The Foreign World, In-house Attorneys and Attorney-Client Privilege
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The Attorney-Client Privilege in the United States

In the first semester of law school, most U.S. attorneys learn the importance and scope of the attorney-client privilege. The attorney-client privilege is the oldest confidential communications privilege known to the common law.² In the broadest sense, the privilege protects confidential communications between the attorney and the client, when those communications are for the purpose of obtaining or providing legal advice. The privilege has been deemed applicable not only to individual clients, but also to a corporation when seeking legal counsel from its in-house attorneys. There are some limitations, however. Generally, factual information is not protected by the privilege, unlike the legal advice based on those facts, which is protected. The privilege will not attach if a third party, not necessary to the provision of the legal advice, is present, and will be deemed waived if the privileged information is disclosed to a third party. For in-house attorneys in the U.S., who often participate actively in business meetings, there is also the need to distinguish between legal advice (protected by the privilege) and business advice, which, even if given by a lawyer, is not protected. Whether a particular communication or document is privileged will, therefore, depend upon a number of factual indicators: To whom was the communication addressed? Was it treated in a

¹ Mr. Patel is placed with Corn Products International, Inc. courtesy of Linder Legal Staffing, Inc.
manner so as to demonstrate confidentiality? Does it predominately reflect legal, as opposed to business, advice?

The U.S. in-house attorney therefore learns to limit the distribution of privileged documents, to draft documents in such a manner as to demonstrate that the advice provided is of a legal nature, and to label every document and correspondence with a legend such as “Confidential – Attorney/Client Privilege.” All of this is with a goal of preventing strategic legal advice from being disclosed in the course of U.S. litigation discovery, a process by which each party can compel the other to disclose documents and information potentially relevant to the claims and defenses raised, regardless of whether the party intends to rely on those items.

A World Without Borders

Globalization and technology have helped create a borderless world. Business is no longer limited to geographic or country boundaries. Companies and individuals can engage in a multitude of transactions almost anywhere and at any time due to the global economy, combined with the power of the internet. For U.S. in-house counsel, this borderless world has created opportunity: both to serve in an expatriate capacity in a country other than the U.S. and to develop an international practice while remaining based in the U.S. A key learning for any attorney in either circumstance is the need to understand that the U.S-style attorney-client privilege does not always translate, particularly for those practicing in-house.
The standards for the attorney-client privilege differ from country to country, at times in surprising and even drastic ways. As a general matter, the privilege likely will not apply to an attorney who is not licensed in the country of interest. Accordingly, the U.S. based in-house counsel who wishes to communication with company representatives based in other jurisdictions must think carefully about the nature of the communications. For highly strategic legal discussions, it is always best to involve local counsel, who not only have the required local legal expertise, but who also are viewed as the attorney for the purposes of attachment of the privilege.

While most countries recognize some form of privilege, a key difference has to do with how, or really whether, the attorney-client privilege applies to in-house attorneys, even those based in the country of interest. As noted above, under U.S. law, communications with in-house attorneys are protected and privileged. In contrast, communications with in-house attorneys in many European countries are not protected. On September 14, 2010, the European Court of Justice ruled in the Akzo Nobel case that the attorney-client privilege only applied when the communication between an attorney and a client was connected to the “client’s right of defense” and when the communication originated from “independent lawyers”. The rationale was that in-house attorneys are

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4 Adams, Rachel; Mikulka, Yuri; Bagosy, Jennifer, Protecting Privilege in a Global Business Environment; ACC Docket, June 2009, page 36 – 37, [PDF]
5 Heineman Jr., Ben W.; European Rejection of Attorney-Client Privilege for Inside Lawyers; [PDF]
not independent because they are employees of the client, and may face the same business pressures as their corporate client.\textsuperscript{6} It was viewed that this relationship that does not obligate the attorney to the same legal and professional ethics as an “independent” outside attorney. As a side note, unlike in the U.S., in some European countries, attorneys who wish to move in-house are no longer considered to be members of the licensed bar.

**Taking Preventive Measures**

In determining whether privilege can be asserted for communications in foreign jurisdictions, a number of factors should be considered. The most important is whether the local law recognizes some form of the attorney-client privilege, and if so, the scope of the privilege.\textsuperscript{7} A related matter is whether the attorney involved is considered to be an attorney, in that jurisdiction, for purposes of the privilege. As noted above, individuals not licensed in the particular jurisdiction (even if licensed in the U.S.), as well as in-house counsel, may not be considered attorneys for purposes of the privilege. In some jurisdictions, there are different classes or categories of lawyers based on education, certification or licensure, only some of whom are considered attorneys for purposes of the privilege.\textsuperscript{8}

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\textsuperscript{6} Id.
\textsuperscript{7} Adams, Rachel; Mikulka, Yuri; Bagosy, Jennifer, Protecting Privilege in a Global Business Environment; ACC Docket, June 2009, page 36 – 37, \url{http://www.acc.com/vl/membersonly/ACCDocketArticle/loader.cfm?csModule=security/getfile&amp;page id=305310} [PDF]
\textsuperscript{8} Bales, Richard; NKU Chase College of Law; Attorney-Client Privilege for Corporate Counsel Outside the U.S. and E.U.; ABA International Labor & Employment Law Mid-Year Meeting 2011.
As a practical matter, it is important to know the scope of discovery in a jurisdiction of interest. In some countries, the risk of U.S.-style broad discovery, is limited, or does not exist at all. Specifically, is there an obligation to produce documents which a party does not intend to rely on in a litigation matter? On a related note, what is the scope of disclosure in connection with a governmental investigation? The Akzo Nobel situation arose in connection with fair competition raids of the corporations offices by the European Commission. Knowing whether a communication or document is likely to be produced can help in-house counsel determine the risk posed by a failure or absence of the attorney-client privilege.

Those who represent U.S. based multinational companies must keep their eyes focused on both sides of the border. In international matters, it is possible that one jurisdiction offers the protection of the attorney-client privilege, while a second does not. Further, the risk of lawsuit or investigation in the U.S. encourages continued diligence in connection with the privilege, even for matters originating in other countries. Once a document or communication enters the U.S., it become discoverable in the U.S. For that reason, if there is a U.S. litigation or investigation risk, it is important that the U.S. licensed attorney properly label matters which would be privileged in the U.S. as being confidential and privileged and encourage their clients to do the same.

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9 Id.
Regardless of where they practice, in-house attorneys should try to maintain a distinction between business and legal roles. For purposes of litigation, the distinction will help determine if the document was intended to confer legal advice or merely business counsel. There is a risk of the privilege being waived or deemed inapplicable, even in jurisdictions where it is recognized, if a majority of the documents or communications claimed to be privileged are not, or are highly questionable, e.g., recitations of facts shared with the attorney for business reasons, or merely to try to invoke privilege, as opposed to communications containing legal advice.

The in-house attorney should be mindful of different modes of communication available. Drafting errors can result in involuntarily waiver of the privilege, particularly if it is unclear whether legal advice (as opposed to business counsel or a recitation of factual information) is actually being given. Further, casual communications, such as E:Mails, can, in hindsight, result in problems if the meaning and intent was not clear. This is particularly a problem if some or all of the writers are writing in languages which are not their native language. In some cases, telephone or in-person conversations are better forms of communication. Appropriate means of communication should also be discussed with clients.

Many non-lawyer clients may not be aware of the attorney-client privilege, so training on this topic, even if informal, is also suggested. Some clients might hesitate to label a document “confidential” because it is not discoverable in their jurisdiction, without realizing that it would be in the U.S. or in other relevant countries. Other clients
might routinely forward privileged E:Mails containing their attorney’s legal advice to third parties, thereby creating a potential waiver of the privilege. Another common misconception may be that documents are privileged merely because an in-house attorney received them (similar to the factual information discussed above). The attorney should develop training that discourages clients from label documents and communications with “Confidential – Attorney/Client Privilege” or similar legends without cause, but instead engenders strong knowledge of when the privilege applies.

**Conclusion**

The international attorney who knows the parameters of the privilege has learned an important lesson, but has also met some good fortune. He or she is able to develop strategies for communicating with colleagues in foreign offices with regards to legal matters, and can confirm that non-lawyer clients recognize and understand the importance of the attorney-client privilege and its proper use. He or she can work with outside counsel as appropriate to understand local law and to allow the privilege to be invoked under the laws of the jurisdiction for highly sensitive and high risk matters. The international attorney therefore no longer feels the burden of ensuring privilege and the risk of having done so incorrectly. There will always be the risk of a potential loss of the attorney-client privilege when multiple jurisdictions are involved, but now our new expatriate or global attorney is better equipped to deal with and mitigate that risk.