New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
An ALM Publication
White-Collar Crime
WWW.NYLJ.COM
VOLUME 257—NO. 19
MONDAY, JANUARY 30, 2017

Recent U.K. Decision **Jeopardizes U.S. Privilege** Assertions For **Witness Interviews**

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While U.K. prosecutors' ongoing challenge to the assertion of privilege in the corporate investigations context is hardly breaking news, the U.K. courts' attack on it is. In 2014, the U.K.'s Serious Fraud Office (SFO) issued its Deferred Prosecution Agreement Code of Practice, which measures a company's cooperation by its willingness to disclose witness accounts and other documents developed during an internal investigation. The SFO followed up by cautioning companies not to claim privilege over records created during an internal investigation, with its head vowing to "bring to heel" companies "whose lawyers obstruct[] investigations by hiding behind the shield of legal professional privilege." Recently, U.K. courts have joined the fray, placing limits on privilege law that have troubling implications for protecting the communications of lawyers—including U.S. lawyers—conducting internal investigations in the U.K. and elsewhere.

On Dec. 8, 2016, the English High Court's decision in *In re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), concluded that the English legal advice privilege does not extend to notes, transcripts, or records of interviews (interview notes) between a company's lawyers conducting an internal investigation and most of its current and former employees.

To understand the decision and its future application, it is necessary to quickly review the basics of U.K. privilege, which differs from its American cousin. English law distinguishes between two types of privilege: Legal advice privilege applies to written or oral communications between a lawyer and client created for the purpose of giving or receiving legal advice; litigation privilege provides broader protections to communications between a lawyer and either her clients or a third party, as long as they are created for the dominant purpose of preparing for litigation, and the litigation is either in existence or "in contemplation." Thus, whether legal advice privilege or litigation privilege applies depends on whether an

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investigation takes place in contemplation of litigation, which is typically driven by whether the situation is adversarial. If the investigation is purely administrative or fact-finding, it is not for litigation purposes. Conversely, when the investigation is for purposes of defending claims that are genuinely anticipated, the litigation privilege would apply. As to timing, the English courts have held that litigation is "in contemplation" when the party claiming privilege can show that there is a real likelihood—and not a mere possibility—of the start of litigation. See *USA v. Philip Morris and British American Tobacco (Investments)* [2001] 1 CLC 811.

In *RBS*, the parties conceded that the internal investigations at issue occurred before litigation was in contemplation. As a result, the litigation privilege did not apply. The court thus squarely addressed whether the legal advice privilege applies to information provided by corporate employees to lawyers—including U.S. outside counsel—or non-lawyer personnel at the direction of a lawyer, in the context of an internal investigation where litigation is not yet in contemplation.

In finding that the privilege did not apply, the court reasoned that the "client" consists exclusively of those employees who are authorized to seek and receive legal advice on the company's behalf. One way the courts determine whether an employee qualifies as the "client" is by looking to who has express corporate authorization to provide instructions to counsel, which tends to be those individuals who are "directing the mind and will" of the company (covered employees). The court's narrow interpretation of the "client" solidified and extended the holding in a widely-criticized 2003 decision of the Court of Appeal, *Three Rivers District Council v. Governor and Company of the Bank of England* (No 5) [2003] QB 1556, to firmly exclude most employee communications with outside counsel from protection.

En route to this conclusion, the court rejected RBS's alternative arguments: one claiming a work product-like protection; the other seeking to apply U.S. privilege law to the interview notes because of the close connection to the United States (the communications were not only with U.S. lawyers, but the engagement commenced in the United States). As to the first argument, the court found that the interview notes did not constitute lawyers' "working papers" because they did not contain sufficient indications about the legal advice provided. In this regard, the court rejected RBS's submission that the interview notes were not merely transcripts of interviews, but reflected the lawyers' mental impressions, finding that RBS failed to adduce any evidence that the interview notes contained substantive legal analysis or contained any attribute revealing the "trend of legal advice" that was being given (despite claims to the contrary in the notes' introductory language).

In rejecting RBS's plea to apply U.S. privilege law, the court applied lex fori—the law of the place where the action is filed—noting it to be the choice of law rule for privilege since the 19th century. As a result, not only are communications that take place in the U.K. now in jeopardy, but so are communications between lawyers and non-covered employees in cases litigated in the U.K., regardless of where the communication took place.

RBS's U.S. Implications

The *RBS* decision has important implications for U.S. lawyers conducting internal investigations in the U.K. or where the notes of the investigation could become the subject of U.K. litigation. When planning for such an investigation, counsel should be aware that if interviews are conducted before litigation is "in contemplation" with anyone other than covered employees, the interview notes will not be privileged, and thus could be subject to disclosure.

And the effects are not limited to actions challenging the assertion of privilege in the U.K. When resolving conflicts of law for purposes of privilege, most U.S. courts apply the "touch base" test: communications which "touch base" with the United States will be governed by U.S. privilege law, while communications which "relate[] to matters solely involving" a foreign jurisdiction will be governed by the applicable foreign law. *Golden Trade, S.R.L. v. Lee Apparel*, 143 F.R.D.

Whether legal advice privilege or litigation privilege applies depends on whether an investigation takes place in contemplation of litigation, which is typically driven by whether the situation is adversarial.

514, 518-19 (S.D.N.Y. 1992). When the communications take place in a foreign country or involve foreign attorneys or proceedings, courts apply the law of the country with the "predominant or the most direct and compelling interest" in whether the communications are privileged. See *Veleron Holding, B.V. v. BNP Paribas SA*, 2014 WL 4184806, at *4 (S.D.N.Y. Aug. 22, 2014). Courts decide which jurisdiction has such an interest by considering the place where the allegedly privileged relationship was entered or where that relationship was centered at the time of the communication, and whether applying foreign law would be inconsistent with important U.S. federal policies. Id. (citation omitted).

Under the direct and compelling interest test, a U.S. court may find that English privilege law should be applied to determine the privilege status of documents created in an internal investigation in the U.K. Thus, not only litigation in the U.K. risks the disclosure of interview notes with non-managerial employees before litigation is contemplated, but proceedings in U.S. courts do as well.

Best Precautions After 'RBS'

To best protect communications, in-house lawyers, outside counsel, and corporate personnel acting on behalf of counsel should, from the outset of the investigation, take a number of precautionary measures prior to gathering information. First, counsel should determine who the "client" is—i.e., which employees are authorized to seek and receive legal advice, and thus which communications will be privileged. To the extent that communications with non-covered employees are necessary to conduct the investigation, the information discussed in those interviews could be subject to disclosure. The notes should thus genuinely reflect both the statements in the interview and the lawyer's own mental impressions recorded for the purpose of providing advice to the client—not just in boilerplate preambles—to ensure that they will be judged lawyers' "working papers."

With an eye on the U.S. courts, it is also important to consider creating a record that the communications are in contemplation of U.S. litigation. U.S. courts generally find that communications which relate to U.S. legal proceedings, or reflect advice concerning American law, "touch base" with the United States and are thus governed by U.S. privilege law, even if they were created abroad or involved foreign proceedings. See *Gucci Am. v. Guess?*, 271 F.R.D. 58, 65 (S.D.N.Y. 2010). Thus, a document created in the U.K. for the purpose of giving legal advice in relation to a U.S.-based investigation or litigation, such as a response to a U.S. subpoena, should expressly state that it relates to the U.S. matter. See *Wultz v. Bank of China*, 979 F. Supp. 2d 479, 492 (S.D.N.Y. 2013) (applying U.S. privilege law to documents located in China containing communications with Chinese in-house counsel to the extent the documents were created after a demand letter was issued in U.S. litigation and pertained to the subject of the U.S. suit).

The Path Ahead

The *RBS* decision extended prior rulings and clarified the limited scope of the legal advice privilege in the context of internal investigations. After issuing its decision in *RBS*, the court granted RBS a "leapfrog" certificate to appeal directly to the U.K. Supreme Court, which has discretion to hear the appeal. If the Supreme Court decides to hear the case, which U.K. commentators consider likely, it will have occasion to reconsider the *RBS* holding. While the decision's binding effects will be determined by the Supreme Court, unless and until the Supreme Court reevaluates the holding, U.S. lawyers conducting internal investigations should plan accordingly to protect their communications from compelled disclosure.