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How national and local professional rules can mess up an international criminal investigation

Frederick T Davis

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Financial and many other crimes these days do not respect national borders. Many – such as money laundering, bribery and terrorism, to name a few – are becoming "international" in at least two senses: the evidence relating to them may often be found in more than one country; and the prosecutors of more than one country may pursue the same set of criminal acts. A cadre of internationally savvy white-collar criminal lawyers, including specially trained teams in large multinational firms, have stepped up to address the challenges of multi-jurisdictional prosecutions. There has been renewed interest in well-known criminal procedures such as extradition and treaty-based cross-border evidence gathering. We are also seeing the emergence of new problems, such as the impact of multi-jurisdictional investigations formally organised in joint investigative task forces; getting access to data no longer physically found only on local servers but now often stored in the Cloud and away from sovereign regulation; and the increased use of blocking statutes.

Less obvious, and infrequently analysed, is the effect of professional rules relating to lawyers, and how differences among those rules affect transnational and multi-jurisdictional criminal investigations. While crimes (and the evidence of them) ignore borders, professional rules do not. Lawyers often bring with them the professional rules of their home jurisdiction and then confront the rules applicable to the places where the investigation is taking place. The differences among these rules – and more importantly, among practices in each country – can create subtle but important problems.

This article will offer an overview of these challenges, and suggestions of how they may (if not appropriately addressed) lead to unanticipated difficulties and suboptimal outcomes. Some issues noted here are matters of local procedure and professional rules that can be researched, but this article also argues that more subtle – and essentially cultural – differences in lawyers' roles must also be understood.

Practice of law

Countries (or their subdivisions) have rules licensing those allowed to practise law within their borders. Violations of these rules may lead to penalties imposed on the lawyer but also to repercussions that affect a client, such as a finding that a communication considered protected by

professional privilege was in fact not. Few lawyers would be crazy enough to take publicly visible acts as an attorney – such as attempting to appear in court – in a country where he or she was not authorised to do so. In less visible activities, such as conducting an internal investigation, however, one often sees lawyers licensed to practise in one country informally interviewing potential witnesses in another. Doing this is not without risk. Internal investigations are increasingly common outside the United States, but in some countries their conduct is vigilantly watched by the local bar to ensure that members of the profession respect the rights of interviewees and comply with professional standards. In France prior to 2016, for example, there was considerable doubt over whether a French lawyer (avocat) could conduct an internal investigation at all. A Paris Bar opinion issued in March 2016 and subsequent guidelines provide that conducting such an investigation is acceptable – but emphasised the professional responsibilities inherent in doing so, strongly implying that the Bar would supervise the practice and intervene if a complaint were brought to its attention. I believe that a lawyer conducting even informal interviews in a country where he or she is not licensed runs a considerable risk if the local bar learns of this. Further, prosecuting authorities in many countries are more sensitive than in the United States to defence lawyers interviewing potential witnesses – often concluding that the purpose is to tamper testimony. Local lawyer participation in interviews, and advice on whether to conduct an interview, is essential.

Professional privilege – the status of the interviewer

In some jurisdictions, the central role of lawyers in investigations is considered normal, and well protected: either in-house counsel or a lawyer in professional practice can conduct interviews, gather evidence and discuss strategy with little fear that the fruits of that process can be compelled for production without consent. These activities are firmly considered to be protected by attorney-client privilege, and often by work-product privilege as well. As long as common-sense (but vigilant) protocols are followed, both attorney and client can rest assured that interviews, their product and any discussion relating to them will remain secret. This may not be the case in other countries. In Europe generally, in-house counsel are not considered capable of generating a professional privilege, and often may not even be allowed to be (or remain) a member of the bar; such a person's communications (even consisting of legal analysis) may not be protected if disseminated internally within the corporation. Further, professional secrecy rules in countries around the world simply vary far more than many people realise. For example, in some countries a communication from one lawyer to an adversary – which would normally be considered unprotected by an attorney-client privilege in the United States – is protected in the sense that neither can pass on that communication to a third person nor use it in litigation. In short, lawyers who assume that their communications will be treated like they would be in their own jurisdiction may be surprised.

Professional privilege– the circumstances of an investigation

Even if a set of interviews (or another aspect of an investigation) is being conducted by a local attorney, care must be taken to ensure that the conduct of the investigation complies with local professional requirements necessary to protect its product from possible compelled disclosure.

In some countries, for example, a lawyer advising or representing a corporation must consider the "client" to be restricted to senior corporate officers who seek legal advice on behalf of a corporation, and are authorised to act on it; communications with officers or employees not in this core group may fall outside of a professional privilege.

In other countries a professional advice privilege is considered applicable only if it is objectively clear that the client is in a situation requiring the advice of a lawyer. An investigation conducted when there is no objective likelihood of adversarial or prosecutorial threat may not be protected.

These and other concerns that may arise under local professional rules must be carefully explored at the outset of any investigation, in close consultation with a local expert. In most situations, risks can be diminished or eliminated by developing careful protocols relating to client communications and making a record of the circumstances generating the need for the investigation.

Professional conduct

Local professional rules may also provide guidance on how interviews and other forms of investigation take place. The US Supreme Court decision in *Upjohn Co v United States*, which held that an investigation conducted by an attorney (including in-house counsel) is normally covered by the attorney-client and work-product privileges belonging to the corporate client rather than to the person being interviewed, led to the salutary practice of giving *Upjohn* warnings to interviewees, informing them that the lawyer owes no professional obligation to the interviewee. Local bars are developing variants of this approach that need to be followed carefully. Some provide clarity on potentially difficult issues such as whether an attorney must advise an interviewee of the need to get independent professional advice and whether the interviewee may review notes of the interview, among other things.

Using the product of an investigation

Conceptually, professional privileges in the United States are viewed as belonging to the client. It follows that the client has every right to waive applicable privileges and permit (or direct) an attorney to share otherwise protected information with an adversary, including a prosecutor. Such is often the case where the product of an internal investigation is turned over to a prosecutor when negotiating a guilty plea or a deferred prosecution agreement, for example. The professional freedom of an attorney to do this cannot be automatically assumed in other countries. In France, for example, a client cannot waive professional secrecy, the rough equivalent of the attorney-client privilege, in the sense that an attorney cannot be authorised (or even directed) to share protected information with an adversary. There may be workarounds possible in such countries; the important point is not to assume that one's "home" principles apply to communications outside of one's own jurisdiction, and to get local professional advice and participation.

The role of lawyers in negotiating criminal outcomes

Differing views of the appropriate role of a lawyer in negotiating a criminal outcome may be the most culturally sensitive – and the most consequential – distinction addressed in this article.

Guilty pleas and other negotiated outcomes have long been an accepted – even dominant – practice in the United States; very few corporations elect to go to trial on criminal matters. And many American lawyers have become highly skilled at a specific kind of professional advocacy: evaluating the best possible outcome for a corporate client, and then obtaining it through careful negotiation with a prosecutor. Because such outcomes are undeniably efficient, several other countries have adopted procedures first developed in the United States or are contemplating doing so. The United Kingdom and France, for example, have adopted regimes clearly inspired by the US DPA, and similar legislation is pending in other countries. The procedural differences among these regimes, and their relative efficacy in the countries that have adopted them, have attracted comment. Less subject to analysis, however, is whether the lawyers in those countries have developed the professional skills to optimise negotiated outcomes for their clients, and whether their professional regimes and traditions will permit them to do so.

A core issue is whether an attorney is even permitted to negotiate in a criminal matter, and further whether he or she feels comfortable doing so. In many countries outside the United States the answer to the first question is “maybe” and to the second a definite “no.”

A somewhat exaggerated distinction may help explain this important, nuanced and complex issue.

A defence lawyer in the United States is, under formal professional rules, subject to a specific but limited duty of candour: she is never under an obligation to provide information harmful to the client’s interest, and under no circumstances can volunteer it; but the lawyer cannot lie to an adversary, including a prosecutor. More broadly – and probably more importantly – lying to a prosecutor is, within the US system of negotiated justice, usually a pretty bad idea: an inaccurate, or even knowingly incomplete, version of facts is very likely to be discovered by a prosecutor and will lead to bad results, and in most situations the optimal outcome for the client depends crucially on establishing a viable level of trust together with a superior mastery of facts. A lying, or even a wilfully ill-informed, lawyer will simply be out-negotiated by a prosecutor. And at some early point in a corporate negotiation, one reaches what amounts to an “all or nothing” point, where telling a prosecutor “I want to negotiate with you, but I will not answer your questions” is no longer an option.

In contrast, in a number of countries in Europe there is open discussion of the “right to lie”. The phrase is generally exaggerated; its basis is probably that in most of Europe a suspect or trial defendant is under significant pressure to provide evidence but is not put under oath, on the principle that it is simply unfair to accuse someone of a crime and then potentially make denial of it a separate offence. More generally, there is a strong sense that under no circumstances can a lawyer ever be put in a position where he or she is expected to provide a prosecutor with accurate, reliable and complete information relating to the client – even if it is in the client’s best interest to

do so. Many European judges – who generally have a much greater role in signing off on such procedures than do their US counterparts – do not like the idea of "negotiation" in criminal matters at all, which strikes them as shady.

This mindset – hard to define, variable among countries, but unmistakably present in many places – can have important consequences. Prosecutors in the US, the UK and some other countries put heavy emphasis on self-reporting. Agonisingly for some, the decision to self-report is oftentimes constrained: much of the advantage will be lost if the prosecutor discovers the matter, and the door to an optimal outcome may totally close if a competitor self-reports first. Put simply, in many countries in Europe and elsewhere, it goes against the grain of lawyers' sense of their professional responsibility to advise a client to – as it often seems – instigate a criminal investigation when none exists. The recent history of criminal convictions of European corporations at the hands of US prosecutors (with huge payments to the US Treasury) occurred in significant part because of a professional reluctance to reach out to negotiate at a time when doing so could have resulted in much better results; by negotiating too late a number of European companies lost opportunities to obtain much better deals.

Even when negotiation starts, professional traditions remain key. As an example, some forms of a negotiated outcome (such as a DPA) require the parties to reach agreement on the relevant facts for which a company takes responsibility. In many countries facts are considered to be established by neutral inquiry. There is little tradition – and in truth an aversion to – private parties negotiating over facts and many lawyers are simply ill-equipped to do so.

Policies in Europe and elsewhere on negotiated outcomes may be changing in a thoughtful attempt to achieve some degree of parity with US prosecutions, and in particular to reach outcomes with national companies that will dissuade parallel efforts by the US Department of Justice. The success of these efforts may be limited, absent a clear understanding of the professional traditions that fostered negotiated procedures, and how those traditions may differ elsewhere.

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