"Taming" Legal Privileges: An Analysis of the U.S. and Italian Law

Riccardo Loschi*

Abstract: Legal privilege guarantees that clients can frankly and openly communicate with their attorneys without running the risk that confidential information is disclosed and used against them. Knowing how to preserve and exercise privilege rights in different jurisdictions is of utmost importance for companies and professionals, especially if operating globally. As demonstrated by recent scandals in the United States and judgments in the European Union, complex privilege issues arise very frequently both in litigation and in the day-to-day business. While legal privilege is recognized in almost every jurisdiction, civil and common law jurisdictions approach and regulate privilege in significantly different ways. This paper compares the legal framework of the United States and Italy through the analysis of case law and decisions. The purpose of this work is twofold: on one hand, to highlight differences and similarities in the U.S. and Italian legal privilege regulation, with a focus on the corporate and cross-border context; on the other, to investigate the different assumptions underlying privilege doctrines, and improve the management of privilege issues in practice.

Keywords: Legal professional privilege; *segreto professionale*; comparative law; United States; Italy.

Table of contents: 1. Introduction. – 2. Scope and Purpose of U.S. and Italian Legal Privilege. – 2.1. The U.S. Legal Framework. – 2.1.1. Attorney-Client Privilege. – 2.1.2. Work Product Doctrine. – 2.2. The Italian Legal Framework. – 2.2.1. Criminal and Deontological Provisions. – 2.2.2. Privilege and Evidence in Italian Civil Litigation. – 3. Legal Privilege and Companies. – 3.1. In-house Counsels and Employees in the United States. – 3.2. In-house Counsels and Employees in Italy. – 4. Waiver of Legal Privilege. – 4.1. Waiver of Privileges in the United States. – 4.1.1. Accidental Disclosure. – 4.1.2. Purposeful Disclosure. – 4.1.3. Common Interest Privilege. – 4.2. Waiver of Privilege in Italy. – 5. The Interstate and Cross-Border Context. – 5.1. United States. – 5.2. Italy. – 6. Concluding Remarks.

1. *Introduction*

Legal privilege guarantees that clients can frankly and openly communicate with their attorneys without running the risk that confidential information is disclosed and used against them. Recent scandals involving politicians and their attorneys[1], as well as rulings of the European Court of Justice (ECJ) on corporate[2] and finance[3] related

---

* Riccardo Loschi earned a combined J.D. and LL.M. from Bocconi University in Milan in 2015, having spent a semester on exchange at The Chinese University of Hong Kong (2014). He has coached the Bocconi University Vis Moot on international commercial arbitration and CISG-related issues. He was admitted to the Milan Bar in 2018 and has practised law at Cleary Gottlieb Steen & Hamilton LLP in Milan. He is currently a LL.M. candidate at Columbia Law School.

1. See Jan Wolfe, *Factbox: Does Attorney-Client Privilege Apply to Trump Lawyer Raid?* (Reuters, April 10, 2018), available at https://www.reuters.com/article/us-usa-trump-russia-privilege-factbox/factbox-does-attorney-client-privilege-apply-to-trump-lawyer-raid-idUSKBN1HH2U7 (last visited October 31, 2019); Randall D. Eliason, *Trump Claims 'Attorney-Client Privilege Is Dead.' Here's Why He's Wrong* (Washington Post, April 10, 2018), available at https://www.washingtonpost.com/opinions/trump-claims-attorney-client-privilege-is-dead-heres-why-hes-wrong/2018/04/10/dac1f63c-3ceb-11e8-974f-aacd97698cef_story.html (last visited October 31, 2019).

2. See Philippe Coen, *Legal Privilege: An Overview of EU and National Case Law*, foreword to the e-Competitions Bulletin special issue on legal privilege (March 22, 2018); C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, ECR 2010 I-8301.

3. See, for example, C-15/16, *Baumeister* (2018), where the ECJ clarified that national competent authorities may not disclose confidential information they have received (except for the cases listed in the MiFID I – now MiFID II – directive), due to the obligation of professional secrecy imposed upon them.

matters, have put legal privilege back in the spotlight. As complex issues of privilege frequently arise in day-to-day business and litigation, both in national and cross-border contexts, knowing how to preserve confidentiality of communication and information is critical for companies, professionals and private subjects.

Almost every jurisdiction recognizes clients' basic right to prevent disclosure of relevant information shared with attorneys[4]. The views on the nature of privilege rights are however not unanimous, and the scope and definition of attorney-client privilege differ from jurisdiction to jurisdiction[5]. These differences mainly depend on how each legal system regulates the taking of evidence in proceedings. The more "intrusive" the power of a counterparty or court to search for and request specific documents, the more often privilege is invoked, and the more the law of privilege is shaped and developed[6]. Correspondingly, the breadth of attorney-client privilege is often narrower in civil law systems than in common law jurisdictions, where the scope of disclosure is broader and privilege defenses are numerous[7].

In the interstate and cross-border context, courts resort to conflict of laws principles to determine the law regulating privilege[8] and rarely

4. For an overview on the scope of legal privilege in various jurisdictions, see Annabelle Möckesch, *Attorney-Client Privilege in International Arbitration* para. 1.2 et seq. (Oxford University Press 2017).

5. An example of definition of attorney-client privilege is "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney". *Black's Law Dictionary*, "Attorney-client privilege" (Thomson Reuters 11th ed. 2018).

6. See, for example, Gary B. Born, *International Commercial Arbitration* 2736–2737 (Kluwer Law International 2nd ed. 2014).

7. For instance, civil law systems such as Italy (see section 3.2 below), France (see, for example, Cour de cassation, 1e civ., November 3, 2016, No. 15-20.495) and Switzerland (see, among others, Federal Criminal Court, September 4, 2017, BE.2017.2) typically exclude from the scope of attorney-client privilege communications with in-house counsels. In Germany, the issue is still disputed, although recent decisions have established that legal privilege does not apply to internal investigations conducted by in-house counsels (see, for example, Bundesverfassungsgericht, 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/17, June 27, 2018). See also Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* 811 et seq. (Kluwer Law 2012).

8. This applies to the vast majority of common law (for example the United States, England and Australia) and civil law jurisdictions (for example Italy, Switzerland

define its nature[9]. Such assessment, however, largely depends on whether national laws characterize privilege as intrinsically substantial or procedural[10]. While this has generally led courts to apply either the *lex loci* or the *lex fori*, different applicable provisions and judicial approaches have produced disparate outcomes even within the same jurisdiction[11].

This paper addresses some of the most relevant privilege-related issues by comparing the legal framework of a common law jurisdiction, the United States, and of a civil law jurisdiction, Italy. The U.S. and Italian legal privilege doctrines reflect different relationships between two conflicting principles underlying legal privilege, that is, the search for truth in proceedings and the protection of a party's right to confidentiality (*rectius*: to freely communicate with her counsel)[12].

Inspired by the search for "substantive" truth by means of adversarial litigation[13], legal privilege plays a significant role in the United

---

and Germany). See Möckesch, *Attorney-Client Privilege* para. 8.18–8.20 (cited in note 4).

9. Among the few judgments on the defining the nature of privilege, see Lord Scott's opinion in *Three Rivers District Council v. Governor and Company of the Bank of England* (No. 6), UKHL 48 (2004), 1 AC 610, 646 (2005), that considers the discussion as to the nature of privilege sterile. Legal privilege assumes substantial connotation when a party invokes it to object to the production of documents during inspections, procedural connotation when a party relies on it to refuse to answer certain questions. See also *Daniels Corporation International Pty v. Australian Competition and Consumer Commission*, 213 CLR 543, 552 (2002), stating that privilege is a rule of substantive law and not merely a rule of evidence because it is not confined to the process of discovery and inspection.

10. See section 5 below.

11. See Diana Kuitkowski, *The Law Applicable to Privilege Claims in International Arbitration*, 32 Journal of International Arbitration 65, 72–74 (2015).

12. On the balance of principles, see Ronald Dworkin, *Taking Rights Seriously* 93–97 (Harvard University Press 1977); Giorgio Pino, *Teoria e pratica del bilanciamento: Tra libertà di manifestazione del pensiero e tutela dell'identità personale*, 8 Danno e responsabilità 577, 577–578 (2003).

13. See Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases*, 18 Law and Philosophy 497, 502–503 (1999), citing Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 Yale Law Journal 207, 218 (1944), who defines the divergence between "substantial" and "legal" truth as follows: "In case a fact is disputed, the judicial decision which determines that the fact has occurred ... 'creates' legally the fact [formal legal truth] and consequently constitutes the applicability of

States. Legislation and case law thoroughly regulate the various aspects of legal privilege and allow the court or one of the parties to request broad disclosure of documents. U.S. legal privilege normally attaches to (i) all communications between in-house or external counsel and their clients that are made for the purpose of obtaining advice or assistance (attorney-client privilege), and (ii) all documents that are prepared in anticipation of litigation (work-product privilege).

In Italy, litigation proceedings are characterized by the search for "legal", rather than "substantive", truth[14]. This results in a narrower scope of legal privilege, so that the need for a comprehensive set of rules is not as strong as in common law jurisdictions. However, while scholars have sometimes argued that a privilege doctrine hardly exists in Italy[15], Italian law specifically regulates privilege rights and their exercise, including through deontological, criminal and civil procedural law provisions[16].

This paper examines privilege rights under U.S. and Italian law in order to (i) highlight the main features of legal privilege and its underlying rationales, (ii) analyse certain limitations applying to the corporate context (that is, corporate employees and in-house counsels), and (iii) discuss if and to what extent foreign legal privileges are recognized and protected.

---

the general rule of law referring to the fact. In the sphere of law the fact 'exists,' even if in the sphere of nature the fact has not occurred".

14. See, for example, Francesco Cavalla, *Retorica processo verità: Principi di filosofia forense*, preface, 11–13 (FrancoAngeli 2nd ed. 2007). See also Giulio Ubertis, *La ricerca della verità giudiziale,* in Giulio Ubertis (ed.), *La conoscenza del fatto nel processo penale*, 10–12 (Giuffrè 1992), who considers the definition of truth and true sentence proposed by Alfred Tarski, *The Semantic Conception of Truth: And the Foundations of Semantics*, 4 Philosophy and Phenomenological Research 341, 341–375 (1944), as the preferable one to guide courts in evaluating facts that will form the basis of their decision.

15. See, for example, Angelo Dondi, *Spunti in tema di "*legal ethics*" come etica della difesa in giudizio*, 49 Rivista trimestrale di diritto e procedura civile 261, 262 (1995).

16. See section 2.2 below.

2. *Scope and Purpose of U.S. and Italian Legal Privilege*

2.1. *The U.S. Legal Framework*

The general rule under U.S. law is that a company cannot be compelled to disclose privileged material to government authorities, civil plaintiffs, or any others, unless exceptions apply or a waiver exists. In order to avoid compulsory disclosure, a party may resort to a number of privilege doctrines. The two core privileges concerning legal information and documents under U.S. law are the attorney-client privilege and the work product doctrine. While attorney-client privilege applies to communications between counsel and their clients seeking legal advice, the work product doctrine attaches to documents prepared by or for a client in anticipation of legal proceedings[17].

2.1.1. *Attorney-Client Privilege*

The attorney-client privilege promotes open communication between attorneys who have been admitted to the bar of a federal court and their clients. It protects communications between them from compelled disclosure if these communications were intended to be, and have in fact been kept, confidential and were made to obtain or provide legal assistance[18].

More specifically, in assessing whether a particular communication exchanged between client and attorney is covered by privilege,

17. U.S. law provides also for other, lesser-known, privileges aimed at protecting specific types of materials from disclosure (for example, self-critical analysis carried out in the context of internal investigations) regardless of whether they involve lawyers. This is the case, for instance, of the bank examination privilege, according to which bank regulators may refuse to disclose information concerning past or ongoing examinations. See, for example, *Tice v. American Airlines, Inc.*, 192 F.R.D. 270 (N.D. Ill. 2000); *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), affirmed, 479 F.2d 920 (D.C. Cir. 1973).

18. *Brennan Center for Justice v. United States Department of Justice*, 697 F.3d 184, 207 (2nd Cir. 2012). See also *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 71 (2010). However, the "reasonable belief" to be dealing with a licensed attorney – which is, a subject acting like an attorney – enables the client to invoke attorney-client privilege. See *Anwar v. Fairfield Greenwich Ltd.*, 982 F. Supp. 2d 260, 265 (S.D.N.Y. 2013); *Gucci America, Inc. v. Guess?, Inc.*, 2011 WL 9375, *5 (S.D.N.Y.).

courts must establish whether it "was generated for the purpose of obtaining or providing legal advice as opposed to business advice"[19]. It follows that attorney-client privilege does not cover business-related communications[20]. Moreover, while attorney-client privilege attaches to communication regarding facts[21], clients cannot refuse to answer questions concerning facts – if compelled to do so – simply because these are incorporated into communications with their counsel[22].

The attorney-client privilege attaches to the client, who is solely entitled to invoke it[23]. By contrast, attorneys and agents[24] have the duty to keep privileged information confidential, unless they obtain their client's permission[25]. Communications exchanged with third parties, not retained as counsel's agents, may also benefit from attorney-client privilege if the third party's work is necessary to enable the communications between the client, the counsel, and/or the agent (such as a translator)[26]. In all other cases, the presence of a third party generally breaks the attorney-client privilege.

---

19. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014). There are no "magic words" to turn a business-related communication into a legal advice. Moreover, merely copying an attorney on a business communication or labeling a document "privileged" does not make it privileged.

20. *In re County of Erie,* 473 F.3d 413, 419 (2nd Cir. 2007).

21. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

22. See *Hoffman v. Outback Steakhouse of Florida, Inc.*, 251 F.R.D. 603, 609–610 (D. Colo. 2008), where the court held that the defendants had to respond to questions concerning facts, despite these were incorporated into privileged communications.

23. *In re Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2nd Cir. 1997).

24. Clients and counsel sometimes retain third-parties experts specialized in certain aspects of internal investigations (for example, forensic accountants or engineers). Since these experts work closely with counsel, communications involving clients or counsel and agents can also be privileged if the agent's work (i) is under the direction of legal counsel (*United States v. Kovel*, 296 F.2d 918, 920–923 (2nd Cir. 1961); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325–30 (S.D.N.Y. 2003); *Gucci America, Inc.*, 271 F.R.D. at 71); (ii) is relevant for providing legal advice (*Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); see also *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002)); and (iii) is directly supervised by the counsel (*Cavallaro*, 284 F.3d at 247; *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d at 325–330).

25. See *Swidler & Berlin v. United States*, 524 U.S. 399, 410–11 (1998); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2nd Cir. 1967).

26. *United States v. Ackert*, 169 F.3d 136, 139 (2nd Cir. 1999).

The application of the attorney-client privilege is subject to limitations. One of the main exceptions to the non-disclosure of privileged communication is the so-called crime-fraud exception. This exception applies where (i) "the client communication or attorney work product in question was itself in furtherance of the crime or fraud" and (ii) there is "probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity"[27]. If these requirements are met, the client will not be entitled to invoke the attorney-client privilege with respect to "client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct"[28]. Other limitations exist at the corporate level, where the attorney-client privilege for communication exchanged within a company is construed narrowly[29] and covers only specific types of communication[30].

2.1.2. *Work Product Doctrine*

Attorney-client privilege may not apply to materials created by attorneys in the anticipation of civil, criminal or other proceedings. To preserve the confidentiality of these materials, clients may rely on the work product doctrine, which protects a party from compelling disclosure.

The Federal Rules of Civil Procedure (FRCP) provide for compelling discovery of any communication or document "that is relevant to any party's claim or defense and proportional to the needs of the case", unless it is "privileged"[31]. Pursuant to Rule 26(b)(3), a party may not disclose "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)"[32]. In determining whether to apply the privilege, courts should therefore assess whether: (i) clients and attorneys

27. *In re Grand Jury Subpoenas Dated March 2, 2015*, 628 Fed. Appx 13, 14 (2nd Cir. 2015) (citations omitted).

28. *Ibidem*.

29. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012).

30. Other peculiar company-related cases – which is, in-house counsels and corporate employees – will be discussed in section 3 below.

31. See FRCP 26(b)(1).

32. FRCP 26(b)(3).

prepared the material specifically because they foresaw an incoming litigation ("because of" test); (ii) materials constitute opinion work product[33]; and, if they do not, (iii) the plaintiff has demonstrated that there exists a substantial need for the disclosure of that material[34].

The practical application of the above-mentioned requirements raises a number of questions. In fact, assessing what should be considered as prepared in the anticipation of litigation, or what material constitutes the result of the attorney's opinion, is not always straightforward. As a general rule, work product doctrine does not protect pre-existing records of materials created by the client which subsequently become relevant in the context of litigation[35]. Nevertheless, the work product doctrine may apply to those records containing a "selection and compilation" of documents, even where the documents themselves do not fall within the scope of privilege. According to case law, such is the case when the creation of a record has involved and required the work, skills and opinion of an attorney[36]. The burden of proving that the above-mentioned requirements are met rests on the party asserting the work product privilege, who is also required to persuade the court that the disclosure of the records or compilation of documents would reveal the attorney's opinions[37].

2.2. *The Italian Legal Framework*

Under Italian law, legal privilege (*segreto professionale*) extends to attorney-client communications and work product by lawyers, including preparatory or internal documents, and protects the

33. The "opinion work product" doctrine includes any documents concerning counsel's opinions and/or judgments on a specific matter. The doctrine does not cover facts or discussions of legal theories. Fact work product is instead discoverable only in case the materials are critical to present a case and the party cannot otherwise obtain them (or their equivalent) without undue hardship. See *Holmgren v. State Farm Mutal Automobile Insurance Co.*, 976 F.2d 573, 577 (9th Cir. 1992); FRCP 26(b)(3).

34. See, for example, *Datel Holdings Ltd. v. Microsoft Corp.*, 2011 WL 866993, *6–7 (N.D. Cal. 2011); FRCP 26(b)(3).

35. *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384–385 (2nd Cir. 2003).

36. *Sporck v. Peil*, 759 F.2d 312, 316–317 (3d Cir. 1985).

37. *Id.* at 317; *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d at 386–387.

confidentiality of all the information exchanged between, by, or to lawyers in the context of a professional relationship. Legal privilege is expressly provided for by the Lawyer's Code of Ethics ("LCE")[38] and Law of December 31, 2012, no. 247 regulating the profession of lawyer in Italy ("Law 247/2012"), while the Criminal Code ("CP"), the Code of Criminal Procedure ("CPP"), and the Code of Civil Procedure ("CPC") regulate the exercise of privilege rights.

2.2.1. *Criminal and Deontological Provisions*

Italian legal privilege applies only to "qualified professionals" as defined in article 200 CPP[39]. The list includes attorneys who are members of the Italian bar (*avvocati*). Pursuant to article 200 CPP and article 6(3) Law 247/2012, attorneys have the duty not to disclose the confidential subject matter of their professional service and the right to abstain from testimony regarding any information acquired in connection with their activities[40].

The Lawyer's Code of Ethics (LCE), in accordance with article 200 CPP and Law 247/2012, imposes on lawyers a duty to respect professional secrecy. Relevant provisions stipulate that legal privilege is both a right and a duty of attorneys and covers all the information acquired from the client in the context of litigation or otherwise[41]. A lawyer must assure the rigorous observance of privilege and the utmost discretion regarding information received as part of the

38. The Lawyer's Code of Ethics (approved by the National Bar Council on January 31, 2014) provides for binding principles and rules of conduct that attorneys must at all times follow in fulfilling their professional responsibilities.

39. The scope of article 200 CPP is narrowly construed: the aforementioned list of professionals cannot be extended to include similar figures since, by virtue of article 200(1)(d) CPP, the right to claim professional secrecy can only be established by law. See Paolo Tonini, *Manuale di procedura penale* 297–298 (Giuffrè 16th ed. 2015).

40. Article 200 CPP and article 6(3) Law 247/2012 are closely linked to article 51(1) LCE, pursuant to which, if a lawyer becomes a witness, he shall "refrain, unless in exceptional cases, from testifying as person of interest or witness about circumstances of which he has obtained information in the course of his professional activity or which are related to any representation in which he has been engaged". See Alessandro Diddi, *Profili processuali della nuova disciplina dell'ordinamento forense*, 3 Processo penale e giustizia 91, 93–94 (2013).

41. Articles 13 and 28(1) LCE; article 6 Law 247/2012.

representation and legal advice provided to the client[42]. A lawyer is, however, allowed to disregard the duty of confidentiality in specific cases, such as when the disclosure of information would prevent the commission of a crime[43]. The duty of confidentiality also applies to a lawyer's employees and third parties occasionally working with a lawyer on specific cases[44].

Pursuant to article 622 CP, the violation of this duty can lead to criminal sanctions if the disclosure damages the client or a third party[45]. From a professional responsibility standpoint, where an attorney violates his duty to respect professional secrecy, the National Legal Council[46] may issue pecuniary and disciplinary sanctions, including suspending the attorney from the exercise of the legal profession from one to three years[47].

Contrary to the approach under U.S. law, the Italian legal privilege mainly protects attorneys and their offices, while clients may not themselves invoke privilege to prevent searches or seizures at their premises[48]. Specific provisions protect attorneys' offices from searches, inspections, or seizures. These include article 103 CPP, which prohibits inspections and searches at a lawyer's office unless the lawyer or one of her associates has been indicted. In this case, the scope of searches and inspections must be limited to the search of evidence

42. Article 13 LCE; article 6(1) Law 247/2012.

43. Article 28(4) LCE; article 200(1) CPP. See also Diddi, *Profili processuali* at 95–97 (cited in note 40).

44. Article 28(3) LCE; article 6(2) Law 247/2012.

45. See Article 622 CP: "anyone disclosing confidential information he or she acquired knowledge of due to his or her ... profession, without cause or to gain profit for him or herself or for others, is punished, if such disclosure causes damage". See also Tonini, *Manuale* at 301 (cited in note 39).

46. The National Bar Council is a public institution which carries out, amongst others, administrative and disciplinary activities relating to the legal profession. It is established under the auspices of the Minister for Justice and consists of lawyers elected by fellow members of the bar, with one representative from each appeal court district.

47. Article 28(5) LCE; article 6(4) Law 247/2012. See also article 51(4) LCE: "The breach of duties under the previous sub-sections [that is, lawyer becoming a witness] entails the disciplinary sanction of censure".

48. In case of searches or seizures at the clients' premises, clients may still be able to avoid the disclosure of privileged documents stored therein if the attorney is present and objects to the seizure of such documents.

specifically identified in advance, and only documents constituting the – or part of – the *corpus delicti* may be seized[49].

It is, however, unclear whether these provisions on legal privilege extend to documents and items relating to proceedings (in which the attorney appeared as defense counsel) other than that in which the search has been ordered. No unanimous position on this issue has been reached in the Italian case law. In one case, the Supreme Court held that no privilege applies to correspondence kept in the attorney's office if the search or seizure order concerns proceedings in which the client is not involved[50]. In a different judgment, the Supreme Court held that the attorney representing a company can invoke privilege against searches or seizures at the company's premises if the company is involved in different proceedings (including civil or out-of-court proceedings)[51]. In both judgments the Court has, however, consistently held that if different proceedings were to be or had been commenced against the attorney's client, such seized correspondence may not be used against her in those proceedings[52].

2.2.2. *Privilege and Evidence in Italian Civil Litigation*

In Italian civil litigation, issues of privilege relating to evidence and discovery may arise with regard to orders for production of documents (article 210 CPC), orders for inspection of persons or things (article 118 CPC), and the right to refrain from giving testimony (article 249 CPC).

49. See article 103(1) and (2) CPP.

50. See Cassazione penale, January 22, 1991, n. 195, in 32 Cassazione penale 1537 (1992).

51. See Cassazione penale, April 17, 2001, n. 8963, in 43 Cassazione penale 1968 (2003).

52. The Supreme Court of Cassation's decision does not take into consideration, however, that the seizure of communication may still result harmful to the attorney's client. This may be the case, for example, if the document seized contains sensitive information that may give rise to client's civil or criminal liability and such information – but not the document itself – are used against him. Moreover, to the author's knowledge no Supreme Court's judgment has clarified whether, in case a company's representative is indicted but the company is not involved in any related proceedings, privilege would apply also to communications searched or seized at the company's premises if these were exchanged between the company and the attorney.

Pursuant to articles 118 and 210 CPC, upon request of a party to the proceedings the court may order the other party or a third party to produce a document or other evidence or consent to the inspection of their person or an object in their possession, if (i) this is necessary for the ascertainment of the facts of the case, and (ii) the enforcement of the order does not result in a breach of one of the duties of secrecy set forth by articles 200 and 201 CPP[53]. Additionally, article 249 CPC states that the provisions of the Code of Criminal Procedure applicable to the hearing of witnesses (including article 200 CPP) also apply to civil proceedings. As a result of the interplay between articles 210, 118, and 249 CPC and article 200 CPP, a party to a proceeding or a third party, called to testify or ordered to produce a specific document or to consent to an inspection, may refuse to do so on the basis of privilege[54].

It should, however, be noted that in Italian civil litigation the existing rules on privilege are rarely enforced. The power granted by Italian law to judges constitutes an exceptional power to compel evidence during proceedings, derogating from the general rules of evidence[55]. Indeed, the Supreme Court considers orders for document production as an "evidentiary tool of last resort, which may be used only to obtain evidence that may not be obtained elsewhere"[56]. Accordingly, numerous judgments of lower courts have clarified that a party may not resort to articles 118 and 210 as a mean to overcome its evidentiary deficiencies[57]. Furthermore, Italian courts do not grant requests for

53. Cassazione civile, June 20, 2011, n. 13533. Pursuant to article 118(2) and (3) CPC, the court may draw adverse inferences against a party or condemn it to pay a fine varying from Euro 250 to Euro 1,500 if it refuses to comply with an order of inspection without cause.

54. See Crisanto Mandrioli and Antonio Carratta, 1 *Diritto processuale civile* 288–290 and 298–299 (Giappichelli 26th ed. 2017); Claudio Consolo (ed.), *Codice di procedura civile commentato* 1451 and 2563 (Wolters Kluwer 5th ed. 2013); Paolo Cendon (ed.), *Commentario al codice di procedura civile* 974–975 and 1268–1269 (Giuffrè 2012).

55. See Cassazione civile, March 14, 1988, n. 2435; Cassazione civile, April 13, 1989, n. 1774.

56. Cassazione civile, February 23, 2010, n. 4375, in 61 Giustizia Civile 1049 (2011). See also Cassazione civile, March 15, 2016, n. 5091, in 81 Responsabilità civile e previdenza 1250 (2016).

57. See, for example, Tribunale di Verona, 3rd civil division, March 12, 2018; Tribunale di Torino, 6th civil division, November 4, 2016, n. 5266; Tribunale di Messina, 2nd civil division, March 15, 2003, in 35 Giurisprudenza di merito 2182 (2003).

the production of categories of documents or "any and all" documents relating to a defined legal relationship or other specific topic or request. Instead, discovery is granted only in relation to specific documents identified in advance as relevant and material to the dispute[58]. If a party to the proceedings fails to produce any document requested by the court, the court may only infer that such document is adverse to the interests of that party[59].

3. *Legal Privilege and Companies*

3.1. *In-house Counsels and Employees in the United States*

In the United States, it is "well settled" that the attorney-client privilege covers communications between the corporation and its in-house counsels on the basis of the same principles regulating privilege between client and outside counsel[60]. Thus, communications exchanged with in-house counsels will be covered by privilege as long as the client exchanged them for the purpose of obtaining legal advice[61]. This implies that communications will not be covered by privilege simply because an attorney is a party to them. Issues may therefore arise should the attorney write or receive communications while acting in a capacity other than that of in-house counsel (the so-called dual hat scenario). This may occur, for instance, where a lawyer also works as a manager of the company. In such cases, privilege does not extend to all communications exchanged between the lawyer and the company, but is limited to those addressed to her as the in-house

58. See Cassazione civile, April 16, 1997, n. 3260. See also Cassazione civile, December 20, 2007, n. 26943.

59. See Consolo, *Codice di procedura civile* at 2441 (cited in note 54); see also Tribunale di Roma, 8th civil division, June 3, 2017, n. 11240.

60. One of the first cases to recognize corporations' privileges is *Radiant Burners, Inc. v. American Gas Association*, 320 F.2d 314 (7th Cir. 1963). In that case, the Seventh Circuit also observed that the nature and scope of the privilege would have to be developed on a case-by-case basis. See also *Hertzog, Calamari & Gleason v. Prudential Insurance*, 850 F. Supp. 255 (S.D.N.Y. 1994); *United States v. Mobil Corp.*, 149 F.R.D. 533 (N.D. Tex. 1993).

61. *Upjohn Co.*, 449 U.S. at 395.

counsel, provided that all requirements set forth by U.S. law are met[62]. As discussed below, complexity increases when communications are exchanged between the client and in-house counsels working under different jurisdictions[63], because communications between client and in-house counsel might not be considered privileged (as is the case, for instance, in Italy, Switzerland or China)[64].

More specifically, attorney-client privilege attaches to communications between counsels and employees of the company only if certain requirements are met: (i) the requested legal advice is to be provided on the basis of the information disclosed in the communication; (ii) the information must concern a matter within the scope of the employee's duties; and (iii) the employee is aware that the information was provided or requested for the purpose of securing legal advice for the company[65]. Before interviewing employees, the company should give its employees a so-called Upjohn warning (also known as "corporate Miranda"), informing them, among other things, that the attorney interviewing them is the company's counsel and the employee should keep the conversation confidential[66]. Company employees should also be aware that where information concerns company-related matters, the privilege attaches to the company and, therefore, the company's directors and representatives are the only empowered to disclose such information[67].

The privileged treatment of communications concerning the company and its former employees is disputed. According to one view, satisfying *Upjohn* requirements should suffice to extend privilege to those communications exchanged with former employees, especially if cumulated with appropriate warnings as to the fact that the counsel,

62. See, for example, *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474–475 (N.D. Tex. 2004) (applying Texas law).

63. In *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994), the court expressly recognized that the definition of the scope of in-house privilege "is complicated", especially in case of cross border issues.

64. See section 5 below.

65. See *Upjohn Co.*, 449 U.S. at 394–395.

66. See *id.* at 383; *United States v. Stein*, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006).

67. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348–349 (1985); *United States v. Wells Fargo Bank, N.A.*, 2015 WL 3999074, *2 (S.D.N.Y.).

and not the employee, represents the company[68]. Case law is, however, not entirely consistent. According to some rulings, communications with former employees are not privileged[69] because former employees "share no identity of interest in the outcome of the litigation" and "it is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit"[70]. To the contrary, it can be suggested that even where communications with former employees are not covered by the attorney-client privilege, privilege can still be invoked on a different basis. For instance, communications might still be privileged if: (i) the work product doctrine's requirements are met[71]; (ii) "the former employee retains a present connection or agency relationship with the client corporation"[72]; or (iii) the present-day communication concerns a confidential matter that was uniquely within the knowledge of the former employee when she worked for the client corporation[73].

3.2. *In-house Counsels and Employees in Italy*

Italy does not grant privilege rights to corporate employees. Contrary to U.S. attorney-client privilege, Italian privilege attaches to attorneys who are members to the bar. Therefore, employees and the companies they work for cannot invoke privilege. This does not mean, however, that employees can freely use or spread confidential communications acquired while they worked for the company. Employees or former employees who disclose sensitive information relating to

68. *In re Allen*, 106 F.3d 582, 605–606 (4th Cir. 1997); *United States v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 40–41 (D. Conn. 1999).

69. *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 304–305 (E.D. Mich. 2000).

70. *Clark Equipment Co. v. Lift Parts Manufacturing Co.*, 1985 WL 2917, *5 (N.D. Ill.).

71. See section 2.1.2 above.

72. *Infosystems, Inc.*, 197 F.R.D. at 306.

73. See *Valassis v. Samelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *Peralta*, 190 F.R.D. at 40; *City of New York v. Coastal Oil New York, Inc.*, 2000 WL 145748, *2 (S.D.N.Y.).

their former employer to the advantage of themselves or third parties are still liable pursuant to article 622 CP[74].

Privilege does also not apply to in-house counsels, albeit for different reasons. Before the implementation of Law 247/2012, in-house counsels did not enjoy any of the legal privilege rights applicable to members of the bar. This was because employees were not allowed membership in the Italian bar[75]. Today, Article 2(6) of Law 247/2012 provides that attorneys and employers (individuals or companies) may "create work relationships ... for the purpose of providing out-of-court legal assistance in the exclusive interest of the employer"[76]. Although Law 247/2012 does not grant legal privilege rights to in-house counsels, doubts may arise as to whether privilege may apply to this third, hybrid, category of counsel – that is, attorneys who are members of the bar and work for an employer on non-judicial matters[77]. In its reading of the provisions of Law 247/2012, the Italian Bar Association (IBA) recently opined that they do not, by any means, aim to assimilate in-house counsels to attorneys, so that only the latter remain entitled to legal privilege rights[78]. The *trenchant* approach of the IBA appears to be inspired by, and supportive of, certain rulings of the ECJ, such

74. See Cassazione penale, October 26, 2010, n. 44840, in 136 Il Foro italiano 286 (2011). The scope of article 622 CP is broad and not limited to the professionals listed in article 200 CPP, but extends to "anyone" who disclose confidential information obtained in the exercise of his profession at his or third-parties advantage and to the (potential) detriment of the subject who provided such information. See Roberto Garofoli, 2 *Manuale di diritto penale* 712 and 714 (NelDiritto 11th ed. 2015).

75. See, for example, Consiglio di Stato, April 23, 2002, n. 2199, in 127 Il Foro italiano 482 (2002).

76. Article 2(6) Law 247/2012.

77. The issue has been raised, among others, by the Bar Council (*Consiglio dell'Ordine degli Avvocati*) of Bologna. See Consiglio Nazionale Forense - Commissione consultiva, *Parere 10 marzo 2017*, available at https://www.consiglionazionaleforense.it/pareri-di-rilievo (last visited October 31, 2019).

78. See *ibidem*. Arguably, the interpretation proffered by the IBA does not adequately addresses certain uncertainties arising from the wording of article 2(6) Law 247/2012, including the relationship between the second period ("out-of-court legal assistance ... is reserved to avvocati (which is, attorneys admitted to the bar)") and the third one ("It is nevertheless permitted the creation of work relationships ... for the purpose of providing out-of-court legal assistance in the exclusive interest of the employer").

as *Akzo Nobel*[79]. In that case, Akzo Nobel Chemicals and its subsidiary Akcros Chemicals challenged two European Commission decisions which held that certain communications between Akzo Nobel's managing director and Akcros's in-house counsels were not covered by privilege. The Court rejected the annulment claim on the grounds that professional privilege is subject to two cumulative conditions. Firstly, privilege applies to all communication exchanged between the client and the lawyer "for the purpose of the client's rights of defense". Secondly, "the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'"[80]. The Court further clarified the concept of independence between lawyer and client, and observed that the independence of lawyers should be determined both positively, "by reference to professional ethical obligations", and negatively, "by the absence of an employment relationship"[81]. For this reason, in-house lawyers do not – and cannot – enjoy "the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client"[82].

With respect to communications concerning out-of-court matters exchanged between corporations and their attorneys working as in-house counsels in Italy, attorneys are therefore not different from in-house counsels and, as such, communications are not covered

79. C-550/07 P, *Akzo Nobel*. In Italy, the *Akzo Nobel* case has been endorsed by Italian Council of State; see Consiglio di Stato, June 24, 2010, n. 4016; TAR Lazio, September 9, 2012, n. 7467, in 61 Rivista di diritto industriale 597 (2012).

80. C-550/07 P, *Akzo Nobel* at para. 41. The Court confirmed the principles set out in the leading case C-155/79, *AM & S Europe Ltd. v. Commission*, ECR 1982 1575.

81. C-550/07 P, *Akzo Nobel* at para. 45. See also Mario Siragusa, *A Selection of Recent Developments in EU Competition Law*, Concorrenza e mercato 7, 60–61 (2011).

82. C-550/07 P, *Akzo Nobel* at para. 45. Moreover, the Court noted that that interpretation does not violate the principle of equal treatment because the in-house lawyer is in fundamentally different position from external lawyers and legal privilege is not "at all the subject-matter of the regulation" (*ibidem* at para. 52–58). However, scholars have argued that under article 6 of the European Convention on Human Rights privilege also constitute a fundamental personal right of the client that, consequently, is legally enforceable before the court. See Taru Spronken and Jan Fermon, *Protection of Attorney-Client Privilege in Europe*, 27 Penn State International Law Review 439, 444 (2008).

by privilege[83]. It is, instead, unclear whether privilege may apply to communications concerning judicial matters on which the attorney employed by the company is assisting the company in her capacity as *outside* counsel. While an affirmative answer can be justified by looking at the subject-matter of the communication, it can be argued that privilege should not apply to those communication either. In fact, the ECJ's judgment in *Akzo Nobel* predominantly examined the "degree of independence" that a counsel should enjoy in order to invoke privilege, rather than the subject matter of the communication. Therefore, as long as the attorney is somehow employed by the company, a proper degree of independence, including with respect to communication relating to judicial matters, can hardly be met[84].

4. *Waiver of Legal Privilege*

4.1. *Waiver of Privileges in the United States*

A party may inadvertently or intentionally waive the privilege attaching to certain documents in a number of ways. A party may also disclose privileged material to third parties bearing a common interest, without waiving the privilege attaching to it. Below, three cases are considered in which legal privilege can be waived, namely (i) accidental disclosure, (ii) purposeful disclosure, and (iii) the so-called common interest privilege.

83. Conversely, pursuant to articles 19 and 23 Law 247/2012, lawyers employed by (i) a public administration or (ii) by a state-owned or a state-controlled entity are to be considered as external s and, as such, fully enjoy legal privilege rights. See Rolando Dalla Riva, *L'avvocato dipendente di ente pubblico, segreto d'ufficio e segreto professionale: Le novità della legge 247 del 2012*, 18 Il lavoro nelle pubbliche amministrazioni 977, 992–993 (2015).

84. The scope of the *Akzo Nobel* decision is limited to the legal privilege under EU law (specifically, to the case of investigations under EU law) and does not specifically address the privilege regimes of the EU's Member States. To determine the applicable legal privilege regime to communications exchanged within the EU, in-house counsel must therefore assess both EU and the relevant Member State's legal framework applicable to the case.

4.1.1. *Accidental Disclosure*

Accidental disclosure of documents does not always cause a party to waive the privilege attaching thereto. For instance, the Federal Rules of Evidence (FRE) address the accidental disclosure of documents in the context of communication between a party and government agencies. Pursuant to section 502(b) FRE, a party who inadvertently discloses information "in a federal proceeding or to a federal office or agency" does not waive its privilege if "(1) the disclosure was inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder promptly took steps to rectify the error"[85].

Less predictable are the consequences of accidental disclosure of privileged communication occurring among private parties. Pursuant to article 501 FRE, privilege claims or defenses in civil cases are governed by state laws applicable to the dispute. Whether accidental disclosure amounts to a waiver of privilege is therefore to be assessed on a case-by-case basis, by the competent state court and according to the applicable state law[86]. Given the legal uncertainties affecting this scenario, parties often preventively enter into so called claw-back agreements, so that either party is entitled to claw back documents once these have been inadvertently disclosed.

4.1.2. *Purposeful Disclosure*

A party might choose to intentionally disclose privileged information for a number of reasons. In the context of governmental

85. *Bayliss v. New Jersey State Police*, 622 Fed. Appx. 182, 186 (3d Cir. 2015).

86. See, for example, *Kanter v. Superior Court*, 253 Cal. Rptr. 810 (Ct. App. 1988), concerning accidental disclosure of documents by a lawyer who subsequently claimed privilege on those documents. In in order to decide that accidental disclosure did amount to waiver of privilege, the court considered whether: (i) the precautions taken to prevent inadvertent disclosure were reasonable; (ii) the rectification of the error occurred timely; (iii) the disclosure was limited in scope and extent; (iv) the issues of fairness and privilege protection were outbalanced by the negligence with which privilege had been guarded; and (v) there existed special circumstances which could have justified an error in the disclosure of documents (for example, accelerated or compelled discovery). See also *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985).

investigation, for example, a party may do so to provide the government with exculpatory facts or obtain credit for cooperating with the government's investigation. Purposeful disclosure carries implications for the disclosing party in the vast majority of U.S. jurisdictions.

One notable consequence is that the party may not limit its disclosure to a single document or communication. Once a piece of otherwise privileged information has been voluntarily disclosed, the party may be required to disclose a number of additional documents pertaining or relating to it[87]. Such disclosure obligations associated with intentional disclosure may extend to future civil litigation as well[88]. As observed in *Re Keeper of the Records*, "it is well accepted that waivers by implication can sometimes extend beyond the matter actually revealed"[89]. Thus, the specific scope of the waiver triggered by partial disclosure will be determined by the court's discretion, and a party may be compelled to disclose more information than what originally planned[90].

4.1.3. *Common Interest privilege*

A peculiar form of waiver is the so-called common-interest privilege. This doctrine allows a party to agree to share with one or more parties a confidential document concerning a matter of common

87. Unlike under English law, where a party is allowed to disclose only certain privileged information, most U.S. state laws do not recognize selective waiver of privilege. See *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2nd Cir. 2000). The Eighth Circuit has acknowledged the possibility of "selective disclosure". According to this theory, litigants can voluntarily disclose materials to the government and, at the same time, preserve their privilege in the civil litigation context. See also *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978). So far, however, other circuits have rejected the "selective disclosure" theory. See, for example, *In re Pacific Pictures Corp.*, 679 F.3d at 1127.

88. See *id.* at 1128; see also *In re John Doe Corp.*, 675 F.2d 482, 489 (2nd Cir. 1982).

89. *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 23–24 (1st Cir. 2003).

90. *Ibidem* ("Such waivers are almost invariably premised on fairness concerns"). See also *In re Subpoena Duces Tecum Served on Willkie Farr & Gallagher*, 1997 WL 118369, *3–4 (S.D.N.Y.).

interest and to agree to keep such information confidential without waiving the privilege[91].

In principle, the "common interest" (i) must be a legal interest, not a business or commercial interest[92]; (ii) must be shared by all the parties; and (iii) must concern information whose disclosure is "reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted"[93]. A common interest agreement can be entered into in any situation, and is not limited to the existence of actual litigation[94]. Further, the common interest privilege doctrine applies even if the parties involved are not aligned on all issues underlying the confidential information or have conflicting interests relating to that specific information[95]. Pursuant to section 76 of the Restatement of the Law Governing Lawyers, it is in fact sufficient that the communications exchanged relate to the matter the parties have in common[96].

4.2. *Waiver of Privilege in Italy*

Italian law does not expressly contemplate the waiver of legal privilege because, as mentioned above, the disclosure of privileged communication is considered an exceptional and last resort measure[97]. Absent specific provisions and case law, the existence of a waiver can however be derived from a systematic interpretation of articles 622 and 50 CP. As mentioned, article 622 CP punishes anyone who discloses confidential information without cause or to gain a profit, while article 50 CP provides that anyone infringing a right with the consent of the person entitled to dispose of such right, does not commit a criminal offense. Thus, attorneys will not be liable for disclosing privileged information as far as the client consented to the disclosure.

---

91. For instance, if one (or many) plaintiff(s) is (are) suing multiple defendants for similar actions based on the same core events, and the defendants want to pursue a similar, joint defense, they may seek to enter into a common interest agreement.

92. *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 964-965 (N.D. Ill. 2010).

93. Restatement (Third) of the Law Governing Lawyers § 76 (2000); see *Oxy Resources California LLC v. Superior Court*, 115 Cal. App. 4th 874, 891 (2004).

94. *United States v. United Technologies Corp.*, 979 F. Supp. 108 (D. Conn. 1997).

95. *Eisenberg v. Gagnon*, 766 F.2d 770, 787–88 (3rd Cir. 1985); *Meza v. H Muehlstein & Co.*, 176 Cal. App. 4th 969, 982 (2009).

96. See Restatement (Third) of the Law Governing Lawyers § 76 (2000).

97. See section 2.2.2 above.

Even where no consent exists, an attorney can – or must – disclose privileged communication or documents without incurring in disciplinary or criminal liability where the disclosure: (i) is beneficial for the defense of the client; (ii) would prevent the client from committing serious crimes[98]; (iii) is necessary to prove facts in a dispute between the lawyer and the client; or (iv) concerns information that the lawyer is legally bound to provide to competent judicial authorities[99]. In practice, implicit or explicit waiver of privilege may occur in several ways. For example, the privilege may be waived when the attorney does not claim it at the time of the documents' request or seizure, voluntarily submits the documents to the court, or consents to the seizure of the documents.

While no U.S.-style common interest doctrine exists, parties can share privileged information among themselves in order to pursue common interests or to agree on common defense strategies. At the same time, however, the disclosure of privileged information should always be subject to the parties' understanding – to be preferably set out in writing – that the information will be kept confidential.

Waiver of privilege can also be limited to specific documents. Consent under article 50 CP is subject to strict construction, meaning that consent does not extend beyond what has been explicitly consented to[100]. It can be noted, however, that partial or limited waiver in a civil litigation context may expose the client to a compelling disclosure order by the court, especially where the piece of information that has been disclosed indicates the existence of additional undisclosed information relevant to the case.

98. See article 28(4) LCE and article 200(1) CPP. According to Alessandro Diddi, *Testimonianza e segreti professionali* 140–144 (Cedam 2012), although attorneys have the duty to inform the competent authorities in case this could prevent the commission of crimes (see, for example, article 364 CP and article 41 Legislative Decree 231/2007), this does not mean that article 200 CPP ceases to apply. Once an attorney has informed the authorities, he might still refuse to testify in the related proceedings.

99. See article 200 CPP. See also Tonini, *Manuale* at 301–302 (cited in note 39).

100. See Ferrando Mantovani, *Diritto penale* 257 (Cedam 8th ed. 2013).

5. *The Interstate and Cross-Border Context*

5.1. *United States*

When a privileged communication or relationship touches multiple jurisdictions, U.S. courts are required to conduct a choice-of-law analysis to determine which substantive law should apply[101]. To determine whether privilege issues involve multiple jurisdictions, federal courts are consistent in applying the so-called touch base approach. Pursuant to this approach, U.S. courts must proceed on a case-by-case basis and apply the Federal Rules where communications "touch base" in the United States, that is, there exists more than a mere "incidental connection with the United States"[102]. Conversely, privilege on purely foreign communication will be governed by the provisions of the relevant foreign jurisdiction[103].

The characterization of privilege as "substantial" has a significant impact on the courts' determination of the applicable privilege law. U.S. law attaches great importance to the "substantial interest" that a state may have in applying privilege to certain communication[104], and requires courts to apply a number of parameters when assessing

101. In *Berg Chilling Systems, Inc. v. Hull Corp.,* 435 F.3d 455, 462 (3rd Cir. 2006), Judge Alito observed that the conflict of laws can be material or apparent. An apparent or "false" conflict arise where the application of laws of different jurisdictions would bring to the same outcome.

102. *VLT Corp. v. Unitrode Corp*., 194 F.R.D. 8, 16 (D. Mass. 2000).

103. *Golden Trade, S.r.l. v. Lee Apparel Co*., 143 F.R.D. 514 (S.D.N.Y. 1992); *Gucci America, Inc*., 271 F.R.D. at 65. The same applies to conflict-of-laws issues arising from communications exchanged between corporate employees' and foreign in-house lawyers. According to scholars, U.S. privilege should apply to communications between employees and foreign lawyers where the foreign jurisdiction "recognizes a privilege comparable to the United States' attorney–client privilege" or the issue at stake "pertains to American law issues or proceedings". See Todd Presnell, *Privilege Issues for In-House Lawyers – Foreign and Domestic – in U.S. Litigation*, IADC Committee Newsletter, January 2016, 3, available at https://www.iadclaw.org/securedocument.aspx?file=1/19/

Corporate_Counsel_January_2016.pdf (last visited October 31, 2019).

104. See Restatement (Second) of Conflict of Laws § 139, comment c) (1971), pursuant to which the law regulating privilege is the law of the forum, which is the law of the state that has a substantial interest in determining whether evidence of the communication should be privileged.

the law applicable to privilege. Pursuant to section 139 of the Second Restatement, U.S. courts are required to consider as admissible communications which: (i) are not privileged under the *lex loci* having the most significant connection to them, even though they would be privileged under the *lex fori*, unless this would conflict with a "strong public policy" of the forum; or (ii) are privileged under the *lex loci* having the most significant connection to them, even where they are not privileged under the *lex forum*, unless special reasons exist not to give effect to the law of the forum[105]. Courts must therefore determine which is "the law of the country that has the 'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential"[106]. Courts' analyses must focus on a number of factors, including the place in which the communication occurred, the location of the attorney and/or the client, the location where the attorney-client relationship was entered into or centered, and the seat of the proceedings[107].

When assessing the law applicable to privilege, federal courts have reached disparate outcomes[108]. Some rulings have confirmed the application of the *lex causae*, while others have considered privilege as subject to the *lex fori*, without characterizing privilege as substantive or procedural[109]. So far, only few courts have justified their decision to apply the *lex causae* to privilege based on its alleged substantial nature[110]. In most of these cases, courts have emphasized the need for

105. See Restatement (Second) of Conflict of Laws § 139 (1971).

106. *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.,* 208 F.R.D. 92, 98 (S.D.N.Y. 2002).

107. See Restatement (Second) of Conflict of Laws § 139, comment e) (1971); *Astra*, 208 F.R.D. at 98. See also *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 76 (S.D.N.Y. 2006), where the court held that communications that are not privileged in a certain jurisdiction will be admissible in the United States, even if U.S. privilege would apply to those communications.

108. See Möckesch, *Attorney-Client Privilege* para. 8.21 et seq. (cited in note 4).

109. See, for example, *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1328 (9th Cir. 1995); *CSX Transportation, Inc. v. Lexington Insurance Co.*, 187 F.R.D. 555, 559 (N.D. Ill. 1999); *Elliott Associates, L.P. v. The Republic of Peru*, 176 F.R.D. 93, 96 (S.D.N.Y. 1997).

110. In a number of cases, U.S. state courts have favored admissibility and therefore applied the less restrictive rule between the forum state and the state with the most significant relationship with the communication. See, for example, *Major v. Commonwealth*, 275 S.W.3d 706, 714 (Ky. 2009) (citing Restatement (Second) of

effective protection of the interest of law of the country most interested in the preservation of confidentiality, by regarding communications as privileged as long as their disclosure would have undermined this interest. An example in this respect is the case *In Re Payment Card Interchange Fee*, where the U.S. District Court for the Eastern District of New York ruled that certain confidential documents prepared by the European Commission in the context of its competition investigations cannot be discovered in US antitrust litigation[111]. The District Court reached the decision after applying a so-called five-parts test, which is used when a court is to balance international comity[112] against discovery requests[113]. This test considers a number of factors, including the country of origin of the information and to what extent the disclosure would undermine foreign-sovereign interests (and *vice versa*)[114]. After careful evaluation of these parameters, District Judge John Gleeson concluded that privilege should apply to the documents due to the Commission's "strong and legitimate reasons to protect

---

Conflict of Laws § 139); *People v. Allen*, 784 N.E.2d 393 (Il. App. 2003) (applying a less restrictive rule); *Kos v. State*, 15 S.W.3d 633 (Tex. App. 2000) (same); *State v. Eldrenkamp*, 541 N.W.2d 877, 881–882 (Iowa 1995) (same). Such approach is made possible by the broad legal concepts set forth by the applicable rules (for example, "strong public policy", and "special reasons").

111. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* No. 05-MD-1720, slip op. at 19 (E.D.N.Y., August 27, 2010).

112. International comity has been defined as the "deference to foreign government actors that is not required by international law but is incorporated in domestic law principles". This principle may come into play where the rules of a foreign sovereign nation are affected by the rules of the nation where the matter is being heard, and requires that the rules of the foreign nation be considered. In applying this principle, federal courts have held that U.S. courts should not engage in actions that may "cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures". See *Ings v. Ferguson,* 282 F.3d 149, 152 (2nd Cir. 1960); *Daimler AG v. Bauman,* 134 S. Ct. 746, 763 (2014). For a detailed analysis of the international comity principle and the criticalities affecting its application in the U.S., see William S. Dodge, *International Comity in American Law*, 115 Columbia Law Review 2071 (2015).

113. See Siragusa, *A Selection of Recent Developments* at 62–63 (cited in note 81).

114. Other factors include the importance of the requested information to the U.S. litigation, the specificity of the request, and the possibility to secure that information through different means. In applying the "five-steps" test, the court followed the principle affirmed *In Re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

confidentiality", which include (i) the "encouragement of third parties to cooperate with the Commission's investigations"; (ii) the "frustration of the Commission's interests [that would derive] from a judgment in favor of the disclosure"; and (iii) the fact that the disclosure would "requir[e] the European Commission to turn over the fruits of its own labors in the service of the plaintiffs' American case"[115].

5.2. *Italy*

Italian law does not expressly grant privilege rights to foreign lawyers. Article 200 CPP merely lists, among the subjects enjoying privilege rights, the category of "*avvocati*", i.e. members of the Italian bar, without clearly specifying whether foreign lawyers fall within the scope of the provision. None of the other provisions on criminal and civil procedure touches upon the issue. It is also unclear whether foreign lawyers may rely on the Italian Lawyer's Code of Ethics to invoke privilege rights. Although the LCE provides that foreign lawyers are subject to the same ethical rules applicable to Italian lawyers when operating in Italy[116], it does not extend the same duty to information obtained by the lawyer while working abroad. These uncertainties mainly depend on the characterization of Italian privilege as "procedural" and should be addressed by applying civil and criminal procedure's general rules and principles.

---

115. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,* slip op. at 19–21. Other examples in this respect concern the applicability of privilege to communication exchanged between the company and in-house counsels residing in foreign jurisdictions. In these cases, U.S. courts have held that where the law of foreign states relevant to the dispute does not recognize communications exchanged with in-house lawyers as privilege, privilege should not apply regardless of what prescribed under U.S. law. See, for example, *In re Rivastigmine*, 237 F.R.D. at 76 (describing how Swiss law does not privilege communications with in-house counsel). See also *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013), where the court found that there was no privilege because "there are cognizable distinctions between a 'lawyer' and an 'in-house counsel' in Chinese law".

116. See article 3(3) LCE. Foreign lawyers might be subject to both the ethical rules of their home country and to the Italian ones. This is the case, for example, of Italian lawyers exercising their functions abroad, which are subject to a double ethical standard. See Remo Danovi, *Il nuovo codice deontologico forense: Commentario* 89–90 (Giuffrè 2014).

According to the Supreme Court, ethical duties imposed on, and privilege rights attributed to, foreign professionals by their home jurisdictions may apply in Italy if certain requirements are met. With respect to the refusal to testify on privileged information, the Supreme Court in 2005 affirmed that privilege can be invoked by foreign professionals if: (i) they obtain the information in the exercise of their functions during activities carried out abroad; (ii) they are authorized to exercise their profession in their home country; and (iii) there exist agreements between their home country and Italy for the mutual recognition of the relevant professional title[117]. With respect to the acquisition of privileged documents, the Supreme Court in 2010 affirmed that the professionals listed by article 200 CPP are the only entitled to invoke privilege and that the list cannot be extended to foreign professionals – specifically, accountants – regardless of whether they are registered or authorized to exercise their profession[118]. The Supreme Court further stated that allegedly privileged communications acquired in the United Kingdom by an Italian public prosecutor should be admitted by Italian courts unless the acquisition methods are found to be against "public order" or "morality"[119].

Arguably, these Supreme Court rulings should also apply to foreign attorneys; being based on general principles of law, they are not limited to specific professionals, but can rather extend to categories of professionals comparable to those mentioned in article 200 CPP. These rulings should therefore also apply to foreign attorneys from countries with which Italy has entered into agreements for the mutual recognition of professional titles (such as the other member states of

117. Cassazione penale, May 1, 2005, n. 7387, in 132 Rivista penale 470 (2006). The case concerned private investigators. The private investigator was qualified under the law of Switzerland and, pursuant to international agreements between Italy (EU) and Switzerland, his professional title is recognized under Italian law. See also Cecilia Sanna, *Gli operatori economici ticinesi e la reciprocità in Italia dei diritti offerti dall'Accordo sulla libera circolazione delle persone*, 28 Rivista italiana di diritto pubblico comunitario 289, 297 (2018).

118. Cassazione penale, February 25, 2010, n. 15208, in 137 Rivista penale 808 (2011). The case involved UK-based registered and unregistered accountants which, according to applicable law, could not have benefitted from privilege rights but should have instead reported the content of the communications to the competent authorities.

119. *Ibidem*.

the European Union)[120]. They could also apply where the disclosure of the information would expose foreign attorneys to civil, criminal or disciplinary liability in their home country[121].

6. *Concluding Remarks*

The attention devoted by United States legislation and courts to legal privilege issues stands at odds with the minimal regulation of the same issues under Italian law. While, as noted, this difference is mainly attributable to the rationales inspiring U.S. and Italian privilege doctrines, the application of the former does not necessarily afford greater protection than the latter.

In the United States, legal privilege enables a party or the court to request or order the disclosure of information that would otherwise be impossible to obtain. In response, U.S. law has developed an equal – if not greater – number of protections and precautions to safeguard the confidentiality of specific sensitive information. The result of the interplay between these *desiderata* is a complex legal framework, where the disclosure-oriented landscape is studded with limitations and exceptions. By contrast, in Italy the scope of legal privilege is

120. Article 2.3.1 of the Code of Conduct for European Lawyers provides that "[t]he lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State". The Code of Conduct for European Lawyers sets forth the core principles shared by all European bar associations and applies to all intra-EU issues relating to the lawyers' deontological duties. See Remo Danovi, *Ordinamento forense e deontologia* 217 (Giuffrè 13th ed. 2018). It follows that preventing a foreign attorney admitted to one of the EU Member State's bar to invoke privilege rights that would otherwise be entitled to invoke in his or her Member State with respect to communications exchanged or information obtained in the exercise of his or her profession would frustrate his or her duty of confidentiality. The exercise of privilege rights by lawyers is regulated by the codes of civil and criminal procedure which, pursuant to article 12 of Law 218/1995 on Italian private international law, shall govern any proceedings taking place in Italy. Absent any EU law providing otherwise, it can be argued that the same provisions applying to Italian lawyers also applies to foreign lawyers involved in civil, criminal proceedings or searches, inspections and seizures.

121. See Cassazione penale, May 1, 2005, n. 7387. The Supreme Court affirmed *obiter dictum* that the refusal to testify on information covered by privilege and acquired abroad was further justified by the fact that, had the foreign private investigator consented to testify in Italy, he would have incurred in disciplinary sanctions in his home country.

narrower in civil litigation, where courts' power to compel disclosure is limited, and that of the parties almost non-existent. This approach protects clients from systematic disclosure of documents and consequently reduces the volume of regulation. The scope of privilege is instead broader in the criminal litigation context, where inspections, searches and seizures are more frequent and may undermine a party's right to confidentiality.

Significantly different is also the approach to privilege issues in the cross-border context. While the U.S. law characterization of privilege as "substantial" requires courts to determine the applicable privilege law by looking also at the interests of the law of the state, Italian courts recognize and enforce privilege rights insofar as the acquisition of privileged information does not conflict with the parties' fundamental procedural rights. With respect to the relevance of legal privilege in the corporate context, in the United States legal privilege is a client's right and consequently also attaches to communications exchanged between the company and its in-house counsels. Conversely, internal communications are not protected in Italy, where privilege is construed as a prerogative of attorneys'[122].

Ultimately, it is hoped that a comparative approach to legal privilege doctrines will develop in the future. After all, the United States and Italy exemplify only one of many settings in which the interplay between broad legal concepts, on one side, and the lack of specific provisions and case law, on the other, may lead to unexpected outcomes should privilege-related disputes arise in cross-border transactions. These could, in turn, undermine legal certainty and the predictability of transnational businesses[123]. A more in-depth understanding of legal privilege, as well as its scope and limitations, may therefore help companies and professionals "tame the beast" by spotting potential criticalities upfront and adopt all necessary measures to preserve the confidentiality of documents and communications.

122. On the concept of truth and the lawyers' exercise of their right not to disclose the "substantive" truth, see Roberto Giovanni Aloisio, *L'avvocato tra verità e segreto*, 26 La nuova giurisprudenza civile commentata 497 (2010).

123. See Angelo Dondi, *Segreti ed etica dell'avvocatura: Rilievi minimi in tema di* law of lawyering *e* attorney-client privilege, 63 Rivista trimestrale di diritto e procedura civile 651, 651–654 (2009), who observes that "despite the scarcity of research on the issue, the laws governing attorney-client privilege [in Italy] is critical for the reform [and innovation] of the rules on civil procedure".