC (Comm) 839, [133] (insurer could not, alone, waive privilege in correspondence between its insured and solicitors). Although the judgment (erroneously) refers to common-interest privilege as if it were exactly the same as joint privilege, requiring the consent of both parties for waiver, it was the third party recipient who sought to waive privilege without the consent of the original recipient and any suggestion that the insured could not have unilaterally waived privilege is strictly *obiter*.

¹⁶⁶ *Buttes* (No. 3), [1981] Q.B. at 243.

¹⁶⁷ *The Good Luck*, [1992] 2 Lloyds Rep. 540, 542 (Q.B. Comm.).

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For example, a common interest in defeating a plaintiff's claim may exist between co-defendants even though the co-defendants may have claims against each other in the event that the plaintiff's claim succeeds. As courts have noted, the fact that there may be disagreements between parties "does not necessarily entail the conclusion that the parties no longer have a common interest in the proceedings themselves."¹⁶⁸

Where information has been exchanged subject to common-interest privilege the right to claim privilege against the recipient of the information is waived, similar to the privilege between persons who jointly retain a lawyer. Thus, an insurer receiving privileged documents from its assured, in circumstances where each is separately represented, is entitled later to use those documents against the assured.

More controversially, there have been a small number of cases in which common-interest privilege has been used as a "sword" to obtain documents where the party who supposedly shared the common interest declined to provide access voluntarily. In one case, a creditor seeking payment of a debt from a guarantor was required to provide the guarantor with the legal advice it had obtained on negotiations with the debtor.¹⁶⁹ The Court found that the creditor and guarantor shared a common interest in reducing the outstanding debt when dealing with the debtor, and that the existence of this common interest required the parties to share legal advice. In another case, a former party to a joint venture was required to provide the other former joint venturer with legal advice it had obtained on litigation between the joint venture vehicle and a third party.¹⁷⁰ In the most recent case, an "after the event" legal expenses insurer was held entitled to obtain communications between its insureds and their lawyers in connection with negligence claims against the lawyers.¹⁷¹

These cases may be explained on the basis that the relationship between the parties independently gave rise to an obligation to share documents, as well as legal advice, probably as an express or implied term of a contract between them, but this is or should be separate from the consideration of whether or not common-interest privilege exists.¹⁷² If it is enough to obtain access to documents, that common-interest privilege could have arisen had disclosure been made voluntarily, then this could represent a significant incursion into privilege. For example, as noted above, alleged joint tortfeasors can have common interests against a tort victim. However, they may quite reasonably not wish to share

¹⁶⁸ *Svenska*, 2 Lloyd's Rep. at 86-87 (quoting *The World Era* [1993] 1 Lloyd's Rep. 363, 366 (Q.B.)).

¹⁶⁹ *Formica v. Export Credit Guarantee Dep't*, [1995] 1 Lloyd's Rep. 692, 699, 702 (Q.B.).

¹⁷⁰ *CIA Barca v. Wimpey*, [1980] 1 Lloyd's Rep. 598, 615 (Eng. C.A.).

¹⁷¹ *Winterthur Swiss Ins. Co.*, [2006] EWHC at [113]–[117] (the original insurer, NIG, could obtain the documents from its insureds using common-interest privilege but could not have provided them to its assignee bringing the negligence claims, Winterthur, except for contractual waivers in the agreements with the insureds because it alone could not waive the common-interest privilege).

¹⁷² *Commercial Union v. Mander*, [1996] 2 Lloyd's Rep. 640, 648 (Q.B.) (*distinguishing Formica*, [1995] 1 Lloyd's Rep. 692) (reinsurer had right to see insurer's legal advice on negotiations with assured where there was a 'follow the settlements' clause but this arose only from the contract between them so reinsurer could not simultaneously seek the advice and purport to avoid the contract of reinsurance).

documents or to share only limited documents because of the potential liability issues between themselves. It should be up to the parties to decide whether they will share documents and, if so, which ones. The court may find that a broad agreement to share documents was created prior to the litigation as a term of some other contract but it should be slow to find such an agreement outside existing “partnerial” relationships. Logically, a party’s voluntary provision of some documents will not create any entitlement to others.

The importance of common-interest privilege has diminished significantly as a result of the decision in *City of Gotha v. Sotheby’s*.¹⁷³ That decision stands as authority for the proposition that a person may continue to maintain privilege against the rest of the world except for the person to whom he has provided a document, even though there was no common interest between the original claimant of privilege and the person to whom the document was given. As such, it can be seen as abolishing the “common interest” requirement of common-interest privilege. Thus, a party need only establish that the document was provided in circumstances of confidence. Ironically, in *City of Gotha*, there probably was a common interest between the person entitled to privilege and the person provided with the document, but the Court expressly decided that it did not need to make that particular finding.¹⁷⁴ It did not consider any common interest to be necessary in order to sustain the continuing existence of privilege against third parties.

If the existence of common interest still has any significance in English law,¹⁷⁵ it would seem to be slight. Perhaps the recipient without a common interest is unable to assert privilege, but must instead rely on its assertion by the party entitled to privilege. This differs from the position of a recipient entitled to common-interest privilege, but it may be a difference without any practical distinction. As already noted, where common-interest privilege applies, the person originally entitled to privilege can waive the privilege without the consent of the recipient, and thus a recipient will not be able to maintain privilege if the party originally entitled to it opposes his position. One other difference, as explained above, is the possibility that common-interest privilege may be used as a “sword” to obtain access to documents. *City of Gotha* could not be so used.

A written contract between parties exchanging privileged information is not in any way a prerequisite for the recognition of joint privilege, common-interest privilege, or the protection of the *City of Gotha* principle. Nonetheless, it is common and advisable for any parties considering an exchange of privileged material to enter into an agreement. Such an agreement may be termed a joint defense agreement or common-interest privilege agreement. A well-drafted agreement will incorporate the following elements:

¹⁷³ *City of Gotha v. Sotheby’s*, [1998] 1 W.L.R. 114, 118 (Eng. C.A.).

¹⁷⁴ *City of Gotha*, 1 W.L.R. at 118.

¹⁷⁵ It may have considerable significance elsewhere. A party relying on *City of Gotha* in England may be disappointed to find that its transfer of a document is interpreted in foreign proceedings (particularly in the United States) as a waiver of privilege where there would have been no waiver if there had been a common interest.

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- (i) confirmation that all documents and information are exchanged in confidence and for a limited, defined purpose so as to limit any waiver;
- (ii) a clear statement of any common interest in order to establish, but also limit, the extent of common-interest privilege;
- (iii) clarification that the supply of some documents or information gives the recipient no right to demand others not supplied;
- (iv) an obligation to assert privilege over the documents and information supplied; and
- (v) an obligation to immediately notify the supplier of the documents or information if any attempt is made by others to obtain disclosure or if the recipient plans to make disclosure in each case so the supplier can apply for an injunction.

Failure to comply with the obligations in (iv) and (v) is unlikely to affect a court's determination of whether privilege has been lost against third parties, but should give the supplier a contractual claim for damages against the recipient.

The combined effect of joint privilege, common-interest privilege, and the *City of Gotha* principle is to afford broad protection in English law to privileged documents exchanged confidentially between separate corporate entities within the same group. Where a subsidiary obtains legal advice on its own position, it is difficult to see how a parent company would not have a common interest, its own fortunes obviously being affected by the performance of its subsidiary. The same may often be true where a parent or sister company supplies advice it has obtained but, in any event the transfer would be protected by the *City of Gotha* principle.

There is one complication, though, with the assertion of privilege by any corporation: corporate documents will not normally be privileged where a shareholder seeks disclosure in the course of legal proceedings against management. The logic rests on the common interest that shareholders have in the property of the company and the fact that the advice has been or will be paid for out of the common fund.¹⁷⁶ Although the directors will have procured the advice, it will nevertheless be for the common purpose pursued by the shareholders because the directors owe a fiduciary duty to act in the best interests of the company. Privilege will apply, however, even against shareholders, where a document was procured by the company for the purpose of defending itself against hostile litigation by shareholders. The concept of hostile litigation is defined narrowly.¹⁷⁷ A derivative action against management or a minority shareholder's petition to wind-up the company because of unfair prejudice is not considered hostile to the company even though the company is nominally a party to the proceedings. A claim for wrongful dismissal by an employee who also happened to be a shareholder

¹⁷⁶ *Woodhouse v. Woodhouse*, [1914] 30 T.L.R. 559, 590 (C.A.) (cited in *In re Nottingham Forest plc*, [2001] 1 All E.R. 954, 957 (Ch.)).

¹⁷⁷ *W. Dennis & Sons Ltd. v. West Norfolk Farmers' Manure & Chem. Coop. Co. Ltd.*, [1943] Ch. 220, 222–223.

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would be considered hostile to the company.¹⁷⁸ Adopting the same principles, advice obtained by trustees will not normally be privileged from disclosure to the beneficiaries of the trust.

E. Waiver

Waiver, in its narrowest sense, only occurs where a person entitled to privilege chooses to deploy the privileged document or information in the course of legal proceedings. If, for example, a person voluntarily submits the advice of his lawyer as evidence to show that he was acting in good faith, then privilege in the advice is lost. Strictly speaking, the only person who has the right to waive privilege is the client who created the document or for whose benefit the document was procured or produced. English law, though, states that solicitors and counsel acting for a party have ostensible authority to bind their client in any matter arising from, or incidental to, litigation.¹⁷⁹ This includes authority to waive privilege that inures to the benefit of the client. As such, if counsel mistakenly reads a privileged document to the court, privilege is waived even though the client would never willingly have permitted counsel to waive the privilege.¹⁸⁰ Indeed, privilege is waived even if the client has expressly instructed the lawyer not to waive privilege (unless, perhaps, the same had been communicated to the other litigants). In such circumstances, of course, the client might have a good claim for professional negligence.

A privileged communication can be deployed in court in various ways. Obviously, if counsel reads the communication to the court in the course of the trial,¹⁸¹ or cross-examines a witness on it,¹⁸² then it is deployed. It can also be deployed by referencing the contents of the communication in a witness statement, expert's report, or statement of case (or, indeed, in any exhibits attached to these including inter-solicitor correspondence). Although the authorities are not completely clear,¹⁸³ it appears the better view is that waiver does not occur as soon as reference is made in such a document, but only where the document

¹⁷⁸ *In re Hydrosan Ltd.*, [1991] B.C.L.C. 418, 421 (Ch.).

¹⁷⁹ *Great Atlantic Ins. Co. v. Home Ins. Co.*, [1981] 1 W.L.R. 529, 539–40 (Eng. C.A.).

¹⁸⁰ *Great Atlantic*, 1 W.L.R. at 537–40.

¹⁸¹ *Id.* (deciding that the inadvertent disclosure of privileged material could not be undone, the Court attached particular importance to the fact that the document had not only been disclosed in advance but had been mistakenly read to the court by counsel).

¹⁸² *See, e.g., Nea Karteria Marr. Co. Ltd. v. Atlantic and Great Lakes Steamship Corp.* (No. 2), [1981] Com.L.R. 138, 138 (Q.B.).

¹⁸³ *See, In re Konigsberg*, [1989] 1 W.L.R. 1257, 1264 (Ch.), (holding that waiver occurred simply by reference in an affidavit in support of a motion; *Vista Mar. Inc. v. Sesa Goa & Anor*, [1997] C.L.C. 1600, 1602–05 (Q.B.), (stating that privilege was only waived once there was a fixed intention to call the evidence but that this could sometimes arise before the trial itself, on the exchange of witness statements or pre-trial checklists (though not in the particular case) (*citing* *R. v. Sec'y of State for Trans. ex parte Factortame Ltd.*, [1997] C.O.D. 432 (Q.B.)). *See also* *Gen. Accident Fire & Life Assurance Corp. Ltd. v. Tanter (The Zephyr)*, [1984] 1 W.L.R. 100, 103–04 (Q.B.) (taking the view that privilege was waived as soon as one party disclosed the document in advance of trial with a Civil Evidence Act Notice indicating that it intended to use the document at trial).

containing the reference is then used in court,¹⁸⁴ whether at an interlocutory hearing¹⁸⁵ or at trial. If a party realizes its error before that stage, it may possibly avoid waiver by seeking to amend the document in question to delete the reference¹⁸⁶ or by indicating its intention not to rely on it.¹⁸⁷

Waiver has generally not been held to occur by a mere reference to the existence of a document or even to its effect but only by summarizing, quoting from, or otherwise describing its contents. As such, parties have been permitted to say in witness statements or affidavits that they have received advice that supports their position without thereby waiving privilege in the advice.¹⁸⁸ Nonetheless, it is a fine distinction, and one on which it would be unwise to rely. Waiver also occurs by implication in any proceedings by a client against its former lawyers because the very proceedings themselves put in issue the content of advice provided.¹⁸⁹ The waiver is limited, however, to matters relevant to the dispute in question and does not extend to communications between the dissatisfied client and its new lawyers.¹⁹⁰

Where waiver does occur, it is not necessarily restricted to the material that has already been disclosed but can often extend to other parts of the same document or communication, and sometimes to other documents or communications on the same subject matter. The logic behind this prevents “cherry picking” or misleading of the court, as was explained in one case:

Where a party deploys in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.¹⁹¹

¹⁸⁴ *Balkanbank v. Taher*, (Q.B. Comm. January 27, 1994) (unreported) (rejecting the plaintiffs’ argument that the mere service of witness statements amounted to the deployment of privileged material in court waiving privilege not only in what was included in the statements but in associated documents).

¹⁸⁵ *See, e.g., Derby & Co. Ltd. v. Weldon* (No. 10), [1991] 1 W.L.R. 660, 667–68 (Ch.) (finding that use of document in application for ex parte interlocutory injunction was a waiver of privilege altogether); *Dunlop Slazenger Int’l v. Joe Bloggs Sports Ltd.*, [2003] EWCA (Civ) 901, (A.C.), [2003] All E.R. 137(D) (holding that a reference to a draft expert’s report in a witness statement during interlocutory proceedings waived privilege in the draft report); this may also be the better reading of *In re Konigsberg*, [1989] 1 W.L.R. at 1261, as it appears that the affidavit had already been set before the court in an interlocutory hearing.

¹⁸⁶ *Vista Maritime*, [1997] C.L.C. at 1602.

¹⁸⁷ *Factortame*, 9 Admin. L.R. at 591.

¹⁸⁸ *Marubeni Corp v. Alafouzos*, [1988] C.L.Y. 2841 (Eng. C.A.); *Tate & Lyle v. Gov’t Trading Corp.*, (1984) 81 L.S.G. 3341 (C.A.).

¹⁸⁹ *See, e.g., Lillicrap v. Nalder & Son*, [1993] 1 W.L.R. 94 (Eng. C.A.) (proposing that waiver does not occur only in professional negligence proceedings).

¹⁹⁰ *Paragon Fin. Plc. v. Freshfields*, [1999] 1 W.L.R. 1183, 1188 (C.A.).

¹⁹¹ *Nea Karteria Mar. Co.*, [1981] Com. L.R. 138.

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The question in each case will be whether the document or part of a document in which privilege has been waived is properly severable from the remainder, or whether fairness requires disclosure.¹⁹²

Reference to the content of privileged communications outside the context of legal proceedings is not strictly considered waiver of privilege, though it is often so described. It can, and frequently does, result in the loss of privilege because privilege can only exist where communications continue to remain confidential. The loss of privilege in these circumstances is probably limited to loss of privilege in information actually disclosed rather than loss of privilege in the whole communication or connected matters, because the same fairness issues as discussed above do not exist.¹⁹³ As already noted, English law, unlike U.S. law, allows a partial loss of confidentiality without privilege being lost as against the rest of the world.¹⁹⁴ It also allows disclosure and loss of privilege for certain limited purposes without privilege, thereby being lost for the use of the document for other purposes.¹⁹⁵

Obviously, privileged documents can lose their confidentiality as the result of voluntary and intentional disclosures. More common, however, disclosure occurs inadvertently either through the carelessness of lawyers or the misdeeds of others. English law does not have a “fruit of the poisoned tree” doctrine in civil litigation; therefore, in principle, evidence is admissible even if it has been illegally or unethically obtained. In theory, at least, a person could steal privileged documents from opposing counsel’s table in the courtroom and be able to present them in evidence. However, it is often possible to obtain an injunction to prevent use of privileged material.¹⁹⁶

An injunction will ordinarily be available where inspection has been obtained by fraud or where the person inspecting the document should have realized that he had only been permitted to see the document by reason of an obvious mistake.¹⁹⁷ The English civil procedure rules were amended in 1999 to specifically

¹⁹² See *Factortame*, 9 Admin. L.R. 591; see also *Great Atlantic Ins. Co. v. Home Ins. Co.*, [1981] 1 W.L.R. 529, 536–40 (Eng. C.A.) (finding that the two paragraphs disclosed needed to be read in the context of the rest of the document thus privilege as to the whole document was waived); *GE Capital Corp. Fin. Group Ltd. v. Bankers Trust Co.*, [1995] 1 W.L.R. 172, 173–76 (C.A.) (holding that document would not otherwise have been privileged but paragraphs repeating legal advice were privileged and had been redacted and thus it was immaterial whether they related to the same or different subject matter).

¹⁹³ Query, however, what the position would be if a party entitled to privilege disclosed part of a privileged document outside legal proceedings, thereby losing privilege in that part, and then sought to rely on that part alone in legal proceedings? It is suggested that the court would be inclined to approach it as a question of waiver and to order disclosure of the whole document.

¹⁹⁴ *Gotha City v. Sotheby’s*, [1998] 1 W.L.R. 114, 118 (Eng. C.A.).

¹⁹⁵ See *Warner Lambert Co. v. Glaxo Labs. Ltd.*, [1975] R.P.C. 354 (C.A.) (plaintiff held to undertaking to only use for limited purposes); *Oxford Gene Tech. Ltd. v. Affymetrix Inc.* (No. 2), [2001] 18 R.P.C. 310, 316, 319 (C.A.); *Bourns Inc. v. Raychem Corp.* (No. 3), [1999] 3 All E.R. 154 (C.A.) (waiver limited to costs proceedings only); *British Coal Corp. v. Dennis Rye Ltd.* (No. 2), [1988] 1 W.L.R. 1113, 1120, 1122 (C.A.) (privilege waived for use only in criminal proceedings).

¹⁹⁶ *Lord Ashburton v. Pape*, [1913] 2 Ch. 469, 473–74 (Eng. C.A.) (finding that a copy of a privileged document obtained illegally would be admissible at trial but could be enjoined if the party entitled to the privilege sought an injunction before the document was put in evidence).

¹⁹⁷ *Guinness Peat Props. Ltd. v. Fitzroy Robinson P’ship*, [1987] 1 W.L.R. 1027, 1045–46 (C.A.).

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provide that an inadvertently disclosed, privileged document may not be used except with the permission of the court.¹⁹⁸ Subsequent cases have confirmed, however, that the test remains the same: permission will be granted if it was not an obvious mistake.¹⁹⁹

The grant of any injunction lies within the equitable discretion of the court and it seems that an injunction to restrain the use of privileged material may be refused for all the same reasons that other injunctions might be refused. Thus, for example, delay or laches may prevent grant of an injunction as will unclean hands on the part of the person seeking an injunction. An injunction was refused for this reason where it was shown that the privileged material contained evidence that the court had been misled.²⁰⁰

Arguably, defenses to a claim of breach of confidence will be grounds for refusal of an injunction. The right to restrain use of privileged material only arises because it is a breach of confidence. If no breach of confidence occurs, then there should be no injunction. Significantly, English law has come to recognize a public interest exception to confidentiality whereby the court must weigh the public interest in disclosure against the public interest in continued confidentiality.²⁰¹ The traditional reasons for recognizing privilege would undoubtedly weigh heavily on the one side of the balance, but there might be exceptional circumstances in which it could be outweighed.

Such exceptional circumstance might arise, perhaps, if a party demonstrated that Parliament had been misled as to the content of legal advice provided to the government. This contention was made recently in relation to the advice received by the UK government from the Attorney General on the legality of war with Iraq. The government repeatedly refused to provide to Parliament the full content of the advice received, providing only a summary. Eventually, a fuller version of the advice was leaked to the press. The government did not take legal action. If however it had, interesting issues may have arisen. The advice would certainly seem to have been privileged when given but there might have been some forceful public interest arguments against granting an injunction to restrain breach of confidentiality. A subsequent decision by the Information Commissioner accepted just such an argument, but in an admittedly different legal context.²⁰²

¹⁹⁸ Civil Procedure Rules, 1988, S.I. 1998/3121, Rule 31.20 (U.K.).

¹⁹⁹ *Breeze v. John Stacey & Sons Ltd.*, [2000] C.P. Rep. 77 (Eng. C.A.); *Al Fayed v. Comm'r of Police of the Metropolis*, [2002] EWCA (Civ) 780, (2002) 99 (30) L.S.G. 39 (Eng. C.A.) (applying the same approach to inadvertent disclosure of documents covered by public interest immunity).

²⁰⁰ *Istil Group Inc. v. Zahoor*, [2003] EWHC 165, [112], [2003] 2 All E.R. 252 (Ch.).

²⁰¹ *London Reg'l Transp. v. Mayor of London*, [2001] EWCA (Civ) 1491, [53]–[62], [2003] EMLR 488, 103–106 (C.A.).

²⁰² See INFORMATION COMMISSIONER'S OFFICE, FREEDOM OF INFORMATION ACT 2000: ENFORCEMENT NOTICE, 2006, May 22, 2006, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/full_transcript_of_enforcement_notice_220506.pdf, (last visited Feb. 23, 2007) (ordering further disclosure under the Freedom of Information Act 2000 because the public interest in disclosure outweighed the public interest in maintaining legal professional privilege in the exceptional circumstances of the case, but noting that the Act had envisaged this possibility in creating a qualified rather than absolute exemption for privileged documents).

IV. Practice Pointers

This section draws together the preceding discussion to distill from it some points of practical application for attorneys involved in cross-border transactions or litigation touching on England. The first part is directed at those who are or may later become involved in litigation in England. The second is for those American attorneys with an English client or opponent involved in U.S. litigation.

A. Application to English Proceedings

English litigators have long been aware of the opportunities that exist to use U.S. discovery procedures in support of domestic proceedings.²⁰³ The opportunities for American litigators to use English procedures in support of U.S. proceedings are much more limited. First, it must be appreciated that English disclosure²⁰⁴ is much more narrow than U.S. discovery. “Standard disclosure” requires only the disclosure of documents that support or detract from the pleaded claims and defenses.²⁰⁵ If a document does neither, it does not have to be disclosed even if it might lead a litigant to other material that could be responsive. Further, depositions and interrogatories are now virtually unheard of in domestic proceedings. Second, English procedural law is now generally adverse to requests for disclosure from persons who are not parties to existing litigation. Unless a litigant can take advantage of certain specialist procedures,²⁰⁶ disclosure is only ordered against non-parties where it is shown that documents meeting the “standard disclosure” test are likely to be discovered and “disclosure is necessary in order to dispose fairly of the claim or to save costs.”²⁰⁷ Non-party disclosure is not available pre-action.²⁰⁸ Third, a party can obtain disclosure from an English court in support of foreign proceedings,²⁰⁹ but assistance will be refused if the request is in terms that are unduly broad by English standards.²¹⁰

In any English court, whether privilege exists in a document depends on English law even if the document was created overseas.²¹¹ Privilege is considered to be a procedural matter determined by the *lex fori* rather than the *lex causae*. An English court will not oblige a litigant involved in foreign proceedings who is resident in England to produce documentation pursuant to letters rogatory issued by the foreign court where such documentation is susceptible to a claim for legal

²⁰³ 28 U.S.C.A. § 1782 (2006).

²⁰⁴ Civil Procedure Rules, 1988, S.I. 1998/3121, Rule 31.1 (U.K.). “Discovery” was renamed “disclosure” in 1998 when new procedural rules were adopted.

²⁰⁵ Civil Procedure Rule 31.6.

²⁰⁶ *E.g.*, *Norwich Pharmacal Co. v. Customs & Excise Comm’r*, [1974] A.C. 133 (H.L.) (appeal taken from C.A.), (finding the “Norwich Pharmacal Orders,” which are invaluable in the case of alleged frauds but also available in other actions).

²⁰⁷ Civil Procedure Rule 31.17.

²⁰⁸ *Id.*

²⁰⁹ Evidence (Proceedings in Other Jurisdictions) Act, 1975, Eliz. 2, c. 34, §6.

²¹⁰ *E.g.*, *Smith v. Phillip Morris Co. Inc.*, [2006] EWHC 916 (Q.B.), [2006] All E.R. 261 (D).

²¹¹ CHARLES HOLLANDER, DOCUMENTARY EVIDENCE 194 (Sweet & Maxwell, 8th ed. 2003).

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professional privilege under the English rules. This will be the case even if the documents would not be privileged under the foreign law or if the foreign court does not recognize the concept of legal professional privilege.²¹² Similarly, any foreign party engaged in litigation in England will need to assess what is or is not privileged by reference to English rather than foreign rules. Ordinarily, this should result in few problems for Americans because, as apparent from the above discussion, English law is generally more generous than U.S. law on privilege issues. There are, however, certain issues to bear in mind if involved in English litigation.

First, English law does not recognize any privilege for professionals other than lawyers. There is no psychotherapist-patient privilege,²¹³ nor privilege for communications with clergy.²¹⁴ Second, the work-product doctrine may already be broader than litigation privilege in some limited respects. For example, while the position is disputed in English law and certainly no more extensive than selections from third-party documents, any compilation and selection of documents by counsel in the U.S. can be subject to work-product protection if it genuinely would reveal counsel's thought processes.²¹⁵ Further, as noted, the scope of litigation privilege may shrink in the future.

Third, a corporate employee meeting the U.S. control group test might not meet the definition of a client for the purposes of English law. It would be sensible to assume a restrictive definition of the client until the English position is clarified. Fourth, American attorneys should be careful not to disclose more than is required. A broad definition of privilege should be assumed in flagging up documents to English lawyers. In particular, identify (i) any documents that went to or from any legal professional even if widely circulated; (ii) any documents prepared with an eye to possible future litigation even if also prepared for other reasons; and (iii) any documents quoting or summarizing legal advice, even if no lawyer was party to the particular communication. While these documents would probably fail the U.S. tests for privilege, they will often be privileged in English proceedings.

Fifth, all disclosed documents should be screened carefully. With rare exceptions, disclosure in English cases is normally measured in hundreds or thousands of pages rather than hundreds of thousands. Perhaps because of this, English courts are less forgiving of inadvertent disclosure and may render it impossible to undo if there was impropriety or the error should have been obvious. Finally, if a document is privileged in the United States or is highly confidential though not privileged, then it may be worth resisting English disclosure even if English priv-

²¹² COLIN PASSMORE, *supra* note 123, at 22.

²¹³ *Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996).

²¹⁴ Recognized in most states and a few federal decisions. JOSEPH McLAUGHLIN, WEINSTEIN'S FEDERAL EVIDENCE § 506.03 (2d ed. 2006).

²¹⁵ *Sporck v. Peil*, 759 F.2d 312, 315–316 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985) (holding that identification of selected documents would reveal defense counsel's selection process, and thus counsel's mental impressions); *Flaherty v. Seroussi*, 209 F.R.D. 300, 307 (N.D.N.Y. 2002) (ruling that newspaper articles gathered by plaintiff's counsel were privileged because disclosure might reveal litigation strategy).

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ilege does not apply. English judges do have a discretion (albeit quite rarely exercised) to not require disclosure even though privilege is inapplicable.

B. Application to U.S. Proceedings

If a party to U.S. proceedings has documents in England, then plainly it is not necessary to go to English courts to get the documents. The U.S. judge can make the necessary discovery order, and the litigant will undoubtedly face sanctions if it fails to comply. English clients should have it drawn to their attention that discovery sanctions in U.S. proceedings can be particularly harsh, extending as far as striking the party's pleadings.²¹⁶ Although proceedings for contempt of court can theoretically be brought in English proceedings for a failure to comply fully with disclosure, they are not at all common. Sanctions of any type are quite rare.

U.S. courts will, by and large, apply the law of the forum to determine whether or not privilege applies. The possible exception is whether any relevant person is to be considered an attorney. There is little consistency in how different U.S. courts approach this question.²¹⁷ The majority of cases to consider the issue have done so in the context of communications with foreign patent agents. Some courts have applied relevant foreign laws to ascertain whether a patent agent would have any right to legal professional privilege in his home country; others have applied U.S. laws or taken a strict, bright-line approach of never extending privilege to foreign patent agents.²¹⁸ However, even when U.S. courts have looked to foreign law to determine whether there would be a privilege under the foreign law, they nevertheless appear to limit the extent of any privilege granted in the U.S. proceedings to that which would be available had the communication been made between a U.S. attorney and client.²¹⁹

With this in mind, a number of practical issues arise that require consideration. For example, dealing with one's own English client or challenging an opponent's disclosure. First, has the English party provided a complete list or set of allegedly privileged documents? Unlike in the United States, there is no routine practice of preparing privilege logs in England. Claims to privilege are often asserted in amorphous or omnibus terms so as to give no indication even as to the number of documents in question, let alone the dates of them or between whom they were communicated. A typical list of privileged documents filed in English proceedings might simply state:

Documents of a confidential nature for the purpose of obtaining legal advice passing between the Claimant and its solicitors and counsel; mem-

²¹⁶ See, e.g., FED. R. CIV. P. 37(c)(1).

²¹⁷ James N. Willi, *Proposal for a Uniform Federal Common Law of Attorney-Client Privilege for Communications with U.S. and Foreign Patent Practitioners*, 13 TEX. INTELL. PROP. L.J. 279, 283 (2005); see also, Daiske Yoshida, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 FORDHAM L. REV. 209, 210 (1997).

²¹⁸ Yoshida, *supra* note 217, at 210.

²¹⁹ *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 536 (D. Ill. 2000) (quoting *Adver. to Women, Inc. v. Gianni Versace S.p.A.*, 1999 U.S. Dist. LEXIS 12263, (N.D. Ill. 1999)).

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oranda and notes made by the Claimant of such communications; confidential communications since action contemplated or pending between the Claimant and third parties for the purpose of obtaining or furnishing information for evidence in this action; documents made or procured by the Claimant's solicitors or agents or counsel for the purpose of this action, including but not limited to statements, drafts and advice; instructions to counsel, counsel's memoranda, advices and reports; statements of the Claimant's witnesses; drafts and copies of the above documents.

While one would hope that an English client or solicitor would forward all privileged documents to its American attorney, there may be a tendency not to provide the more obviously privileged documents where they are not individually listed.

Second, have any of the allegedly privileged documents been forwarded to (or, indeed, originated from) non-control group employees or outside the client, other than to persons with a common interest? U.S. courts are likely to regard it as irrelevant that this has not led to the loss of privilege in the overseas jurisdiction. They have, and probably will, deny privilege in these circumstances.²²⁰ Similarly, voluntary disclosure of documents to foreign governmental authorities, such as in antitrust investigations, will vitiate privilege in U.S. proceedings even if the disclosure was made strictly on condition that the documents be kept confidential by the authority.²²¹ Third, are claims to privilege being maintained in respect of documents that, properly understood, only come within the work-product doctrine? English clients and lawyers may not draw the distinction, but it could be important given the different scope of litigation privilege and the work-product doctrine, and also given the opportunities to invade the work-product doctrine that do not exist in English law.

In the non-contentious context, before any U.S. hostilities have broken out, the key advice for an American lawyer to provide to an English client is the same as that which is commonly given by English lawyers. Namely:

Minimize the creation of sensitive documents, even if it is assumed they will be privileged;

Be careful about what is said in documents, even if assumed to be privileged; and

Limit the distribution of privileged documents as far as possible.

While in English law the failure to abide by the advice on distribution may not be fatal, the American lawyer should make it clear that it may have more serious implications if there is ever U.S. litigation.

²²⁰ *Smithkline Beecham Corp.*, 193 F.R.D. at 538.

²²¹ *In re Vitamins Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490 (D.C. Dist. 2002).

V. Conclusion

The discussion in this article makes clear that the English law of privilege is applied more generously in many respects than are the equivalent laws in the United States. Probably the most significant difference lies in the consequences that flow from a disclosure of privileged documents to persons other than the original recipients. While U.S. law takes a strict view, finding waiver to have occurred where disclosures are made to other employees of the client corporation if not strictly necessary, English law is much more liberal. If privilege has already attached, then it is unlikely to be lost as against the rest of the world by disclosure to anyone, provided it occurs in confidence and such confidentiality is maintained.

Litigation privilege is another area in which significant differences arise. If, in England, a lawyer takes a statement from a witness of fact, then that statement is privileged unless and until the lawyer's client decides to deploy it in the litigation. A court will not remove that privilege even if the adversary is unable to obtain a statement from the same witness, perhaps because the person has died or cannot be located. Similarly, privilege may apply more readily to internal or other factual investigations. In fact, despite the recent flurry of appellate court decisions on privilege issues, it is relatively uncommon today for claims of legal privilege to be challenged in English litigation. Discovery is much less extensive (and less expensive) and tends to be pursued less antagonistically.

All this has significance whenever a matter has both a U.S. and English dimension. English lawyers are generally aware of the greater discovery burden in the United States but will not necessarily know of the different approaches to privilege. Similarly, American lawyers may not think to warn their English counterparts, or clients, about the issues. There is clearly a danger that English clients or lawyers may inadvertently waive U.S. privileges by doing what is permissible under English law but not in the United States. Similarly, privileged documents may be created in England which will not be privileged in the U.S. .

At the same time, it would be unwise for anyone, American or otherwise, to be complacent about what falls within English privilege. Although it is seemingly broad, and broader than the U.S. concept, privilege has been a hot topic in England for the last few years and there has been something of a backlash against it. With the law being less developed than in the United States, in some respects, there is scope for continued reform and the availability of legal professional privilege may narrow. Indeed, the U.S. litigation experience may well have an impact on that process. Although the English and U.S. legal systems are quite different in some respects, some "cross-pollination" does still occur. What a bad sentence can't we end with something better?
