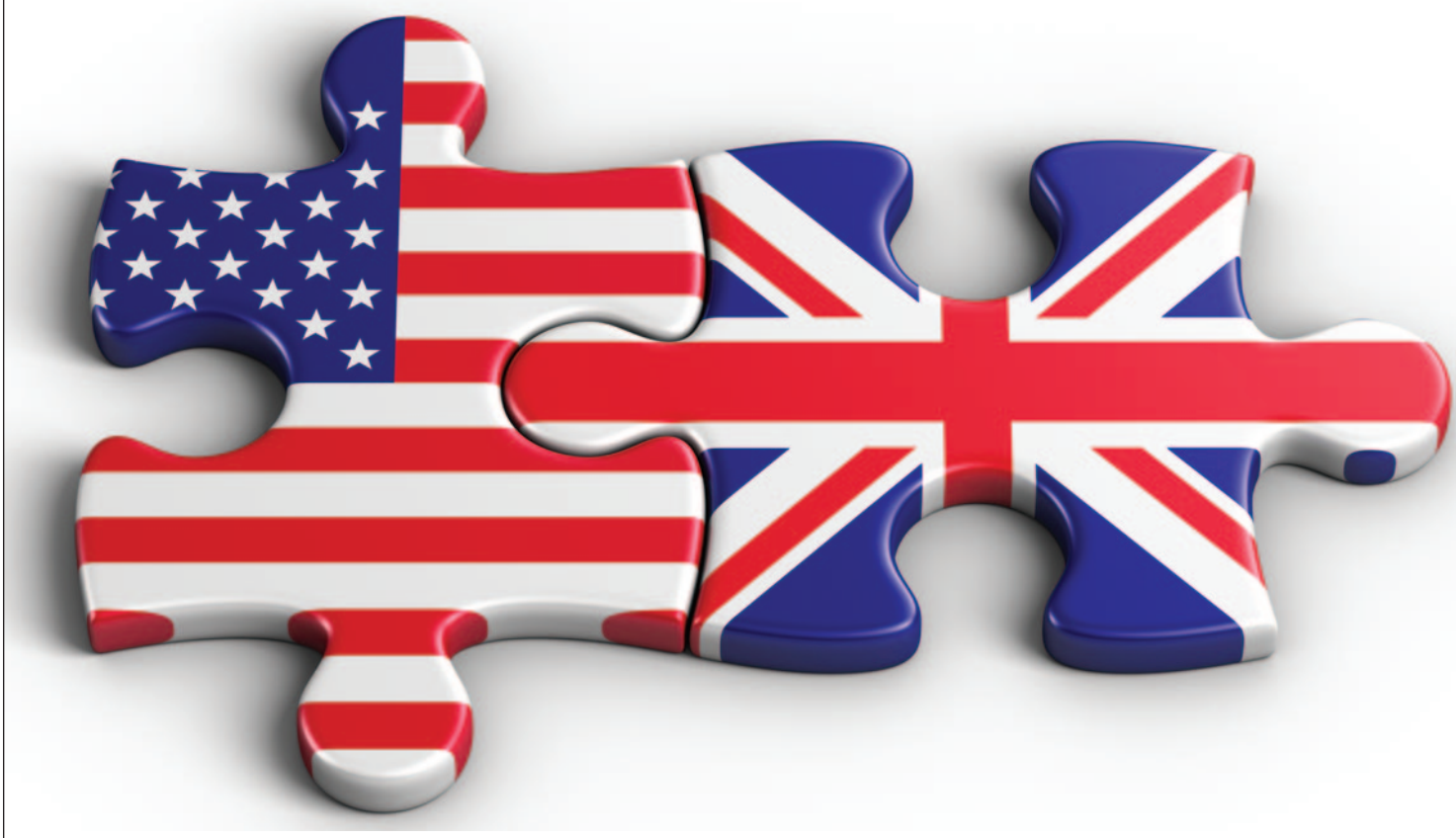

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An American Lawyer in Queen Elizabeth's Court:

How NACDL Highlighted the International Consequences of an English Court Case

In May 2017, the U.K. High Court of Justice, Queen's Bench Division, handed down a decision that shook the white-collar criminal defense bar: Attorney work papers, including witness interview memoranda, were not protected by the "litigation privilege" under U.K. law. The High Court's decision in *Eurasian Natural Resources Corp. v. Director of the Serious Fraud Office* ("*ENRC I*") thus held that a governmental law enforcement agency like the Serious Fraud Office ("SFO") — which investigates and prosecutes complex fraud, bribery, and corruption — could compel disclosure of these materials.

The decision threatened to fundamentally alter the approach of attorneys tasked with conducting internal investigations into suspected corporate wrongdoing. With their work papers and other material potentially discoverable by U.K. law enforcement, attorneys conducting internal investigations would certainly think hard about the scope of any investigation and the extent to which they reduced to paper their investigative summaries and findings. For obvious reasons, the *ENRC I* decision was significant in the United Kingdom. But, as the National Association of Criminal Defense Lawyers ("NACDL") recognized, the decision had implications in the United States, too. Disclosure of these documents in the United Kingdom — even compelled disclosure — could result in waiver of work-product immunity protections in the United States. Given the frequency of cooperation between the SFO and the U.S. Department of Justice, that risk was neither theoretical nor trivial.

When Eurasian Natural Resources Corp. ("ENRC") appealed the High Court's decision to the U.K. Court of Appeal, NACDL sought to ensure that the Court of Appeal understood the international implications of the High Court's decision. This article tells that story.

The Common Origins of Litigation Privilege and Work-Product Immunity

The United States and the United Kingdom share a "union of mind and purpose"[1] that is nowhere more evident than in the legal systems of the two nations. Not only do the legal systems of the United States and the United Kingdom share the same historical roots and common law approach, but the law of the United Kingdom has left a lasting imprint on the American legal system — even to this day. As Justice Breyer has explained, the U.S. Supreme Court "has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" — particularly opinions from the nations of the Commonwealth.[2] Indeed, the

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Justices of the U.S. Supreme Court routinely consider legal sources from the United Kingdom, including Blackstone's *Commentaries*, U.K. statutes, and U.K. court decisions.[3]

In the past three terms, the U.S. Supreme Court has cited or discussed Blackstone's *Commentaries* no fewer than 28 times — in more than one of every 10 cases.[4] And in that same period of time, it has cited the courts of England, Great Britain, and the United Kingdom no fewer than 17 times.[5] English decisions dating to the 1600s and 1700s — the time period surrounding the American founding — are discussed most frequently.[6] But more modern jurisprudence is relevant as well.[7] The United Kingdom and members of Parliament have also expressed their views on American law, having filed *amicus* briefs in 14 cases pending before the U.S. Supreme Court in the last 15 years.[8]

Given those shared historical roots and the continuing influence of English law in the United States today, it is unsurprising that the same bedrock principles animate the two legal systems. Among those similarities is the shared view that the administration of justice — indeed, society as a whole — is served best when lawyers have the freedom to render proper legal advice to a client in confidence.[9] To do so, a lawyer must be able to assemble facts, analyze them, and apply the law without fear of disclosure.[10] As the House of Lords, which previously served as the United Kingdom's highest judicial body, explained in one case, "each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations."[11] Both the "work-product doctrine" in U.S. law, and its equivalent in the United Kingdom — the "litigation privilege" — serve that interest by protecting a lawyer's ability to maintain confidentiality over materials prepared or received in connection with a representation.

The U.K. "litigation privilege" protects from disclosure communications between parties or their lawyers and third parties that are made for the purpose of obtaining information or advice in connection with existing or contemplated litigation.[12] For the litigation privilege to apply, three conditions must be satisfied: First, litigation must be "in progress or in contemplation."[13] To meet this requirement, the party claiming privilege must "show that he was aware of circumstances that rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility."[14] Second, the communication must be "made for the sole or dominant purpose of conducting that litigation."[15] Thus, the "documents are protected … when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence."[16] Third, the litigation must be "adversarial, not investigative or inquisitorial."[17]

The U.S. "work-product doctrine" is the American cousin of the litigation privilege. It protects the confidentiality of materials "prepared in anticipation of litigation or for trial."[18] Under the American work-product doctrine, a document is prepared in anticipation of litigation when it "can fairly be said to have been prepared or obtained because of the prospect of litigation."[19] In other words, "production of the material must be caused by the anticipation of litigation" to qualify for work-product protection.[20] Documents that are prepared in the ordinary course of business do not meet that standard.[21] The work-product doctrine attaches to both "documents and tangible things" and "intangible" work product such as an attorney's thoughts or recollections.[22] Thus, the litigation privilege and work-product doctrine have traditionally been substantially co-extensive. For the most part, what was protected by one would be protected by the other.

The Factual Background: ENRC's Internal Investigation

The *ENRC* litigation arose from an SFO investigation into ENRC and its wholly owned subsidiary. In 2009 and 2010, ENRC sought to acquire an African mining company, Camrose Resources Limited.[23] As part of that deal, ENRC — through an intermediary company with ties to a friend of an African country's president — was alleged to have also purchased the rights to a copper mine that had been unlawfully appropriated by the government of that African country.[24] Also in 2010, ENRC received an email from a purported whistleblower who accused ENRC's wholly owned subsidiary of engaging in corruption and financial wrongdoing.[25]

ENRC's board of directors retained counsel and initiated an internal investigation into these allegations.[26] ENRC also hired a forensic accounting firm to conduct a books-and-records review.[27] Early in the investigation, ENRC executives believed that a formal SFO investigation was likely.[28]

By mid-2011, the allegations against ENRC went public when the British press published an article describing the whistleblower allegations.[29] That reporting, in turn, attracted the attention from the SFO that ENRC executives had predicted. In August 2011, the SFO sent ENRC a letter. That letter referenced the press reports of corruption allegations and "urged ENRC to consider carefully the SFO's 21st July 2009 Self-Reporting Guidelines … whilst undertaking its internal investigations."[30] The letter invited ENRC to meet with the SFO to discuss "'ENRC's governance and compliance programme,'" but stated that, at that point, SFO had not initiated a criminal investigation of ENRC.[31]

ENRC accepted the invitation to meet and, throughout 2011 and 2012, met with the SFO on several occasions to discuss the allegations and its internal investigation.[32] At these meetings, the SFO emphasized the seriousness of the allegations, stating that it "'could give no assurance that it would not undertake enforcement action and that ENRC should take the matter very seriously.'"[33]

Meanwhile, ENRC continued with its internal investigation. By 2012, attorneys for ENRC had interviewed 80 employees, and reviewed over 500,000 electronic documents and reams of hard copy documents as part of their internal investigation.[34] While conducting its investigation, ENRC also considered whether to avail itself of the SFO's corporate self-reporting policy. Under that policy, the SFO, in considering whether to prosecute the corporation, would take account of the corporation's disclosure of wrongdoing.[35]

In October 2012 — in the middle of ENRC's internal investigation — the SFO adopted new self-reporting guidelines. The new guidelines required a corporation to provide the SFO, as part of the self-reporting process, with "'[a]ll supporting evidence including, but not limited to emails, banking evidence and witness accounts.'"[36] By December 2012, ENRC's lawyers had completed their internal investigation and prepared a draft report of investigation.[37] Noting the new self-reporting

guidelines, ENRC's lawyers wrote the SFO requesting confirmation "'that ENRC is still part of the corporate self-reporting process.'"[38] ENRC also sought confirmation that any report of investigation would be submitted to the SFO under a "'limited waiver of legal professional privilege for the purposes of the corporate self-report only,'" and that the report would "'not be used by the SFO as evidence of any wrongdoing'" if the SFO and ENRC were unable to resolve the allegations.[39]

The SFO responded that it did not consider ENRC to be in the self-reporting process because ENRC had not yet reported any wrongdoing.[40] With respect to privilege, the SFO rejected ENRC's position, stating that it could not limit its use of any investigative report.[41] Voicing "'concern[] at the apparent lack of progress,'" SFO issued an ultimatum: ENRC needed to provide the SFO with a copy of the investigative report by Jan. 31, 2013, or the SFO would open a formal criminal investigation.[42] A day before that deadline, on Jan. 30, ENRC's lawyers produced a copy of the draft report to the SFO. A month later, on Feb. 28, 2013, they provided the SFO with a copy of the 470-page final report.[43]

On March 28, 2013, the SFO informed ENRC that it believed a "corruption offence" had occurred and stated that it was considering a formal investigation. The SFO also served on ENRC several document requests, including requests for documents that constituted work papers from and evidence uncovered by ENRC's internal investigation. The SFO ordered ENRC to produce those documents by April 27, 2013.[44] Before that deadline passed, however, the SFO accepted the case and opened a formal investigation.

ENRC, in turn, asserted both the litigation privilege and the legal advice privilege (the U.K. analog to the attorney-client privilege) over the documents and refused to produce them.[45] Specifically, ENRC asserted privilege over four categories of documents:

- attorney notes and memoranda from witness interviews of ENRC's employees;
- materials created by the auditor that ENRC's lawyers had hired to conduct the books and records review;
- documents summarizing the conclusions and investigative findings as presented by ENRC's lawyers to ENRC's board of directors; and
- certain other documents related to the books-and-records review.[46]

The SFO denied that these documents were covered by the litigation privilege and, in February 2016, initiated litigation.[47]

The High Court Rules That the Documents Are Not Protected by Privilege

After a four-day trial (on the privilege issues only), the High Court ruled on ENRC's claims of privilege.[48] It concluded that the documents were not protected by the litigation privilege for two reasons.

First, the High Court held that the documents were not prepared at a time when ENRC "was 'aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility.'"[49] It concluded that, when ENRC initiated the investigation, no one at ENRC believed the investigation would yield evidence that a crime meriting prosecution had occurred.[50] The High Court acknowledged that "it was always possible that the internal investigation … would turn up information which, if it ever came to the attention of the SFO, might result in criminal proceedings." That possibility, however, was merely speculative.[51] At most, the evidence suggested that ENRC initiated its internal investigation out of concern that the SFO would initiate a formal *investigation* after it learned of the allegations.[52] But the *prospect* of an SFO *investigation* did not qualify as adversarial litigation for purposes of determining whether the litigation privilege applied.[53]

In other words, the High Court concluded that, because ENRC's investigation did not uncover any evidence of a crime (or, at least, that ENRC did not view the investigation as having uncovered evidence of a crime), ENRC had no reason to think criminal prosecution was a real likelihood.[54] Going further, the High Court drew a surprising distinction between the breadth of litigation privilege in civil and criminal proceedings, suggesting that the privilege may apply more broadly in the context of civil proceedings. Civil proceedings, the High Court explained, can be initiated even "where there is no properly arguable cause of action."[55] But "[c]riminal proceedings … cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met."[56] Thus, "[c]riminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that" criminal prosecution and conviction "is realistic."[57]

In the High Court's view, ENRC's internal investigation did not unearth such evidence. Because the company had no realistic expectation that it would be prosecuted — at most, it had only a realistic expectation of a formal SFO investigation — ENRC's internal investigation documents were not protected by the litigation privilege.

Second, the High Court concluded that, even if criminal proceedings could be reasonably contemplated, the documents were not protected by the litigation privilege because they were not prepared for the "dominant purpose" of obtaining legal advice in conducting those proceedings.[58] Instead, the High Court concluded that ENRC created the documents with the "specific purpose or intention" of providing them to the SFO as part of the self-reporting process.[59] For that reason, too, the High Court concluded the documents were not entitled to the protections of litigation privilege.[60]

The High Court thus ruled in favor of the SFO, ordering that ENRC was required to produce most of the documents over which it had asserted privilege.

NACDL Seeks Leave to Intervene Before the UK Court of Appeal

ENRC appealed the High Court's decision to the U.K. Court of Appeal. Both the High Court's decision and the subsequent appeal received extensive attention and were heavily covered in the British press.[61] The case received attention outside the United Kingdom as well.[62] Among those watching the case were members of NACDL, who immediately recognized that the consequences of the High Court's decision were not limited to the United Kingdom. The decision could have a profound impact on entities and organizations in the United States, too. The High Court's narrow view of litigation privilege could result in waiver of work-product protections under U.S. law. NACDL set about to make sure that, in considering ENRC's appeal, the U.K. Court of Appeal was aware of that impact.

In an American court, NACDL's course would be clear — submit an

amicus brief. Indeed, NACDL routinely participates as *amicus* in cases involving issues that are important to its membership, filing dozens of *amici* briefs every year.[63] But the rules of the U.K. Court of Appeal do not clearly provide for the filing of written *amicus* submissions. The absence of such a rule is not surprising, given the relative importance of written advocacy and oral advocacy in the United Kingdom.

As any appellate lawyer in the United States knows, briefs do the heavy lifting of developing and explaining a legal argument on appeal in the U.S. courts. They are lengthy — often 50 or 60 pages, sometimes more — and arguments not raised in the briefs are waived. *Amicus* briefs, through which non-parties can provide the court with additional information or perspective not emphasized by the parties, are common. In fact, securing *amicus* support can be a critical component of appellate strategy. An *amicus* brief might argue policy implications or consequences of a particular outcome that a party itself cannot credibly raise because it may not suffer those consequences. *Amici* might present facts or other information that fall within their area of expertise. Or *amici* might be encouraged to stake out a more extreme position than the party to the appeal — a practice known informally as "flanking" — to make the party's position seem more reasonable and measured. In contrast to the prominent role of briefing in an American appeal, oral argument is time-limited — sometimes as short as 10 minutes — and focused on a few key issues of concern to the court.

The emphasis in U.K. courts is flipped. Briefing is limited to the "skeleton argument," an outline of the argument spanning no more than 25 pages (frequently, far less than 25 pages).[64] These submissions are a "very abbreviated note of the argument" and contain "a numbered list of points stated in no more than a few sentences which … both define and confine the areas of controversy" and "in no way usurp any part of the function of oral argument in court."[65] Advocates are also required to lodge with the court copies of the relevant authorities on which they rely.[66] These collectively form each party's "bundle." The "hearing" — oral argument, which even in an appeal can last for days — is the main vehicle for presenting, developing, and challenging a legal argument.[67] It is not uncommon for advocates to read passages from cases to the court — a practice that would surely irritate a U.S. judge. That emphasis on oral advocacy makes written submissions by non-parties somewhat uncommon in the United Kingdom.

Working with highly regarded barrister Amanda Pinto, Q.C., who is an acknowledged expert in corporate criminal matters, and her junior, Catherine Collins — both of the Chambers at 33 Chancery Lane — NACDL prepared what would function as an *amicus* brief in an American appeal and submitted it to the Court of Appeal. Court staff in the Appeal Office advised that the "master" — a judge who deals with all procedural issues in the case leading up to, and after, a trial or hearing[68] — would decide whether to accept the submission, given that the rules of the Court of Appeal did not clearly provide for *amicus* submissions. Ultimately, the master refused to accept the submission, directing that NACDL submit a formal application for permission to intervene by way of written submissions.

Unlike in the United States,[69] an intervenor in a U.K. court case need not demonstrate standing. Instead, a prospective intervenor need only submit an "application notice" requesting leave to intervene and a witness statement describing the facts and information that the prospective intervenor wishes to bring to the court's attention. As directed, NACDL prepared the requisite application notice and witness statement, seeking permission to intervene by way of written submissions — its earlier submitted *amicus* brief.

NACDL's Written Submission Highlights the International Consequences of the High Court's Ruling

NACDL's written submission explained that much of the material at the heart of the High Court's decision — witness interview memoranda, the work product of outside consultants retained by counsel — would have been protected under the American work-product doctrine.[70] Compelled disclosure of that material in the United Kingdom, NACDL argued, would have jeopardized those work-product protections in the United States.

For example, in *Massachusetts v. First National Supermarkets, Inc.*, the court found — under circumstances similar to those in *ENRC* — that attorney notes from witness interviews conducted as part of an internal investigation were protected work product.[71] The court reasoned that, when "the internal investigation commenced, it was anticipated that any facts which were developed which demonstrated criminal violations of the antitrust laws could result in both criminal and/or civil litigation."[72] It did not matter that "there was no litigation pending or imminent at the time of [the] interviews."[73] "[O]ne of the primary reasons for undertaking the investigation," the court explained, "was to determine whether or not violations had occurred and to prepare [for] any litigation which might result from such violations."[74] That was precisely the purpose of ENRC's investigation: "to find out if there was any truth in the whistleblower's allegations (and then to decide what to do about it if there was …)."[75] Thus, the materials at issue in *ENRC* would have qualified from work-product protections in the United States.

Significantly, under American law, if protected work product is disclosed outside the attorney-client relationship without precautions to prevent subsequent disclosure to a potential adversary, its confidentiality is lost as to the rest of the world.[76] That is no less true when disclosure is made to a government agency.[77] Even *involuntary* disclosure can waive confidentiality under the work-product doctrine.[78] And, once otherwise protected material has been disclosed, a party can no longer invoke work-product protection. In other words, one cannot "unscramble the egg."

The High Court's decision in *ENRC I* thus presented a real risk of undermining the scope of work-product protections in the United States. Applying the High Court's decision in *ENRC I*, a U.K. court could have decided that investigative material — material ordinarily entitled to work-product protections in the United States — was not entitled to confidentiality under the litigation privilege and could order disclosure of that material. That disclosure could have defeated the assertion of work-product protection in the United States because a U.S. court could have decided that disclosure in the United Kingdom — even if compelled by a decision such as *ENRC I* — would waive work-product protections. The determination of no confidentiality in the United Kingdom

would mean a corresponding loss of confidentiality in the United States.

NACDL thus argued to the Court of Appeal that the shift in the law brought about by the High Court's decision would unquestionably have a negative effect on litigants involved in U.K.-U.S. cross-border proceedings and investigations. Lawyers and their clients would have been prejudiced by an inability to provide proper, well-developed advice without the risk that what went into forming that advice — indeed, the advice itself — may be discovered by an adversary.

Those risks, moreover, were not merely theoretical. The realities of modern commerce have rendered national borders less important. Frequently, transactions — particularly those involving the financial and insurance markets — have a trans-Atlantic component. Consequently, recent years have seen an increasing number of cross-border investigations. Of late, the SFO has frequently partnered with the U.S. Department of Justice to conduct parallel investigations involving conduct on both sides of the Atlantic — formally agreeing to share the "facts of the case" and "key evidence," among other forms of cooperation.[79] "Key evidence," of course, could include documents and information that were treated as non-privileged under the High Court's decision in *ENRC I*, and obtained by the SFO. The SFO then could have made the documents available to U.S. authorities under the cooperation agreement, notwithstanding that the documents would otherwise be protected under the American work-product doctrine.

A few recent cases illustrate the scope and breadth of the cooperation between law enforcement authorities in the United Kingdom and the United States, demonstrating the reality of the risk presented by the High Court decision. Last year, Deutsche Bank's London subsidiary was sentenced in the United States after pleading guilty to wire fraud based upon its manipulation of the LIBOR international interest rate. As the Department of Justice made clear in announcing the sentence, the assistance and cooperation of the SFO were critical to the success of the American investigation.[80] Also last year, Rolls-Royce agreed to pay $170 million in criminal fines arising from violations of the U.S. Foreign Corrupt Practices Act ("FCPA"). The SFO initiated the investigation, which ultimately prompted Rolls-Royce's disclosure to the Department of Justice. In announcing the result, American officials touted the case as an example of the "strong relationship between the United States and the U.K. Serious Fraud Office."[81]

The involvement of the SFO combined with the High Court's decision in *ENRC I* could have jeopardized the American work-product protections afforded to documents generated in the course of an internal investigation in each of those cases and others like them. Indeed, as of 2017, the SFO was involved in 10 percent of all open FCPA investigations by the Department of Justice and the Securities and Exchange Commission.[82] And at least 24 times in the past four years, the Department of Justice has thanked the SFO for its cooperation and assistance when announcing resolutions of a criminal case or investigation in the United States. That level of cooperation is only likely to increase now that former senior FBI official Lisa Osofsky has assumed leadership of the SFO.[83]

Nor is the trans-Atlantic cooperation limited to the SFO and the Department of Justice. The U.K. Financial Conduct Authority and the City of London Police this past year assisted the U.S. Securities and Exchange Commission in its fraud investigation of State Street, an action that resulted in payment of a $35 million penalty.[84] And, of course, the impact of *ENRC I* would have extended to parallel civil litigation that can often accompany a criminal and regulatory investigation.

Following *ENRC I*, a lawyer advising a client in a U.S. proceeding or investigation that may have a U.K. aspect to it would have had to consider whether providing the most thoughtful analysis and forthright advice might ultimately work to the client's detriment. NACDL thus recognized the negative impact that decision would have on the robust adversarial system that is central to the administration of justice in both the United Kingdom and the United States. And its submission sought to place that perspective before the Court of Appeal.

The Court of Appeal's Response to NACDL's Uncommon Request

Predictably, the SFO opposed NACDL's motion to intervene. It argued that NACDL's perspective was unnecessary because the interests of the legal profession were adequately represented in the case by the Law Society of England & Wales — a professional organization akin to a bar association in the United States — which had earlier been granted leave to intervene and present oral argument. The Law Society, however, did not oppose NACDL's motion, nor did ENRC.

Ultimately, the Court of Appeal issued a Solomonic decision on NACDL's motion. The court denied permission to intervene. However, it encouraged NACDL to provide a copy of its submission and the authorities on which it relied to ENRC, the SFO, and the Law Society — an opportunity that NACDL seized.

The UK Court of Appeal Overturns the High Court

Notwithstanding the court's decision on NACDL's motion to intervene, NACDL's arguments did not go unnoticed. During the three-day hearing, the Law Society emphasized the international repercussions of the High Court's decision. It argued that English law on privilege should be consistent with that of other common law jurisdictions and pointed out that no other common law jurisdiction imposed the sort of restrictions on privilege found in the High Court's decision.[85] The Law Society even

directly referenced NACDL's arguments, explaining that because the SFO shares information with foreign counterparts, like DOJ, a narrower definition of privilege in the United Kingdom would allow those foreign counterparts to obtain information that they would otherwise not be entitled to under their domestic law.[86]

The Lord Justices of the Court of Appeal appeared sensitive to those concerns as well. Lord Justice Vos in particular seemed sympathetic to the viewpoint that English law on privilege should be consistent with that of other common law jurisdictions.[87] Indeed, he went so far as to say that, if it is not, the common law itself may be in jeopardy.[88]

Ultimately, the Court of Appeal reversed the decision of the High Court ("*ENRC II*").[89] It concluded that both reasons given by the High Court for denying privilege — that no adversarial litigation was reasonably contemplated, and that the documents were not created for the dominant purpose of defending against that litigation — were incorrect. In this case, the Court of Appeal explained, the circumstances provided ample reason for ENRC to believe that adversarial litigation — criminal proceedings — were in reasonable contemplation.[90] Indeed, the SFO had specifically made clear to ENRC that criminal proceedings were a possibility.[91]

The Court of Appeal also rejected the High Court's conclusion that, for litigation privilege to apply in the context of an anticipated criminal proceeding, the individual must know that a crime has occurred. A party anticipating possible criminal prosecution, the Court of Appeal reasoned, "will often need to make further investigations before it can say with certainty that proceedings are likely."[92] That is especially true when the putative defendant is a corporation. Without an internal investigation, a corporation will often, if not always, lack the information necessary to evaluate the sort of allegations lodged against ENRC here.[93] Thus, the Court of Appeal squarely rejected the distinction between civil and criminal proceedings on which the High Court had relied: "It would be wrong for it to be thought that, in a criminal context, a potential defendant is likely to be denied the benefit of litigation privilege when he asks his solicitor to investigate the circumstances of any alleged offence."[94]

The High Court's determination that privilege did not apply because the documents had been prepared for the purpose of self-disclosure to the SFO was also flawed, the Court of Appeal concluded. That an attorney may have prepared a document for disclosure to an opposing party does not, the court explained, strip the underlying preparatory work of entitlement to the litigation privilege.[95] In short, documents prepared "to head off, avoid or even settle reasonably contemplated proceedings" are as much entitled to litigation privilege as documents arising from efforts to "resist[] or defend[]" against those proceedings.[96]

In the United Kingdom, a losing party before the Court of Appeal can seek further review in the U.K. Supreme Court. (As in the United States, the Supreme Court is the United Kingdom's highest judicial authority, having taken over that role from the Appellate Committee of the House of Lords in 2009.[97]) Recently, however, the SFO announced that it would not seek review of the *ENRC II* decision in the U.K. Supreme Court.[98] Thus, the principles of litigation privilege laid out in the Court of Appeal's *ENRC II* decision are — for now, at least — settled.

Conclusion

The Court of Appeal decision in *ENRC II* was, without question, both a big victory for those who rely upon the litigation privilege and a firm signal of the importance of that privilege in the adversarial system of justice that the United States and the United Kingdom share. Corporations that are subject to the SFO and other law enforcement authorities in the United Kingdom — a rising number in recent years — can now rest assured that documents and memoranda produced in the course of an internal investigation will likely remain privileged, both in the United Kingdom and the United States.

Nonetheless, the Court of Appeal took pains to make clear that its decision turned on the facts of this particular case.[99] For example, the court pointed out that not "every SFO manifestation of concern would properly be regarded as adversarial litigation."[100] Thus, even after *ENRC*, a U.K. court may conclude that documents generated in an internal investigation are not entitled to the litigation privilege, although the standard for making such a finding has undoubtedly been raised. In that sense, and notwithstanding the Court of Appeals decision in this case, the biggest lesson from *ENRC* remains: Entities that are subject to the regulatory authority of multiple jurisdictions should, at the outset of any internal probe into allegations of misconduct, develop a firm understanding of the privileges, immunities, and confidentiality that apply to attorney-client communications and attorney work product under the laws of each jurisdiction. And, perhaps more importantly, entities should consider and understand how those different legal doctrines interact across foreign borders to ensure that decisions made in one jurisdiction will not have the unintended effect of waiving protections in another.

Notes

1. Margaret Thatcher, *Toasts of the President and Prime Minister Margaret Thatcher of the United Kingdom at a Dinner at the British Embassy* (Feb. 20, 1985), http://www.presidency.ucsb.edu/ws/index.php?pid=38242.

2. *Knight v. Florida*, 120 S. Ct. 459, 463-64 (1999) (Breyer, J., dissenting).

3. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting); *Shaw v. United States*, 137 S. Ct. 462, 466 (2016); *Knight v. Florida*, 120 S. Ct. 459, 463-64 (1999) (Breyer, J., dissenting).

4. *See, e.g.*, *Byrd*, 138 S. Ct. at 1527; *Ziglar*, 137 S. Ct. at 1874 (Breyer, J., dissenting); *Shaw*, 137 S. Ct. at 466.

5. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017).

6. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1245 (2018) (Thomas, J., dissenting); *Artis v. District of Columbia*, 138 S. Ct. 594, 610 (2018) (Gorsuch, J., dissenting).

7. For example, in *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017), Justice Alito, writing for a unanimous Court, held that the Hague Service Convention does not prohibit service by mail. In reaching that conclusion, he invoked decisions from the United Kingdom (and other Commonwealth nations) that similarly held the Convention does not prohibit service by mail. *Id.* at 1512 n.6 (citing, among other cases, *Crystal Decisions (U.K.), Ltd. v. Vedatech Corp.*, [2004] EWHC (Ch) 1872, 2004 WL 1959749, ¶21); *see also Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014) (citing *Cannon v. Cannon*, [2004] EWCA (Civ) 1330, [2005] 1 W.L.R. 32, ¶51).

8. *See, e.g.*, Brief of the Government of the United Kingdom of Great Britain and Northern Ireland, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018); Brief of the United Kingdom of Great Britain and Northern Ireland, *Carty v. Thaler*, 559 U.S. 1106 (2010).

9. *See Three Rivers Dist. Council v. Governor & Co. of the Bank of Eng. (No. 6)* [hereinafter *Three Rivers (No. 6)*], [2004] UKHL 48, ¶¶52, 85; *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("[D]iscovery should not nullify the

privilege of confidential communication between attorney and client.").

10. *Hickman*, 329 U.S. at 511.

11. *Three Rivers (No. 6)*, [2004] UKHL 48, ¶¶52.

12. *Id.* ¶¶10, 102; *United States v. Philip Morris Inc. (No. 1)* ("*Philip Morris (No. 1)*"), [2003] EWHC 3028 (Comm).

13. *Three Rivers (No. 6)*, [2004] UKHL 48, ¶102.

14. *Philip Morris (No. 1)*, [2003] EWHC 3028, ¶46.

15. *Three Rivers (No. 6)*, [2004] UKHL 48, ¶102.

16. *Id.* ¶99 (quoting *Wheeler v. Le Marchant*, [1881] 17 Ch. D. 675, at 680-81).

17. *Id.* ¶102.

18. Fed. R. Civ. P. 26(b)(3)(A)-(B); *Hickman*, 329 U.S. at 508.

19. 8 Charles Alan Wright et al., Federal Practice and Procedure § 2024.

20. *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 321 (N.D. Ill. 2010).

21. *Id.*

22. *See* Fed. R. Civ. P. 26(b)(3); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003).

23. *Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Corp.*, [2018] EWCA Civ 2006, ¶7 [hereinafter *ENRC II*].

24. *Id.*

25. *Id.* ¶8.

26. *Id.*

27. *Id.* ¶12.

28. *Id.* ¶¶13-15.

29. *Id.* ¶16.

30. *Id.* ¶17.

31. *Id.*

32. *Id.* ¶¶20-31.

33. *Id.* ¶22.

34. *Id.* ¶31.

35. *See* Serious Fraud Office, *Corporate Self-Reporting*, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/ (last accessed Oct. 2, 2018).

36. *ENRC II*, [2018] EWCA Civ 2006, ¶32.

37. *Id.* ¶34.

38. *Id.*

39. *Id.*

40. *Id.* ¶35.

41. *Id.*

42. *Id.*

43. *Id.* ¶¶37-38.

44. *Id.* ¶41.

45. *Id.* ¶42.

46. *Id.* ¶46.

47. *Id.* ¶43.

48. *Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Corp.*, [2017] EWHC 1017 (QB) [hereinafter *ENRC I*].

49. *Id.* ¶149.

50. *Id.* ¶¶102-105.

51. *Id.* ¶118.

52. *Id.* ¶105.

53. *Id.* ¶151.

54. *Id.* ¶¶159-161.

55. *Id.* ¶160.

56. *Id.*

57. *Id.*

58. *Id.* ¶164.

59. *Id.* ¶¶170-171.

60. The High Court also concluded that the documents did not fall within the scope of the United Kingdom's legal advice privilege. The analog to attorney-client privilege in the United States, legal advice privilege "attaches to all communications passing between the client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice." *ENRC I*, [2017] EWHC 1017 (QB), ¶62. Unlike litigation privilege, legal advice privilege does not require that litigation be reasonably contemplated. *Id.* However, in the corporate context, the legal advice privilege only attaches to communications made between the lawyer and "those individuals who are authorised to obtain legal advice on [the] entity's behalf." *Id.* ¶70. Thus, unless a corporate employee (or even a corporate officer) has been authorized to solicit and obtain legal advice on behalf of the corporation, that employee's or officer's communications with the company's lawyers will not be privileged. *Id.* ¶¶70-87. Because ENRC's lawyers interviewed many corporate employees who lacked that authorization, the High Court concluded that the legal advice privilege did not apply to most of the documents. *Id.* ¶¶177-179.

61. *See, e.g.*, Barney Thompson, *Miner ENRC Wins Leave to Appeal on Handling Over Documents*, Financial Times, Oct. 11, 2017, https://www.ft.com/content/d2a0895e-ae71-11e7-aab9-abaa44b1e130 (last accessed Oct. 3, 2018); Caroline Binham & Jane Croft, *High Court Backs SFO Access to ENRC Evidence*, Financial Times, May 9, 2017, https://www. ft. com /content/b1d27a70-34d7-11e7-99bd-13beb0903fa3 (last accessed Oct. 3, 2018); Caroline Binham, *Judge to Weigh What Material ENRC Must Turn Over in Criminal Probe*, Financial Times (Feb. 1, 2017), https://www.ft.com/content/763b45fa-6a05-3173-a201-aef59f2421b1 (last accessed Oct. 3, 2018).

62. *See, e.g.*, Alex Davis, *SFO Wins Landmark Privilege Ruling to Access Internal Docs*, Law360 (May 10, 2017), https://www.law360.com/articles/922424/sfo-wins-landmark-privilege-ruling-to-access-internal-docs (last accessed Oct. 3, 2018).

63. *See* National Association of Criminal Defense Lawyers Inc., *Amicus Briefs*, https://www. nacdl.org/Amicus/.

64. *See* U.K. Ct. App. Civ. Div. Practice Direction 52C ¶31.

65. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159, 1168 & n.32 (2004) (quoting U.K. Ct. App. Civ. Div. Practice Direction 3.1.1).

66. *See* U.K. Ct. App. Civ. Div. Practice Direction 52C ¶29.

67. *See generally* The Honourable Society of the Middle Temple, *Guide to Advocacy* (Sept. 2014).

68. *See* U.K. Courts and Tribunals Judiciary, *High Court Masters and Registrars*, https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-ct-masters-regis t r ars/ (last accessed Oct. 8, 2018).

69. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003) (describing rules of standing for a prospective intervenor).

70. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010) (attorney memoranda protected under work-product doctrine because "[w]ork-product protection applies to attorney-led investigations when the documents at issue 'can fairly be said to have been prepared or obtained because of the prospect of litigation'").

71. 112 F.R.D. 149 (D. Mass. 1986).

72. *Id.* at 151.

73. *Id.*

74. *Id.*; *see also Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981) (notes and memoranda from internal investigation were protected work

product); *In re Grand Jury Subpoena*, 599 F.2d 504, 511-12 (2d Cir. 1979) (similar); *Lafate v. Vanguard Grp., Inc.*, No. 13-cv-5555, 2014 WL 5023406, at *6 (E.D. Pa. Oct. 7, 2014) ("Generally, documents created as part of an internal investigation, such as the one at issue in this case, are considered to be made in anticipation of litigation for the purposes of the work-product doctrine.").

75. *ENRC I*, [2017] EWHC 1017, ¶165.

76. *See, e.g.*, *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1193 (3d Cir. 2006) (voluntary disclosure to government agency can waive work-product protections as to all); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302, 306-07 (6th Cir. 2002) (same); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993) (same).

77. *See, e.g.*, *Westinghouse Elec. Corp. v. Rep. of Phil.*, 951 F.2d 1414, 1430 (3d Cir. 1991) (disclosure to government agency, which was potential adversary, waived work-product protection notwithstanding existence of non-disclosure agreement).

78. *See United States v. Ary*, 518 F.3d 775, 783-84 (10th Cir. 2008).

79. *See Agreement for Handling Criminal Cases with Concurrent Jurisdiction Between the United Kingdom and the United States of America*, U.K.-U.S., ¶10, Jan. 2007, https://publications. parlia ment. uk/ pa/ ld 200607/ldlwa/70125ws1.pdf.

80. *See* Press Release, U.S. Dep't of Justice, Deutsche Bank's London Subsidiary Sentenced for Manipulation of LIBOR (Mar. 28, 2017), https:// www.justice.gov/opa/pr/deutsche-bank -s-lon don-subsidiary-sentenced -manipulation-libor.

81. *See* Press Release, U.S. Dep't of Justice, Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), https://www. justice.gov/opa/ pr/rolls-royce-plc-agrees-pay-170 -million-criminal-penalty-resolve -foreign-corr u p t-practices-act.

82. *See* Skadden, Arps, Slate, Meagher & Flom LLP , *Cross-Border Investigations Update* (Nov. 2017), https://www.skadden.com/ insights/publications/2017/11/ cross- border-investigations-up da t e -november-2017.

83. *See* Frances Gibb, Jonathan Ames & Harry Wilson, *Fraud Office Faces Uncertain Future as Ex-FBI Lawyer Lisa Osofsky Set to Take Charge*, SUNDAY TIMES, Apr. 26, 2018, https:// www. thetimes. co.uk/article/ fraud-office-faces-uncertain-future-as-ex -fbi-lawyer-lisa-osofsky-set-to-ta k e -charg e - g gj8qpp0k.

84. Press Release, U.S. Sec. & Exch. Comm'n, State Street Paying Penalties to Settle Fraud Charges and Disclosure Failures (Sept. 7, 2017), https://www. sec.gov/news/press-release/2017-159.

85. Elaina Bailes & Oliver Ingham, *Will Court of Appeal Case Clarify Muddled Law on Legal Advice and Litigation Privilege?*, LEXOLOGY (July 18, 2018), https://www. lexology.com/library /detail.aspx?g=9ba05 788-cf56-4dcb-896c-65cbcbbb4dae.

86. *Id.*

87. *Id.*

88. *Id.*

89. *ENRC II*, [2018] EWCA Civ. 2006. Even before the Court of Appeal overturned *ENRC I*, the High Court itself had begun to question the wisdom of that decision. In *Bilta (UK) Ltd. v. Royal Bank of Scotland PLC*, [2017] EWHC 3535, ¶¶58-72 (Ch.), the High Court ruled that documents generated during an internal investigation were covered by the litigation privilege. In doing so, *Bilta* noted tension between *ENRC I* and other decisions of the Court of Appeal. *Id.* ¶58. It also emphasized that determining litigation privilege is a fact-bound inquiry; one company's interactions with the SFO do not say much about the application of privilege based on another company's interactions. *Id.* ¶59.

90. *ENRC II*, [2018] EWCA Civ. 2006 ¶96.

91. *Id.*

92. *Id.* ¶98.

93. *Id.*

94. *Id.* ¶99.

95. *Id.* ¶102.

96. *Id.* While ENRC prevailed on the litigation privilege issues, the Court of Appeal concluded that binding precedent — *Three Rivers District Council & Others v. Governor & Co. of the Bank of England (No. 5)*, [2003] QB 1556 [hereinafter *Three Rivers (No. 5)*] — required it to affirm the High Court's decision on the legal advice privilege issues. *ENRC II*, [2018] EWCA Civ. 2006 ¶¶123-130. Still, the court questioned the reasoning of *Three Rivers (No. 5)*, stating its inclination to overrule that decision were it free to do so. *Id.* ¶130. The SFO recently announced that it would not seek review of the *ENRC II* decision in the U.K. Supreme Court, perhaps in part to preclude the Supreme Court from accepting the invitation by the Court of Appeal to overrule *Three Rivers (No. 5)*.

97. *See* U.K. Supreme Court, *Frequently Asked Questions*, https://www.supremecourt. uk/faqs. html#1a (last accessed Oct. 8, 2018).

98. *See* Richard Crump, *SFO Won't Appeal Landmark ENRC Legal Privilege Ruling*, LAW360 (Oct. 2, 2018), https://www.law360.com/articles/1088530 /sfo-won-t-appeal-landmark-enrc-lega l -privilege-ruling.

99. *ENRC II*, [2018] EWCA Civ. 2006, ¶88 (noting "[t]his aspect of the appeal is, in our judgment, primarily factual …").

100. *Id.* ¶96.

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