

APPENDIX A

RESOLUTION 301

ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

FEBRUARY 1983*

(ARCHIVED 1998)

BE IT RESOLVED, That the American Bar Association requests the Commission of the European Communities, when conducting a competition inquiry pursuant to Article 11 or 14 of Regulation 17, to grant to an undertaking the same protection, including the same procedural safeguards, against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a Member State of the European Community.

BE IT RESOLVED, That, as a separate matter from the above resolution, the American Bar Association requests the Commission of the European Communities to study and extend the attorney-client privilege to house counsel, whether of Member States of the Communities, or otherwise.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

REPORT NO. 2 OF THE SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION*

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REPORT

The Section of International Law and Practice submits this recommendation and report for adoption by the House of Delegates in response to a recent decision of the Court of Justice of the European Communities. That decision, *AM&S Europe Ltd. v. Commission*,¹ recognized the existence of a limited attorney-client privilege within European Community law but, by its literal terms, seems to exclude communications with U.S., and other non-EEC, lawyers from protection. The Court specifically excluded from the scope of the privilege communications with in-house lawyers, whether qualified to practice in a Member State of the Community or not.

The *AM&S* decision, if applied to exclude the privilege for communications with U.S. lawyers, would pose serious concerns for U.S. and European multinational firms and the U.S. lawyers who advise them. The Section urges the House to authorize the full Association to request that the Commission of the European communities afford the same protection, including the same procedural safeguards, to written communications between a client and a U.S. lawyer that it accords to communication with an

EEC lawyer. Any lesser protection would deny clients of U.S. lawyers a right that U.S. courts and antitrust enforcement agencies grant to clients of European lawyers. In addition, discriminating against communications with U.S. lawyers would be inconsistent with the basic principles declared by the Court in the *AM&S* decision and would be contrary to the policies of encouraging trade and friendly relations between the U.S. and Member States of the Community.²

The AM&S Decision

AM&S Europe is a U.K. company that is part of the Rio Tinto Zinc group. A subsidiary of *AM&S Europe* owns and operates a zinc smelter in England.³ As part of a competition inquiry into the zinc industry, officials of the Commission arrived at the

²Although this Report limits its recommendation to requesting protection for confidential client communications with U.S. lawyers, the Section also believes that the Commission may want to protect communications with a lawyer of any foreign jurisdiction that, as the following discussion will demonstrate about the United States, provides a privilege for communications with European lawyers and subjects its lawyers to an appropriate system of legal ethics and discipline.

³C.M.L.R. at 271-72, Comm. Mkt. Rep. at 9062 (A.G. Warner).

*The recommendation was amended, then approved. See page 400.

¹Case No. 155/79, [1982] 2 Comm. Mkt. L. R. 264, 1979-1981 Transfer Binder] Comm. Mkt. Rep. (CCH) ¶ 8757 (E.C.J. 1982) (not yet officially reported). References within will be to both unofficial reporters.

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Bristol, England, premises of AM&S Europe and asked to examine the undertaking's files.⁴ AM&S refused to make certain documents available on the ground that a legal professional privilege protected them from disclosure. The Commission then took a formal decision under Regulation 17, article 14(3), requiring AM&S to submit to fresh investigations and to produce business records, including all the documents for which AM&S claimed privilege. AM&S again refused to produce the documents for which it claimed privilege, but offered to show Commission officials enough of each document to enable them to determine that the document qualified for privilege. The Commission officials refused the offer and, still withholding the documents from the Commission, AM&S applied to the European Court of Justice for a declaration voiding the Commission decision that required production of the whole of the privileged documents.⁵

The documents AM&S refused to disclose to the Commission included: (1) communication requesting advice from English lawyers who were not full-time employees of the undertaking ("outside" lawyers), (2) documents from outside English lawyers with advice on English law, Community law, and the law of a non-EEC country, (3) a document containing advice on the law of a non-EEC country sent to the undertaking by a firm of lawyers qualified to practice in the non-EEC country, (4) documents containing legal advice from lawyers employed by the undertaking ("in-house" lawyers), and (5) documents from one AM&S executive to another summarizing legal advice received and discussing the need to obtain legal advice.

The Court, after hearing oral argument and the opinion of the Advocate General, ordered AM&S to send to the Court, "under confidential seal,"⁶ the documents for which AM&S claimed privilege. AM&S submitted the documents, and one of the judges and the Advocate General then examined them, prepared a report on the nature of the documents, and sent the report to the parties in the case.⁷ The Court re-opened the

proceedings, heard further argument, and received a second Advocate General's opinion.⁸ The Court found that documents in categories (1) and (2) above were privileged and that the documents in the remaining categories were not protected.⁹

A. Scope of the Privilege

The main legal point contested between the Commission and AM&S was the nature of the procedure to be used to ascertain whether a document qualified for privilege but, before reaching that question, the Court first needed to decide whether Community law afforded *any* protection to written attorney-client communications during a competition investigation. The Court confirmed the Commission's "wide powers" under articles 11 and 14¹⁰ to gather information about competition matters¹¹ but then stated that "principles and concepts common to the laws of" the Member States restrict those powers. One common principle is "the observance of confidentiality, in particular, as regards certain communications between lawyer and client."¹² Some Member States apply the principle because "it contributes toward the maintenance of the rule of law," others solely because it respects "the rights of the defence."¹³ All Member States recognize that confidentiality serves the requirement "that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."¹⁴ The Court then went on to impose three conditions on the scope of the privilege.

1. Remarks that are worth reproducing in full contain the critical passage for U.S. lawyers:

⁸*Id.* at 270-71, Comm. Mkt. Rep. at 9056.

⁹*See id.* at 298-99 (A.G. Slynn), 327, Comm. Mkt. Rep. at 9061, 9078; Edward, Outline for Speech to Conference on EEC Competition law Procedure delivered in Brussels on June 8, 1982.

¹⁰Regulation 17, article 11, empowers the Commission to request information from undertakings. Article 14 of the Regulation, discussed above, permits the Commission to examine and copy files at the premises of an undertaking.

¹¹C.M.L.R. at 322, Comm. Mkt. Rep. at 9058-59.

¹²*Id.* at 322-23, Comm. Mkt. Rep. at 9059.

¹³*Id.* at 323, Comm. Mkt. Rep. at 9059.

¹⁴*Id.* at 323, Comm. Mkt. Rep. at 9059.

⁴The Commission has authority to conduct on-site investigations and examine and copy books and records. *See* Regulation 17, art. 14.

⁵C.M.L.R. at 268-69, Comm. Mkt. Rep. at 9040.

⁶*Id.* at 269, Comm. Mkt. Rep. at 9055.

⁷*Id.* at 270, Comm. Mkt. Rep. at 9055.

Having regard to the principles of the Treaty concerning freedom of establishment and the freedom to provide services the protection thus afforded by Community law, in particular in the context of Regulation 17, to written communication between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the member-States, regardless of the member-State in which the client lives.

Such protection may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession as laid down in Council Directive 77/249/EEC of 22 March 1977 which is based in its turn on the mutual recognition by all the member-States of the national legal concepts of each of them on this subject.¹⁵

The reference to a "lawyer entitled to practise his profession in one of the member-States" suggests a limitation on the scope of the privilege, but the Court's opinion may not justify such a limitation. The Court's reasoning suggests that it was seeking to avoid discrimination among lawyers of the various Member States¹⁶ rather than to exclude qualified lawyers of foreign jurisdictions from the privilege.¹⁷ The Court specifically referred to Treaty sections designed to eliminate economic barriers among the Member States¹⁸ and emphasized that the privilege "must apply without distinction" to advice given by a lawyer of any Member State. The Council Directive cited by the Court supports this view. The foundations for the Directive are the Treaty sections on the freedom of establishment and the freedom to provide services, to which the Court referred. The Directive states that, "if lawyers are to exercise effectively the freedom to provide services host Member States must recognize as lawyers those persons practicing the profession in the various Member-States."¹⁹

¹⁵*Id.* at 324, Comm. Mkt. Rep. at 9060 (footnote omitted and emphasis added).

¹⁶See EEC Treaty arts. 3(c), 7.

¹⁷See Ghandhi, *Legal Professional Privilege in European Community Law*, 7 Eur. L. Rev. 308, 313 (1982).

¹⁸The Court mentioned the sections providing for the abolition of the restrictions on the freedom of establishment, EEC Treaty arts. 52-58, and on the freedom to provide services, *id.* arts. 59-66.

¹⁹Council Directive of March 22, 1977, To

Thus, the Court, in the paragraphs reprinted above, may have been extending, not restricting, the scope of the privilege.

2. A second restriction on the scope of the privilege is that it does not apply to communications with in-house lawyers. The Court said that protected communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."²⁰ This restriction "is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs," which are obligations enforced by "rules of professional ethics and discipline."²¹

3. The third condition relates to the subject of the communication. To be covered by the privilege, a communication must be "made for the purposes of and in the interests of the client's rights of defence."²² Other provisions of Community law²³ "ensure that the rights of the defence may be exercised to the full, and the protection of the confidentiality of written communications between lawyer and client is an essential corollary to those rights."²⁴ In general, the privilege will attach to documents exchanged after the Commission initiates an administrative procedure or takes a decision imposing a pecuniary sanction, but it may also extend to earlier communication having "a relationship to the subject-matter of that procedure."²⁵ The Court apparently intends the "subject-matter" test to be construed broadly; it held that the privilege applied to documents that were written before the U.K. became a member of the Community and that were "principally concerned with how far it might be possible to avoid conflict . . . with regard to the Community provisions on competition."²⁶

Facilitate the Effective Exercise by Lawyers of the Freedom to Provide Services, O.J. No. L 78/17 (March 26, 1977), Comm. Mkt. Rep. (CCH) ¶ 1494.

²⁰C.M.L.R. at 323, Comm. Mkt. Rep. at 9059.

²¹*Id.* at 324, Comm. Mkt. Rep. at 9060.

²²*Id.* at 323, Comm. Mkt. Rep. at 9059.

²³See Reg. 17, art. 19; Reg. 99.

²⁴C.M.L.R. at 323, Comm. Mkt. Rep. at 9059.

²⁵*Id.*, Comm. Mkt. Rep. at 9060.

²⁶*Id.* at 326, Comm. Mkt. Rep. at 9061.

B. The Procedure for Applying the Privilege

The main dispute in the case was over the procedure to be used to apply an attorney-client privilege. The Commission argued that its officials should be able to see the entirety of the documents and to determine whether the documents should be used or not.²⁷ The Commission said that, if its officials conclude that a document is privileged, they will not copy the document and will not be allowed to use the knowledge gained from it.²⁸ AM&S argued that the Commission's approach denied the principle of confidentiality. The Commission should decide whether privilege applies from a description of a document supplied by the undertaking,²⁹ because officials of the Community would have difficulty expunging the content of a document from their minds.³⁰

The Court agreed with AM&S and approved a three-step procedure for verifying whether a document qualifies for protection. First, an undertaking must "provide the Commission's authorised agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection . . . , although it is not bound to reveal the contents of the communications in question."³¹ Second, if the Commission is not satisfied, it must take a formal decision under article 14(3) requiring production of the documents and possibly imposing fines for a refusal to comply. Third, the undertaking must comply or bear the risk of paying the fines. It may apply to the Court for a declaration that the Commission's decision is void and, at the same time, request the Court immediately to suspend or alter the Commission's order to produce the documents.³²

Discussion

Although the Court stated that the Community privilege applies only to communications with a lawyer entitled to practice in a Member State and found that the privilege did not protect a document containing legal advice from an independent

foreign lawyer, neither the arguments of the parties nor the reasoning of the Advocates General³³ or the Court addressed the specific issue of whether to apply the privilege to foreign lawyers. The Section of International Law and Practice submits that the Court may not have fully considered the implications of a privilege rule that does not cover U.S. lawyers and, accordingly, urges the House of Delegates to request that, for the purposes of the attorney-client privilege, the Commission treat communication with U.S. lawyers as those with lawyers entitled to practice in a Member State. That treatment should include the right of undertakings not to disclose to Commission officials the content of confidential communication with U.S. lawyers and to seek relief from the European Court should the Commission formally demand access to the documents.

There are three grounds for making such a request: (1) U.S. courts and antitrust enforcement agencies draw no distinction between U.S. lawyers and foreign lawyers when faced with a claim of attorney-client privilege; therefore, as a matter of comity, the Commission should accord clients with confidential communications to or from U.S. lawyers the same right, (2) U.S. lawyers are subject to strict rules of professional ethics and discipline wherever they practice, and (3) excluding U.S. lawyers from the scope of the Community privilege would substantially impair the freedom of clients to obtain legal advice from lawyers of their choice and therefore would be inconsistent with the spirit and reasoning of the *AM&S* case as well as with rights contained in U.S. treaties with various Member States and protected by article 234 of the EEC Treaty.

I. As Matters of Comity and Reciprocity, the Commission Should Include U.S. Lawyers Within the Protection of The Community's Legal Privilege.

United States courts recognize that, to maintain order and stability within the international community, they must in

²⁷*Id.* at 319-20, Comm. Mkt. Rep. at 9057.

²⁸*Id.* at 291, Comm. Mkt. Rep. at 9074 (A.G. Warner).

²⁹*Id.* at 319, Comm. Mkt. Rep. at 9057.

³⁰*Id.* at 292, Comm. Mkt. Rep. at 9074 (A.G. Warner).

³¹*Id.* at 325, Comm. Mkt. Rep. at 9060.

³²*Id.*, Comm. Mkt. Rep. at 9061.

³³Advocate General Slynn thought the privilege should apply "to confidential communications between a lawyer qualified in one jurisdiction and a lawyer qualified in another jurisdiction about the affairs of their mutual or respective clients," *id.* at 310, Comm. Mkt. Rep. at 9005, but whether he meant to refer to lawyers qualified in different Member States or to EEC and non-EEC lawyers is unclear.

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appropriate circumstances accommodate the rights and privileges afforded by foreign legal systems.³⁴ They do so as part of international comity, which in the U.S. "is neither a matter of absolute obligation, . . . nor of mere courtesy and good will."³⁵ The foundations for this practice are "mutuality and reciprocity."³⁶ The Commission too recognizes the roles of mutuality and reciprocity within the sphere of international relations. Recently it argued that the European Court should not construe a treaty between the Community and a non-member country so that private parties had rights under the treaty in the Community that they did not have in the non-member state.³⁷ When the Commission determines what level of protection it should grant to client communications with U.S. lawyers, it therefore, as a matter of comity, should take into consideration the way U.S. courts and enforcement authorities treat confidential communications between clients and EEC lawyers.

A. THE ATTORNEY-CLIENT PRIVILEGE IN THE U.S.

The privilege in the U.S. for confidential communications between lawyer and client is old and well-established.³⁸ The formulation of the privilege most often quoted by courts³⁹ is language from Judge Wyzanski in *United States v. United Shoe Machiner Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made

(a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or a tort; and (4) the privilege (a) has been claimed and (b) not waived by the client.

Most states have statutes or rules that embody the privilege.⁴⁰

The privilege is quite broad. It attaches to communications with in-house lawyers⁴¹ and to any confidential communication made for the purpose of facilitating the rendition of legal services.⁴² To qualify for protection, the communication does not have to be made during litigation or in contemplation of litigation and does not have to relate to the subject-matter of a particular case or investigation.⁴³

The U.S. attorney-client privilege protects information from disclosure during antitrust investigations conducted by federal agencies. Both the Federal Trade Commission and Department of Justice have authority to enforce the U.S. antitrust laws. Congress gave both the power to investigate suspected antitrust violations and to collect information from private persons before instituting judicial action.⁴⁴ These statutory powers

⁴⁰8 J. Wigmore, *Evidence in Trials at Common Law* § 2292, at 555-59 n.2 (McMoughton rev. ed. 1961 & Supp. 1982) (citing statutes or rules from 41 states).

⁴¹*Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975); *Burlington Industries v. Exxon*, 65 F.R.D. 26, 36 (D. Md. 1974); *Georgia-Pacific Plywood Co. v. United States Plywood Co.*, 18 F.R.D. 463 (S.D.N.Y. 1956); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1956).

⁴²See Proposed Fed. R. Evi. 503(b).

⁴³*Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Alexander v. United States*, 138 U.S. 353, 358 (1891); J. Wigmore, *supra* note 39, §§ 2294-97.

⁴⁴See 15 U.S.C. § 49 (1976) (giving the FTC power to issue subpoenas requiring the production of documents or witnesses); *id.* § 1312(a) (giving the Department of Justice power to issue civil investigative demands for the production of documents, answers to interrogatories, and oral testimony).

³⁴See *Hilton v. Guyot*, 159 U.S. 113 (1895).

³⁵*Id.* at 163-64.

³⁶*Id.* at 228; see *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12 (1964).

³⁷*Polydor Ltd. v. Harlequin Record Shops Ltd.*, Case No. 270/80 (written and oral procedure), opinion reported in [1982] 1 C.M.L.R. 677 (E.C.J. 1982).

³⁸See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

³⁹See, e.g., *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir.), *cert. denied*, 439 U.S. 829 (1978); *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981); *SEC v. Kingsely*, 510 F. Supp. 561, 563 (D.D.C. 1980); *Commonwealth v. SS Zoe Colocotroni*, 61 F.R.D. 653, 660 (D.P.R. 1974).

do not override the attorney-client privilege, however. The court in *Finnell v. United States Department of Justice*, 535 F. Supp. 410, 412 (D. Kan. 1982), recognized that the privilege protected documents demanded pursuant to an Antitrust Division civil investigative demand.⁴⁵ Another case demonstrates that the privilege applies during FTC investigations. *FTC v. TRW Inc.*, 479 F. Supp. 160 (D.D.C. 1979), *aff'd*, 628 F.2d 207 (D.C. Cir. 1980), in *TRW*, the FTC sought enforcement of investigative subpoenas. It receded from its demand for some documents when TRW demonstrated that the attorney-client privilege applied, 479 F. Supp. at 162 n.2, but contested the applicability of the privilege to other documents.⁴⁶ The trial court ordered TRW to produce the contested documents, finding that the privilege did not protect them. *Id.* at 164.

B. THE PROCEDURE FOR APPLYING THE PRIVILEGE

The procedure that U.S. litigants and courts use to apply the privilege to written communication is very similar to the procedure adopted by the European Court in *AM&S*. The following scenario is illustrative. When a government agency institutes an investigation or litigation, it typically will demand production of certain categories of documents. The subpoena or document request will not require production of privileged documents but will require the responding party to provide a brief description of the nature and subject matter of a withheld document, its date, the names of the author and recipient, the number of pages, and the nature of the claimed privilege. The responding party must produce unprivileged documents and submit the requested information about documents withheld under a claim of privilege. As to documents withheld under a claim of privilege, the government will recede from its demand⁴⁷ or will press its

⁴⁵See also 15 U.S.C. § 1312(c)(1)(1976); *FTC v. Bukens Steel Co.*, 444 F. Supp. 803 (D.D.C. 1977).

⁴⁶See also *FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980); *United States v. McKay*, 372 F.2d 174, 175, (5th Cir. 1967) (IRS summons).

⁴⁷See, e.g., *FTC v. TRW, Inc.*, 479 F. Supp. 160, 162 n.2 (D.D.C. 1979), *aff'd*, 628 F.2d 207 (D.C. Cir. 1980).

claim to see the documents. If the government agency decides to pursue its claim, it will seek to have a court enforce the subpoena. The court or a court-appointed master then will examine the disputed document *in camera* and decide whether the claim of privilege is valid.⁴⁸

C. APPLICATION OF THE PRIVILEGE TO COMMUNICATIONS WITH FOREIGN LAWYERS

The U.S. attorney-client privilege attaches to communications with lawyers of any jurisdiction. Judge Wyzanski's formulation, cited earlier, requires only that a communication be with someone who "is a member of the bar of a court" and who was acting as a lawyer at the time of the communication. Proposed Federal Rule of Evidence 503 defines a lawyer for purposes of the privilege as "a person authorized, or reasonably believed by the client to be authorized, to practice law in *any state or nation*" (emphasis added).⁴⁹ See also J. Wigmore, *supra* note 39, at 581.

The cases establishing this proposition are the peculiar result of the federal system of the United States and the responsibility of the individual states for regulating the practice of law; those cases involve application of the privilege to communications with a lawyer who rendered advice in one state but was a member of the bar of another state. For example, in *Paper Converting Machine Co. v. FMC Corp.*, 215 F. Supp. 249 (E.D. Wis. 1963), plaintiff sought production of documents written by the defendant's in-house patent lawyer. The lawyer was a member of the Ohio bar but was employed by the corporation in California and was not a member of the California bar. The court nonetheless found that the privilege protected communications with the lawyer because he had "the status of an

⁴⁸See *In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982); *United States v. ATT Co.*, 86 F.R.D. 603 (D.D.C. 1980); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 32 (D. Md. 1974).

⁴⁹Scholars describe Rule 503 as "a fair summary of the law of most states," T. Morgan & R. Rotunda, *Professional Responsibility* 59 n.* (1981), and "a restatement of the traditional common law attorney-client privilege which had been applied in the federal courts prior to the adoption of the federal rules." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 503[02], at 503-17 (1981).

its. If the government pursue its claim, it must enforce the subpoena. The court-appointed mediator in the disputed case decided whether the

PRIVILEGE TO FOREIGN LAWYERS

The privilege attaches to communications of any lawyer of any state. In its formulation, it is not only that a communication is from someone who "is a lawyer" and who was acting at the time of the communication. Federal Rule of Civil Procedure 68 for purposes of discovery is authorized, or the client to be waived in any state or country.⁴⁹ See also *J. v. ...* at 581.

His proposition is that the federal system of discovery is the responsibility of the court in regulating the discovery process. Communications with a foreign lawyer in one state are the bar of another. *Paper Converting Corp.*, 215 F. Supp. 251 (D.C. 1967). The plaintiff sought discovery of documents written by the defendant lawyer. The court, sitting on the Ohio bar but sitting on the California bar of the California Supreme Court found that the communications with the lawyer were "the status of an

attorney." *Id.* at 251. At issue in *Georgia-Pacific Plywood Co. v. United States Plywood Co.*, 18 F.R.D. 463 (S.D.N.Y. 1956), were communications with an in-house lawyer who resided and had offices in New York but who was a member of the D.C. and Pennsylvania bars rather than the New York bar. Judge Kaufman said the major issue in the case was whether "one who is a resident and practicing law by acting as house counsel for a corporation in a state in which he has not been admitted to the bar, may nevertheless qualify as an attorney for purposes of the privilege if he has been licensed elsewhere." *Id.* at 465 (emphasis added). Judge Kaufman concluded that the privilege did apply. *Id.* at 466. See also *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954).

We have no reason to believe that a court or an antitrust enforcement agency will apply a different rule to communications with a lawyer qualified in a foreign country but not admitted to the bar of a state of the U.S.⁵⁰ No reported decision requires production of documents exchanged with a foreign lawyer.⁵¹ Given the number of occasions in which U.S. Courts required the production of foreign documents,⁵² the most reasonable inference is not that parties failed to claim a privilege for communication with foreign legal advisers but that no U.S. litigant or court ever seriously questioned the applicability of the privilege to such communications.⁵³

⁵⁰The Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited a state from denying a Dutch woman admission to the bar simply because she was an alien. *In re Griffiths*, 413 U.S. 717 (1973).

⁵¹One district court implied it would grant protection to communications with a lawyer of a foreign bar. See *Mead Digital Systems, Inc. v. A.B. Dick Co.*, 89 F.R.D. 318, 320 (S.D. Ohio 1980). In one of the *Uranium* cases, a federal district court deferred consideration of defendants' "objections to production of foreign documents on grounds such as attorney-client privilege." *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1156 (N.D. Ill. 1979). The court's ruling on that objection, if ever made, is not reported.

⁵²See note 68 *infra*.

⁵³Of course, the limitations on the scope of the U.S. privilege that apply to a communication with a U.S. lawyer also apply to

The way courts treat privileged communications with foreign patent agents further supports this conclusion. In several cases, U.S. courts refused to order the production of communications with foreign patent agents when the law of the foreign country provided a privilege for those communications. *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 953-54 (N.D. Ill. 1982); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 391-94 (D.D.C. 1978); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169-70 (D.S.C. 1974). See also *Mead Digital Systems, Inc. v. A.B. Dick & Co.*, 89 F.R.D. 318, 320-21 (S.D. Ohio 1980); but see *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 40 (D. Md. 1974) (communications with no patent agent, U.S. or foreign, is necessarily within attorney-client privilege).⁵⁴

II. U.S. Lawyers are Subject to Strict Rules of Professional Ethics and Discipline Wherever They Practice.

Just as the Community's attorney-client privilege is based in part on the special role of lawyers in society and on the rules of professional ethics and discipline, which are the counterpart to that role, so is the U.S. attorney-client privilege.⁵⁵ The principal source of rules of professional ethics in the U.S. is the ABA Model Code of Professional Responsibility, adopted as binding obligations in some form in all the states and the

a communication with a foreign lawyer. For example, if a client waives protection, it is a matter of indifference whether the communication was with a foreign or U.S. lawyer.

⁵⁴Although these courts adopted a rule of protecting communication that qualify for privilege under the substantive law of the foreign jurisdiction, the Section does not believe the House should urge the Commission to attempt to apply the substantive privilege laws of over 100 foreign legal systems. Instead, it believes that the better course is for the Commission to apply the substance of the European Community's privilege when seeking communications between a client and anyone qualified as a "lawyer" of a foreign jurisdiction. This is the position adopted in the U.S. by the Advisory Committee on the Federal Rules of Evidence. See Proposed Fed. R. Evid. 503, Advisory Comm. note 2, reprinted in 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 503-4 (1981).

⁵⁵See ABA Opinion 250 (1943).

... v. ..., 675 F.2d 482, *States v. ATT Co.*, 1980); *Burlington*, 65 F.R.D. 26, 32

at 503 as "a fair assumption that most states," T. Weinstein, *Professional Responsibility*, and "a restatement of the common law which had been developed in the courts prior to the restatement." 2 J. Weinstein *Evidence* 503[02],

District of Columbia.⁵⁶ These individual jurisdictions, but not the Code, prescribe penalties for breach of the rules. The Code, among other things, requires all lawyers, whether in-house or outside, to maintain the integrity and competence of the profession⁵⁷ and to preserve the confidences and secrets of their clients.⁵⁸ It prohibits lawyers from handling a legal matter that they know they are not competent to handle.⁵⁹

The Code also provides that a "lawyer shall not" violate or circumvent a disciplinary rule, "[e]ngage in illegal conduct involving moral turpitude," "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation," or "[e]ngage in conduct that is prejudicial to the administration of justice."⁶⁰ The Code specifically instructs a lawyer that he shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent,"⁶¹ and explains that a lawyer may represent a client "so long as he does not thereby assist the client to engage in illegal conduct A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."⁶²

These ethical obligations apply whether U.S. lawyers are practicing within their licensing jurisdiction or some other jurisdiction and whether they are advising on the law of their licensing jurisdiction or some other jurisdiction. A lawyer is subject to the disciplinary system of the jurisdiction in which the lawyer is licensed to practice, even though the conduct occurred in another jurisdiction.⁶³ As a result, so long as a U.S.

lawyer fulfills the requirements for practicing where he or she resides,⁶⁴ the Community's attorney-client privilege should apply to communications with him or her about the law of any jurisdiction, including European Community law.

III. Excluding U.S. Lawyers from the Scope of the Privilege Would Be Inconsistent with the Reasoning of the AM&S Decision and Might Contravene Rights Protected by U.S. Bilateral Treaties with Member States and by Article 234 of the EEC Treaty.

Failure to provide full protection to communications with U.S. lawyers would substantially impair the freedom of clients to obtain fully informed and considered advice from U.S. lawyers. This is not a matter of concern merely for U.S. courts and law enforcement agencies. It affects the substantial commercial connection between the EEC and the U.S., might affect the rights of defense in EEC competition law proceedings, and might contravene article 234 of the EEC Treaty, which protects rights established by bilateral treaties between the U.S. and various Member States.

A. THE REASONING OF THE AM&S DECISION ARGUES FOR PROTECTION OF COMMUNICATIONS WITH U.S. LAWYERS.

The existence of an attorney-client privilege in the Community rests on two principles: (1) that everyone "must be able, *without constraint*, to consult a lawyer;" and (2) that, "to ensure that the rights of the defence may be exercised to the full," confidential communications between lawyer and client must be protected. The Court recognized that the second principle is a wide one; the privilege must protect communications "concerned with how far it might be possible to avoid conflict" between an undertaking and enforcement authorities. Given the complex commercial interrelationships between the Community and the U.S., the exclusion of U.S. lawyers from the full protection of the Community's privilege would seem to violate these principles.

Secretary of State Shultz recently remarked "that from the heavily integrated

⁵⁶Assoc. of the Bar of the City of New York, *Professional Responsibility of the Lawyer* 221-25 (N. Galston ed. 1977); ABA National Center for Professional Responsibility, *Code of Professional Responsibility by State* (1980).

⁵⁷Disciplinary Rule 1-101.

⁵⁸*Id.* 4-101.

⁵⁹*Id.* 6-101(A)(1).

⁶⁰*Id.* 1-102.

⁶¹*Id.* 7-102(A)(7). If a lawyer has communications with a client about a criminal or fraudulent act yet to be performed, the communication is not privileged in the U.S. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982); *Matter of Doe*, 651 F.2d 899 (2d Cir. 1977).

⁶²Ethical Consideration 7-5.

⁶³See *Selling v. Radford*, 243 U.S. 46 (1917); *In re MacNeil*, 266 F.2d 167 (1st Cir.), cert.

denied, 361 U.S. 861 (1959); ABA, *Professional Discipline For Lawyers and Judges, Standards for Lawyer Discipline and Disability Proceedings* § 4.1 (1979). See also *Proposed Final Draft, Model Rules of Professional Conduct* Rule 8.5 (May 30, 1981).

⁶⁴Disciplinary Rule 3-101(B).

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economies of the major nations has evolved . . . a world financial market."⁶⁵ There probably are few economies more heavily integrated than those of the EEC Member States and the U.S. A few statistics make the point.⁶⁶ The value of private investment in EEC countries by private U.S. investors grew from \$20 billion in 1970 to over \$76 billion in 1980. European direct investment in the U.S. grew from \$9.5 billion in 1970 to \$43.5 billion in 1980. In 1970 the value of U.S. exports to EEC countries was \$11.3 billion and, in 1980, \$53.7 billion. U.S. imports from the Community were \$9.2 billion in 1970 and \$35.9 billion in 1980. Undertakings often establish a presence across the Atlantic to facilitate trade; they hire agents, establish branches, or create wholly or partly owned subsidiaries under the laws of the foreign territory.

As the U.S.-European markets grow increasingly interdependent, the occasions in which European companies in the U.S., and U.S. companies in Europe, need access to advice from U.S. lawyers to maintain and increase the level of trade also increase. As the Supreme Court of the United States recently said in an opinion concerning the attorney-client privilege:

In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, *The Attorney-Client Privilege in the Corporate Area*, 24 *Bus. Law.* 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 440-441 (1978) ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").

Upjohn Co. v. United States, 449 U.S. 383, 392 (1981). Business conduct or decisions in one area frequently implicate the regulatory systems of several states. Financial transactions often cross national boundaries. The substantive and procedural law of one jurisdiction borrows from and is influenced by the laws of another.

⁶⁵Washington Post, October 30, 1982, at A14, col. 1.

⁶⁶All of the following statistics are from United States Department of Commerce, *Statistical Abstract of the United States* § 31, tables 1497, 1501, 1514 (1981).

These circumstances make it imperative for a European undertaking that wishes to effect an international business plan and yet act consistently with the law to convey to U.S. lawyers much the same confidential business information that it conveys to its European counsel. The undertaking legitimately and likely would use and retain within the Community the written advice it receives, and the Commission might find the documents exchanged between a European undertaking and a U.S. lawyer relevant to a competition inquiry. One can conceive of a variety of business proposals requiring advice from U.S. lawyers that might become the object of a Commission competition inquiry:

- A proposed joint venture agreement involving EEC undertakings or U.S. and EEC undertakings and contemplating some manufacturing or marketing in the U.S. market.
- An EEC or U.S. multinational's contemplated decision to change its world-wide distribution system.
- A proposed merger or acquisition agreement involving EEC and U.S. undertakings that both are competitors in the EEC and U.S. markets.
- An EEC or U.S. undertaking's defense to a novel Commission competition case. Although EEC and U.S. competition laws are not identical, they are parallel, and European undertakings may seek advice on U.S. antitrust law as part of its presentation to the Commission or Court.⁶⁷

Not granting the full protection of the Community's privilege to advice from U.S. lawyers in these situations therefore would constrain the ability of undertakings "to consult a lawyer," contrary to a fundamental principle of the *AM&S* decision. In some circumstances, it might impair "the rights of the defence." Moreover, denying full protection to written advice from U.S. lawyers would dampen the incentives to trade or would encourage undertakings to be less scrupulous in their attention to the law.

A further troubling consideration is that denying full protection to communications with U.S. lawyers may undermine the attorney-client privilege in the U.S. It is possible that the Commission (1) will

⁶⁷See, e.g., *Hoffmann-La Roche & Co. v. Commission*, [1979] E.C.R. 461, 506; *ICI Ltd. v. Commission*, [1972] E.C.R. 619, 669 (A.G. Mavras).

demand documents from U.S. offices of undertakings⁶⁸ or (2) will share with U.S. enforcement authorities information obtained from documents that would be privileged in the U.S.

(1) The Commission claims the power to assert jurisdiction not only over European companies, many of which have branches or subsidiaries in the U.S., but also over foreign companies whose "conduct has an appreciable impact within the common market."⁶⁹ Article 11 of Regulation 17 gives the Commission the power to demand documents from undertakings that are subject to the jurisdiction of the Community. Thus, although the legality of such an order has not been tested in the EEC, the Commission may order an undertaking to produce documents from files in the U.S. If the Commission does so and does not apply all the protections of the Community's attorney-client privilege to communications with U.S. lawyers, it would see U.S. documents that U.S. law would protect from disclosure.

(2) At least one international agreement encourages the antitrust enforcement agencies of various nations to share the fruits of their investigations. In 1979 the Council of the OECD recommended that OECD member countries "allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned."⁷⁰ In a particular case, the

Commission may follow the OECD recommendation to share information or, at some time in the future, the Community may enter into a treaty obligating the Commission to share information with U.S. antitrust authorities. In either event, if the Commission withholds full protection from communications with U.S. lawyers, there would be the unacceptable anomaly of U.S. enforcement authorities having access to documents through EEC enforcement efforts that they could not obtain through compulsory process in the U.S.

B. ARTICLE 234 OF THE EEC TREATY PROTECTS THE RIGHT GIVEN IN SEVERAL BILATERAL TREATIES OF UNDERTAKINGS TO ENGAGE THE LAWYERS OF THEIR CHOICE.

The failure to extend the full protection of the Community privilege to a client's communications with a U.S. lawyer may contravene article 234 of the EEC Treaty by burdening rights granted in treaties between the United States and various Member States. The first paragraph of article 234 provides in part: "The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty." The effect of this section of the Treaty is to assure that the EEC Treaty or any act of a Community institution does not infringe in any way upon the rights established by a treaty entered into by a Member State and a third state before formation of the Community.

Each of the ten Member States of the Community has a bilateral commercial treaty with the United States.⁷¹ Seven were

⁶⁸U.S. enforcement authorities often make so-called extraterritorial document demands, see, e.g., *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), but, as discussed above, they grant the protection of the attorney-client privilege to communications with foreign lawyers.

⁶⁹Commission of the European Community, *Eleventh Report on Competition Policy* 36, 38 (1982). See *ICI Ltd. v. Commission*, [1972] E.C.R. 619; *Istituto Chemioterapico Italiano SpA v. Commission*, [1973] E.C.R. 357.

⁷⁰OECD, Recommendation of the Council Concerning Co-operation Between Member Countries On Restrictive Business Practices Affecting International Trade, adopted Sept. 25, 1979, reprinted in [1979] *European Yearbook* 245, 247 (1981).

Bilateral treaties, such as the one between

the United States and Italy, state that each party agrees "to take such measures as it deems appropriate with a view to eliminating" the harmful effects of restrictive trade practices. Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, United States-Italy, art. XVIII, 3, 63 Stat. 2255, T.I.A.S. No. 1965.

⁷¹Treaty of Friendship, Navigation, and Establishment, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, 257, T.I.A.S. No. 5306; Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, 1296, T.I.A.S. No. 5432; Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625; Treaty of Friendship,

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concluded before January 1, 1958, the effective date of the EEC Treaty.⁷² All of the treaties, except the nineteenth-century convention with Great Britain, are post-World War II Agreements designed to encourage and protect trade and investment by nationals and companies of one contracting party in the territory of the other contracting party.⁷³ This is accomplished primarily by affording nationals and companies of either contracting party "national treatment with respect to engaging in all types of commercial, industrial, financial and other activities for gain within the territories of the other" party.

One method these nine treaties use to achieve their objectives is to guarantee to nationals and companies of both contracting parties the right to engage attorneys or lawyers of their choice. A typical provision provides:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, attorneys,

Commerce, and Navigation, March 27, 1956, United States—*Netherlands*, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942; Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States—*Germany*, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593; Treaty of Friendship, Commerce, and Navigation, Oct. 1, 1951, United States—*Denmark*, 12 U.S.T. 908, 915, T.I.A.S. No. 4797; Treaty of Friendship, Commerce, and Navigation, Aug. 3, 1951, United States—*Greece*, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, United States—*Ireland*, 1 U.S.T. 785, 781, T.I.A.S. No. 2155; Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, United States—*Italy*, 63 Stat. 2255, T.I.A.S. No. 1965; Convention to Regulate Commerce, July 3, 1815, United States—*Great Britain*, 8 Stat. 228, T.S. No. 110, *extended indefinitely*, Aug. 6, 1827, 8 Stat. 361, T.S. No. 117.

⁷²See Council Decision of 11 November 1980, O.J. No. L 307/29 (Nov. 11, 1980), authorizing the tacit renewal or continued operation of certain Treaties of Friendship, Trade and Navigation Treaties and similar Agreements concluded between Member States and third countries.

⁷³See Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956).

agents and other specialists of their choice.⁷⁴

Preserving the right to choose lawyers, as well as protecting access to courts, a right contained in other provisions of the treaties, is recognition that nationals and companies must be free to have access to legal advice and legal protection.

Denying full protection to confidential communications with U.S. lawyers would impose an unacceptable burden on the right to engage lawyers of choice and thereby may run afoul of article 234. As the European Court recognized, maintaining the confidentiality of lawyer-client communications "serves the requirement that any person must be able, without constraint, to consult a lawyer."⁷⁵ Denying any part of the protections of the privilege to a category of lawyers, here non-EEC lawyers, would impair access to those lawyers and therefore would constrain a client's choice of lawyers. In particular, it would constrain the ability of nationals and companies of European contracting states conducting business in the U.S. to obtain the advice of U.S. lawyers,

⁷⁴Treaty of Friendship, Commerce, and Navigation, March 27, 1956, United States—*Netherlands*, art. VIII, 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942. *See also* Treaty of Friendship, Navigation, and Establishment, Feb. 23, 1962, United States—*Luxembourg*, art. VIII, 1, 14 U.S.T. 251, 257, T.I.A.S. No. 5306; Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, United States—*Belgium*, art. 8, 1, 14 U.S.T. 1284, 1296, T.I.A.S. No. 5432; Convention of Establishment, Nov. 25, 1959, United States—*France*, art. VI, 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625; Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, United States—*Germany*, art. VIII, 1, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593; Treaty of Friendship, Commerce, and Navigation, Oct. 1, 1951, United States—*Denmark*, art. VIII, 4, 12 U.S.T. 908, 915, T.I.A.S. No. 4797; Treaty of Friendship, Commerce, and Navigation, Aug. 3, 1951, United States—*Greece*, art. XII, 4, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, United States—*Ireland*, art. VI, 1(d), 1 U.S.T. 785, 781, T.I.A.S. No. 2155; Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, United States—*Italy*, arts. I, 2(c), II, 3, V, 4, 63 Stat. 2255, T.I.A.S. No. 1965.

⁷⁵C.M.L.R. at 323, Comm. Mkt. Rep. at 9059.

when that advice is likely to be sent to the European offices of the undertaking and to contain confidential information about the U.S. and European market activities of the undertaking. It also would burden the freedom of U.S. undertakings doing business in Europe to seek advice from their U.S. lawyers on questions affecting conduct in both the U.S. and European markets.

Conclusion

One must wonder whether the European Court gave its full attention to these significant implications. It does not appear as if any part of the EEC Treaty or of any other provision of Community law requires that non-EEC lawyers be treated differently from Member State lawyers for purposes of a legal privilege. Neither Advocate General Warner nor Advocate General Slynn argued for such a rule, and none of the parties in the *AM&S* case suggested that the privilege apply only to EEC lawyers. Even the Court, when requesting the parties to address how the privilege rules of various Member States applied to specific situations,⁷⁶ did not identify advice

from foreign lawyers as raising a special concern.

Until the matters raised in this Report and other relevant arguments are fully briefed and reviewed by the Court and the Court specifically rules that communications with non-EEC lawyers cannot be protected by the Community's privilege, the Section of International Law and Practice urges that the House request the Commission to grant an undertaking the same ability to protect its communications with a U.S. lawyer and the same access to procedural safeguards, including the right to withhold disclosure from Commission officials and to seek relief from the Court, that Community law accords to communications with Community lawyers. This protection should be afforded to communications containing or requesting advice on the law of any jurisdiction from U.S. lawyers without regard to the place of their residence.

CHARLES N. BROWER

Chairman

⁷⁶C.M.L.R. at 270, Comm. Mkt. Rep. at 9056.

group legal service plans which maximize the participation of lawyers who provide service thereunder; and

Further Resolved, That the American Bar Association encourages the development of any prepaid and group legal service plan designed to make legal services available at reasonable cost and consonant with the highest professional standards and in the best interest of the public.

★ **Section of International Law and Practice.**³⁷ Mr. Wallace moved the approval of the Section's recommendation concerning the Commission of the European Communities. Secretary McCalpin reported that the Board recommended that the recommendation be approved.

Kenneth J. Burns of Illinois, a former Secretary of the Association, then moved approval of an amendment proposed by the Section of Corporation, Banking and Business Law to add the following paragraph:

Be It Resolved, That, as a separate matter from the above resolution, the American Bar Association requests the Commission of the European Communities to study and extend the client-attorney privilege to house counsel, whether of Member States of the Communities, or otherwise.

Mr. Wallace accepted the amendment on behalf of the sponsors and by voice vote, the House approved the recommendation as amended, which was approved as follows:

Be It Resolved, That the American Bar Association requests the Commission of the European Communities, when conducting a competition inquiry pursuant to Article 11 or 14 or Regulation 17, to grant to an undertaking the same protection, including the same procedural safeguards, against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a Member State of the European Community.

Be It Resolved, That, as a separate matter from the above resolution, the American Bar Association requests the Commission of the European Communities to study and extend the attorney-client privilege to house counsel, whether of Member States of the communities, or otherwise.

Judicial Administration Division.³⁸ Judge Plaine moved the approval of the Division's recommendation concerning the approval of the *Standards Relating to Juror Use and Management*. Secretary McCalpin reported that

³⁷The full report of the Section appears at page 675.

³⁸The full report of the Division appears at page 687.

orders, administrative decisions to exclude aliens from entering the United States and constitutional and statutory writs of habeas corpus.

The Section's ninth recommendation (Report No. 120A), presented jointly with the Section of Administrative Law was approved by voice vote. It reads:

Be It Resolved, That the American Bar Association opposes legislative proposals relating to immigration and naturalization that would limit the rights of persons subject to exclusion, deportation or asylum proceedings to retain counsel and to enjoy full representation.

The Section's tenth recommendation (Report No. 121B) was approved by voice vote. It reads:

Be It Resolved, That the American Bar Association recommends that employer sanctions should be rejected because they would be an unworkable, ineffective, expensive and discriminatory procedure for controlling undocumented immigration.

International Law and Practice (Reports No. 300, 301, 117, 118B, 120B, and 121A)

The Section withdrew its first recommendation (Report No. 300) which concerned legislative proposals relating to immigration and naturalization and submitted substitute recommendations (Reports No. 117, 118B, 120B, and 121A). For House action on these recommendations see the separate entries which follow.

* The Section's second recommendation (Report No. 301) was amended and approved by voice vote. As approved it reads:

Be It Resolved, That the American Bar Association requests the Commission of the European Communities, when conducting a competition inquiry pursuant to Article 11 or 14 of Regulation 17, to grant to an undertaking the same protection, including the same procedural safeguards, against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a Member State of the European Community.

Be It Resolved, That, as a separate matter from the above resolution, the American Bar Association requests the Commission of the European Communities to study and extend the attorney-client privilege to house counsel, whether of Member States of the Communities, or otherwise.