English law

'... a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence ... It is a fundamental condition on which the administration of justice as a whole rests...' (R v Derby Magistrates, ex p B [1996] 1 AC 487). This applies equally to both legal advice privilege and litigation privilege.

Under English law there are two types of legal professional privilege: (i) legal advice privilege; and (ii) litigation privilege. Legal advice privilege protects confidential written or oral communications between a lawyer and a client for the purpose of giving or receiving legal advice. It does not protect communications with third parties (such as non-legal advisers). Litigation privilege protects communications between client or lawyer (on the one hand) and third parties (on the other), or other documents created by or on behalf of the client or his lawyer, which come into existence once litigation is in contemplation or has commenced for the dominant purpose of use in the litigation.

Key similarities and differences between English and US law on privilege

Privilege is a fundamental right under both US and English law, but US work product protection is not always absolute.

There are two main types of privilege protection under US and English law. Broadly, these protect communications between lawyer and client (attorney-client privilege/legal advice privilege) and documents prepared for litigation (work product protection/litigation privilege). There are strict rules for when each of these types of privilege apply

The

US* law

'The purpose of the attorney-client privilege is 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' (Upjohn Co. v United States, 449 US 383, 389 (1981)). This applies to attorney-client privilege but the protection provided by the work product doctrine is not always absolute.

US law has two types of legal professional privilege: (i) attorney-client privilege; and (ii) work product protection. The attorney-client privilege generally protects communications between in-house or external counsel and their clients that are (i) intended to be confidential and (ii) made for the purpose of seeking or obtaining legal assistance or advice. It can also cover communications with third parties (such as non-legal advisers) if the purpose of the communication is to facilitate the rendering of legal service by the attorney. The work product doctrine, which comprises 'fact' work product and 'opinion' work product, typically protects documents prepared by attorney, client or any third party so long as they were prepared in anticipation of litigation or for trial.

In the case of corporate mandates, any employee can be part of the corporate client group as long as flour conditions are met; (1) the communication is authorized by company superiors; (2) the employee was aware that the communication related to legal advice; (3) the communication concerns information which cannot be obtained from more senior employees, and (4) the communication relates to the employee's dation. Communications temployees and employees who are not part of the corporate client group may only be printinged where the work product doctrine applies—i.e. where the communication or disconnect was prepared in anticipation of higgsion or for this.

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