Applying Another Country's Privilege Law Can Sometimes Expand Privilege Protection

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In his April 2, 2014 “Privilege Points” release, Tom Spahn discusses privilege under foreign law:

As a matter of comity, U.S. courts usually apply other countries' privilege laws to purely overseas communications that do not "touch base" with the United States. Because most European countries (and the EU itself) do not extend privilege protection to in-house lawyers' communications, in many situations applying foreign privilege law decreases possible privilege protection for U.S. corporations.

However, in some contexts, foreign law offers a greater chance of privilege protection than U.S. law normally provides. In Cadence Pharmaceuticals, Inc. v. Fresenius Kabi USA, LLC, Case No. 13-cv-00139 DMS (MDD), 2014 U.S. Dist. LEXIS 13661 (S.D. Cal. Feb. 3, 2014), the court assessed communications in Germany involving a patent agent, which dealt with a European patent application. The court concluded that the communications did not "touch base" with the U.S., and therefore applied German law. Id. at *8-9. The court extended privilege protection to the communications – relying on a European patent lawyer's affidavit in holding that "[i]n Germany, communications with patent agents are afforded confidentiality, even though patent agents are not admitted to practice law." Id. at *18. United States courts disagree about privilege protection for patent agents here. Buyer's Direct Inc. v. Belk, Inc., No. SACV 12-00370-DOC (MLGx), 2012 U.S. Dist. LEXIS 57543, at *7, *8-9 (C.D. Cal. Apr. 24, 2012) (recognizing "a split in authority" on privilege protection for registered patent agents proceedings before the U.S. PTO).

Because applying other countries’ privilege law might expand or contract available privilege protection, lawyers whose clients communicate to or from other countries must always assess the possible risks and rewards.