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A comparison: legal privilege in the United States versus England and Wales when dealing with privacy issues

The concept of privilege allows and encourages frank communication between lawyers and their clients. Whether you are dealing with a data subject access request (DSAR) or a security incident, privilege often comes up and managing investigations on a multinational scale can be complex and time consuming. This is especially the case given that different rules may apply to different documents and a privileged document in England and Wales may not be privileged in the United States.

The table below has been designed to assist by providing a summary of the key similarities and differences in relation to privilege when dealing with these issues in England and Wales and the United States, as well as a recap of the concepts.

Comparison of the concepts of privilege

Type of privilege	U.S. position	English and Welsh position
Lawyer–client general advice communications. This type of privilege generally covers confidential communications between lawyers and their clients, when such communications are made for the purpose of seeking or giving legal advice. Communications protected by privilege allow a party to withhold evidence from disclosure to a third party or a court.	In the United States, the doctrine is known as "attorney–client privilege" and originates from common law. It is defined in federal courts by the Federal Rules of Evidence (Fed. R. Evid. 502).	In the UK, the doctrine is known as "legal advice privilege" and originates from common law.

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Lawyer–client communications in the context of litigation. This type of privilege covers confidential communications between lawyers and their clients (as well as clients and third parties) which come into existence to be used in connection with actual or pending litigation. It tends to be slightly wider-ranging than the first category of privilege above, in that it prevents disclosure of documents prepared not just by lawyers but also by other third parties (such as accountants and auditors) in the context of litigation.	In the United States, the doctrine is known as "work product" and originates from common law. It is defined in federal courts by the Federal Rules of Civil Procedure (Fed. R. Civ. P. 26(b)(3)) and Fed. R. Evid. 502.	In the UK, the doctrine is known as "litigation privilege" and originates from common law.
	The work product doctrine protects documents prepared during or in anticipation of litigation from discovery by opposing counsel. This entails a fact-specific inquiry involving subjective factors (e.g., what did the creators of a document believe) and contextual factors (e.g., based on the circumstances, is application of the protection warranted). In the United States, application of the work product doctrine varies widely among courts, but here are a few general observations about work product as compared to attorney–client privilege: • Work product protects materials created by both lawyers and non-lawyers. • Work product can be shared without necessarily creating a waiver. • The work product protection can be overcome by an opposing party's substantial need for protected material.	Litigation privilege applies to proceedings in the High Court, County Courts, Employment Tribunals, and, sometimes, arbitration (if subject to English procedural law).

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1 *Boyer v. Gildea,* 257 F.R.D. 488, 491 (N.D. Ind. 2009).
2 *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2D 1252, 1260–62 (3d Cir. 1993).
3 *Westhemeco Ltd v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979).

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cont. **Lawyer–client communications in the context of litigation.** This type of privilege covers confidential communications between lawyers and their clients (as well as clients and third parties) which come into existence to be used in connection with actual or pending litigation. It tends to be slightly wider-ranging than the first category of privilege above, in that it prevents disclosure of documents prepared not just by lawyers, but also by other third parties (such as accountants and auditors) in the context of litigation.	Communications relating to work product protection may be discoverable depending on the context and on whether the party seeking discovery can demonstrate that it: (a) has substantial need of the materials in the preparation of its case; and (b) is unable, without undue hardship, to obtain the materials or their substantial equivalent by other means. Attorney–client privilege, on the other hand, cannot be overcome by any demonstration of substantial need.	There is no equivalent test to overcome the protection of litigation privilege.
	Disclosures of an attorney–client privileged document to a third party will result in the waiver of privilege in most circumstances. In the United States, it is unsettled whether disclosure of work product outside the attorney–client relationship nullifies the work product protection.	Disclosing a document to a third party does **not** necessarily result in the loss of privilege: It can be retained provided the disclosure was for a specific purpose. However, where a privileged document has been shared with a large number of third parties, this may render the privilege waived/lost. There is no specific audience size to render privilege lost; it is generally perceived that where information enters the public domain, the privilege in the information is lost. The crucial consideration is "whether the document and its information remain confidential in the sense that it is not properly available for use."[4]
	Common interest privilege enables the sharing of privileged documents with others who have the same interest. As such, passing a privileged communication to a person with a recognized common interest will not lose privilege in the way it could do if it had been disclosed to a third party. The common interest privilege, known as joint defense privilege in the United States, applies in the same way that it applies in the UK.	

4 *Bourns Inc. v. Raychem Corp* [1999] 3 All ER 154.

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In-house lawyer-business communications Similar to the above, this type of privilege can exist within confidential communications between an in-house lawyer and their 'client', i.e., the business they are employed to provide legal advice to. As may be expected, the scope is narrower than the concepts described above.	Attorney–client privilege protects communications between company attorneys and non-management employees – this casts a wide net over all employees within a company who may receive legal advice. Federal common law protects communications between counsel and lower-level employees when the communication may assist counsel in providing legal advice to the corporation.	Confidential legal communications between an in-house lawyer and the business they advise are protected by privilege, and the above principles apply. This excludes documents that do not take the form of legal advice, such as documents that contain strategic or operational advice. Where communication is legal in nature and as long as the in-house lawyer retains a valid practising certificate, English law protects such communication from disclosure to third parties. The pool of 'clients' (i.e., employees) receiving advice that can be protected by privilege is smaller than in the United States – only employees authorised to request and receive legal advice are eligible for protection by privilege.

Practical application to specific privacy scenarios

Type of privilege	U.S. position	English and Welsh position
Data subject access requests (DSARs)	If considering a DSAR request under the California Consumer Protection Act (CCPA), it is not yet clear if the doctrine of privilege allows businesses to exclude privileged communications from responses. Under section 1798.145(b) of the CCPA, the law does not apply where compliance would violate "an evidentiary privilege under California law" and does not prevent a business from disclosing covered personal information "to a person covered by an evidentiary privilege under California law as part of a privileged communication."	If considering a request under the GDPR and Data Protection Act 2018, companies are not required to disclose any information consisting of legal professional privilege (which, in general terms, includes both legal advice privilege and litigation privilege, as set out above). This data does not have to be disclosed. In the case of *Holyoake v. Candy and another*,[5] the records of legal advice between the data controller and its lawyers were exempt from disclosure following a DSAR, as they qualified for legal professional privilege. The court, however, held that this would not be the case if there was evidence of iniquity (fraud). However, in *Dawson-Damer v. Taylor Wessing LLP*,[6] the Court of Appeal overturned the High Court's decision not to order compliance with the DSAR. A narrow interpretation of the legal privilege was used: only privileged data that related to UK law was exempt; data under other laws of another jurisdiction was not exempt from disclosure.

5 *Holyoake v. Candy* [2017] EWCA Civ 92.
6 *Dawson-Damer v. Taylor Wessing LLP* [2020] EWCA Civ 352.

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Security incident response and instructing experts Where a security incident arises, companies will understandably want to ensure that privilege is established as widely as possible as they work through the incident, investigations, and potential claims. As shown in the table above, however, there are real differences in when privilege will apply in the UK and United States and therefore it is not possible just to make assumptions based on one jurisdiction as to what will be covered. You must therefore consider the countries where potential claims or regulatory investigations may occur and adjust the approach accordingly.	Several recent cases have affirmed the privilege protections applicable to third-party forensic consultants after a breach (*Genesco Inc. v. Visa U.S.A. Inc.*,[7] *In re Experian Data Breach Litigation*,[8] and *In re Target Corporation Customer Data Security Breach Litigation*[9]). In general, an auditor is considered a non-privileged party under federal law;[10] therefore, disclosure of privileged information to auditors will waive the attorney-client privilege.	In the case of *ENRC v. SFO*[11] the Court of Appeal overturned the High Court's decision that interview notes and forensic accounting materials were not protected by litigation privilege. The reason the High Court took this decision, however, was because the dominance test was not satisfied not because forensic materials are not generally covered by litigation privilege. The Court of Appeal, finding that litigation was in reasonable contemplation and that the dominance test was satisfied, declared that the material was protected by privilege.
Communications with regulators	Disclosure of privileged or work product-protected documents to regulators often leads to a waiver. When disclosing documents, it is important for parties to insist that there is no general subject matter waiver. Though privilege should be and is usually available during regulatory investigations, waiver is often 'encouraged' in exchange for reduced penalties and other concessions.	The judgment in *Property Alliance Group v. Royal Bank of Scotland plc*[12] confirms that communications with a regulator may benefit from privilege. In this particular case, the court held that the public benefit from the regulator's investigation and the fact that the investigation could lead to civil proceedings was enough to render such communication privileged. In addition, the court held that privileged documents disclosed to a regulator may still retain their privileged status.

7 *Genesco Inc. v. Visa, U.S.A. Inc., No*. 3:13-cv-00202 (M.D. Tenn. Mar. 7, 2013).
8 *In re Experian Data Breach Litigation*, No. 8:15-cv-01592 (C.D. Cal. Oct. 2, 2015).
9 *In re Target Corporation Customer Data Security Breach Litigation*, , No. 14-md-02522 (D. Minn.).
10 *Couch v. United States*, 409 U.S. 322 (1973).
11 *Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006.
12 *Property Alliance Group v. Royal Bank of Scotland plc* [2018] EWCA Civ 355.

Tips on ensuring privilege of documents and communications

Any documents over which you wish to claim privilege should be marked "privileged and confidential".

The client should always liaise with the lawyers – this will more easily fall under the legal advice privilege.

If a report is being prepared, it may qualify for privilege if it satisfies the dominant purpose test for a claim for litigation privilege.

Third party communications may be covered by the litigation privilege if the communication took place facing an imminent litigation claim.

Where litigation is not in question, if a report was created by an attorney or in-house lawyer to advise a client or board member, and that attorney or in-house lawyer acts in a legal capacity, then this advice would be privileged.

Avoid waiving privilege by disclosing information to a large party or by disclosing part of a document, as the whole document will be rendered discoverable (**unless** the subject matter of the specific part is different from that of the whole document).

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