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I. INTRODUCTION

Although the attorney-client privilege for in-house counsel[1] is fairly predictable in the United States, the privilege is subject to many different interpretations in foreign countries. This has become an issue during the last thirty years as in-house counsel at large U.S. corporations have seen their responsibilities expand both geographically and substantively.[2] This process began shortly after World War II, when American corporations traveled to Europe with the Marshall Plan to help rebuild the war-torn

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[1] This article uses the terms "in-house counsel," "corporate counsel," "general counsel," and "corporate attorneys" interchangeably to describe lawyers who work in a legal capacity for a company as opposed to attorneys who work for a private law firm.

[2] *See* Mary C. Daly, *The Randolph W. Thrower Symposium: The Role of the General Counsel: Perspective: The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel*, 46 EMORY L.J. 1057, 1057-58, (Summer, 1997) (Professor Daly's article addresses "the intersection of two of the most significant changes in corporate legal practice in the United States over the past thirty years: the growth in number, prestige, and power of in-house counsel and the globalization of the business and capital markets."). *See also* Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1384 (April, 1998) (noting that the globalization of the legal profession is demonstrated by the fact that "cross-border legal practice is both increasing and increasingly important, throughout the world.").

economies[3] and continued in subsequent years as U.S. companies expanded into countries in South America, Asia, and Africa.[4] Now American multinationals frequently maintain operations on each continent.[5]

In addition to expanded geographic responsibilities, a greater role in the legal activities of their companies has made the attorney-client privilege more important to corporate practitioners.[6] As one group of scholars has noted: "The 'in-house' lawyers of large corporations have taken over the role of general counseling previously handled by senior partners of the large law firms, and house counsel offices have assumed more of the burden of routine legal work and the management of the work of outside law firms."[7] Thus, general counsel now find the need to communicate with company employees around the world about issues ranging from firm-wide labor and employment practices to regional antitrust problems.[8]

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[3] *See generally* Roger J. Goebel, *Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice: Professional Qualification and Education Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 445 (February, 1989) (noting that following World War II the United States began to "export capital and technology initially to Europe and Latin America, then to Asia, Africa, and other parts of the world.").

[4] *Id.*

[5] *Id.* Further evidence of this trend is that during the last 10 years, courts have seen a significant increase in lawsuits involving foreign and multinational corporations. *See* Lucinda A. Low, *Virtually All Areas of Law Profession Face Globalization*, NAT'L L.J., Aug. 5, 1996, at C9; Hans Smit, *The Explosion in International Litigation*, METROPOLITAN CORP. COUNS., Oct. 1996, at 59.

[6] For a good overview of the changes at in-house legal groups, see Daly, *supra* note 2, at 1059-65 (addressing the "shift in power from outside law firms to the offices of general counsel."); Peter H. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 Int'l Law. 677, 686 (Spring, 1986) (stating that multinational corporations have turned to fully qualified lawyers to work in-house since it is virtually impossible for outside counsel to adequately advise the corporation in all of the forums where possesses operations). Along these same lines, in-house lawyers have also assumed responsibility for managing corporate law compliance measures, which have increased in recent years. For a comprehensive discussion of in-house counsel and internal company legal audits, see Richard S. Gruner, *The Randolph W. Thrower Symposium: The Role of the General Counsel: Perspective: General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1114 (Summer, 1997) (noting that "[t]he activities of general counsel in corporate organizations are changing in response to increasing demands for corporate law compliance and expanding knowledge about how to effective manage law compliance in organizational settings."). In addition, as Professor Gruner also points out, part of these new duties include "becoming increasingly sophisticated in recommending the use of organizational management techniques for preventing or minimizing legal liability of corporate organizations." *Id.*

[7] David M. Trubek, Yves Dezalay, Ruth Buchanan, and John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L.R. 407, 435 (1994).

[8] *See, e.g.*, Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575 (involving in-house counsel discussions with European managers about European Community ("EC") antitrust issues); and Re Deere & Co. v. Cofabel NV, Commission Decision of De-

In the United States, in-house attorneys have traditionally relied on the attorney-client privilege to protect the confidentiality of legal conversations with company employees.[9] By shielding these discussions from court-ordered discovery, the privilege, in theory, encourages full and frank disclosure from corporate officials about legal problems within the organization and thereby promotes general compliance with the law.[10] Outside the United States, however, a company lawyer's discussions with foreign managers may not be protected by the privilege.[11] Some countries extend the privilege to corporate attorneys, some jurisdictions withhold the privilege, and still other nations qualify the privilege for in-house counsel.[12] The gaps in the privilege at the international level present a major problem for general counsel.[13] In the worst case scenario, the company's own legal opinions could be used against it by a foreign tribunal.[14]

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cember 14, 1984, [1985] 2 C.M.L.R. 554 (concerning American in-house counsel advice to European managers about EC antitrust issues).

[9] *See* Alexander C. Black, *What Corporate Communications Are Entitled to Attorney-Client Privilege-Modern Cases*, 27 A.L.R. 5th 76, 76 (1997) ("Corporate clients rely on the protection of the attorney-client privilege for confidential communications with in-house and outside counsel, both in extraordinary matters such as internal investigations into corporate wrongdoing and in such everyday legal matters as employment decisions and contract negotiations."). This note focuses on the attorney-client privilege rather than the ethical obligation of attorneys to keep the confidences of their clients. State specific rules and codes of conduct govern attorneys in the United States. These rules are generally the same regardless of whether an attorney practices law as an in-house lawyer or at a private law firm. *See* Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145, 168 (Winter, 1995). Normally, only the attorney-client privilege bars discovery and therefore is of concern to corporate practitioners.

[10] *See infra* notes 33-36 and accompanying text.

[11] *See infra* Part III. It should be noted that in foreign jurisdictions, the law of the forum usually governs procedural matters such as the attorney-client privilege. *See Developments in the Law – Discovery*, 74 HARV. L. REV. 940, 1050 (1961); *In re* Investigation of World Arrangements, 13 F.R.D. 280, 286 (D.D.C. 1962); Arthur Andersen Co. v. Finesilver, 546 F.2d 338, 342 (10th Cir. 1976), cert. denied, 429 U.S. 1096, (1977). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS @122, 127 (1971):

> @122 Issues Relating to Judicial Administration: A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.
>
> @127 Pleading and Conduct of Proceedings: The local law of the forum governs rules of pleading and the conduct of proceedings in court.

[12] *See infra* Part III.A.

[13] Many problems arise when communications between in-house counsel and company employees are not protected by the attorney-client privilege. In countries that do not recognize a privilege for in-house counsel, for example, corporate attorneys have been frustrated in their efforts to advise their corporate clients. Commenting on two cases that withheld the attorney-client privilege from in-house counsel at the European Community level, one practitioner has noted: "The *AM&S* and *John Deere* cases have considerably choked off free and uninhibited internal written discussions of a company's obligations and liabilities under EEC competition law, and it seems that this state of affairs is not only detrimental to the company

To reduce this risk, general counsel at multinationals should become familiar with the parameters of the attorney-client privilege at the international level[15] and use this knowledge to devise strategies to protect the corporation's sensitive information in foreign jurisdictions.[16] Part II of this comment begins by describing the roots of the modern attorney-client privilege in the United States and its extension to in-house counsel.[17] This section provides a context for analyzing the privilege as it is applied to corporate counsel at the international level. Part III then continues by setting forth the global parameters of the privilege for in-house counsel.[18] This section illustrates why general counsels need to take additional measures to

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itself, but also to society as a whole." Burkard, *supra* note 6, at 686. The U.S. Supreme Court has also noted the problem with different applications of the attorney-client privilege:

> If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

[14] *See, e.g.*, Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, pts. 24 & 27, at 1612 (holding that AM & S' own in-house legal memoranda were not protected by the attorney-client privilege in matters before the European Court of Justice); and *Re* Deere & Co. v. Cofabel NV, Commission Decision of December 14, 1984, [1985] 2 C.M.L.R. 554, pts. 21, 27, at 560-62 (legal memorandum from John Deere's in-house counsel to managers in Europe were used against it to show intentional violation of EC antitrust laws). In *Deere & Co.*, the court opinion, for example, stated: "Deere and Company knew that such conduct, and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel." *Id.* pt. 21, at 560.

[15] Academic scholars and practitioners generally encourage in-house counsel to know how foreign jurisdictions apply the attorney-client privilege. *See, e.g.*, EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 283 (3rd ed. 1997) (observing that "[c]ross-frontier lawyers would do well to become thoroughly familiar with the privilege law in each country in which they are rendering legal advice."); Josephine Carr, *Are Your International Communications Protected?*, 14 NO. 6 ACCA DOCKET 32, 34-38 (November/December, 1996) (listing the status of the attorney-client privilege in European countries). Although companies would be advised to know how the privilege is applied in each jurisdiction where legal communications may be sent, companies with operations in many countries may find it more practical to learn the general parameters of the privilege.

[16] The use of the privilege in an international context is the same as the use of the privilege in the United States. In the context of U.S. discovery proceedings, one commentator has stated: "Knowing well the parameters of the privilege may, with advance planning, allow a lawyer with foresight to protect what would otherwise have to be disclosed. Knowing the limits of the privilege will permit the resourceful lawyer to discover and thereby uncover what an opponent seeks to keep hidden." EPSTEIN, *supra* note 15, at 2. Part III of this comment provides strategies for protecting internal legal communications.

[17] This note, however, does not discuss the intricacies of the attorney-client privilege in either the United States or other countries (*e.g.* raising the privilege in court, rules of comity, burden of proof for the privilege). These details lie beyond the scope of this journal article.

[18] Part III of this note focuses on the main differences in the privilege at the international level. There are probably as many subtle differences in the application of the attorney-client privilege as there are jurisdictions. The purpose of this paper is to give readers a good sense of the differences that in-house counsel may face in other countries.

protect company information in foreign regions. Finally, Part IV of this comment concludes by suggesting four strategies that corporate counsels at multinational firms may use to help protect their companies' sensitive communications.

II. THE ATTORNEY-CLIENT PRIVILEGE FOR IN-HOUSE COUNSEL IN THE UNITED STATES

Although courts in the United States only began extending the attorney-client privilege from private practitioners to in-house counsel in the early part of the Twentieth Century,[19] corporate attorneys now regularly assert this privilege to protect confidential communications with corporate employees from court ordered discovery.[20] Not everything that transpires between an in-house lawyer and a company employee, however, is protected by the privilege.[21] Courts in the United States generally consider four factors to determine whether the privilege applies to a corporate legal memorandum or conversation.[22]

A. The Roots of the Attorney-Client Privilege

The attorney-client privilege for in-house counsel in the United States derives from a much earlier privilege for lawyers in private practice.[23] Dean Wigmore refers to this more general privilege as "the oldest of the privileges for confidentiality known to common law."[24] According to Dean Wigmore, the privilege for private practitioners first surfaced and played a role in jurisprudence during the reign of Queen Elizabeth I in England.[25]

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[19] *See infra* notes 39-41 and accompanying text.

[20] *See infra note 42.*

[21] *See generally* RESTATEMENT, THE LAW GOVERNING LAWYERS § 123 (Tentative Draft No. 1, 1988) (discussing the scope of the privilege for organizations). *See also* EPSTEIN, *supra* note 15, at 73-86 (reviewing the corporation as a client). Part II.C. of this note discusses application of the privilege to general counsel.

[22] *See* RESTATEMENT, THE LAW GOVERNING LAWYERS § 118 (Tentative Draft No. 1, 1988). These four factors include the following: (1) a communication, (2) made in confidence, (3) between privileged persons, (4) for the purpose of seeking or obtaining legal advice. Part II.C. of this note examines these elements. This is not to suggest, however, that courts have settled all issues involving the attorney-client privilege for in-house counsel. As this part of the note demonstrates, jurisdictions differ in their approaches to this doctrine.

[23] *See* 8 J. WIGMORE, *EVIDENCE* § 2290 (McNaughton Rev. 1961). John Henry Wigmore served as Dean of Northwestern University School of Law from 1901-1929.

[24] *Id.*

[25] *Id. See also* PAUL R. RICE, THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 9 (ed. 1993 & supp. 1995) (discussing the English common law origins of the U.S. attorney-client privilege). In the United Kingdom, where the privilege originated, the attorney-client privilege is referred to as the "legal professional privilege." It is described as the "right which protects from disclosure confidential communications passing between attorney and

As Dean Wigmore notes, during this time, "the privilege already appears as unquestioned."[26] The early English courts granted a privilege for communications between lawyers and their clients in "consideration for the oath and the honor of the attorney rather than for the apprehensions of his client."[27] The jurists who framed the privilege believed that compelling a loyal attorney to testify against a client would violate the attorney's honor as a gentleman.[28]

In the 18th Century, however, the focus of the privilege shifted from the attorney to the client. Rather than serving the honor of gentlemanly lawyers, "[the] new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser."[29] As under the former justification, the revised attorney-client privilege ensured confidentiality by forbidding the disclosure of client confidences even by an attorney and at the hands of the law.[30]

During the 19th Century, the privilege continued to rest on this rationale basis, but evolved as that of the client "to include communications made, first, during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and lastly, in any consultations for legal advice, wholly irrespective of litigation or even of controversy."[31] In the United States, courts recognized this justification and scope for the attorney-client privilege in the early 1800's.[32]

At the beginning of the 21st Century, the attorney-client privilege in the United States remains rooted in a concern, "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice."[33] Without such a privilege, the courts reason, clients would withhold potentially damaging information from their attorneys for fear that such information could be used against them in a court of law.[34] Most courts con-

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client, whether by production of documents or by oral evidence." *See* Aubrey Roberts, *Colloquium on Attorney-Client Privilege in International Practice, Legal Professional Privilege in the United Kingdom*, 7-SPG INT'L L. PRACTICUM 15 (Spring, 1994).

[26] 8 J. WIGMORE, *EVIDENCE* § 2290 (McNaughton Rev. 1961).

[27] *Id.*

[28] *See id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See, e.g.*, Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294, 6 L.Ed. 474 (1826).

[33] *See, e.g.*, Upjohn Co. v. United States, 499 U.S. 383, 389 (1981).

[34] *See* RICE, *supra* note 25, ch. 2:3, at 52 ("The purpose of the privilege in the United States has always been to encourage people to seek legal advice freely and to communicate candidly with the attorney during those consultations."). For judicial support of this premise, see Fisher v. United States, 425 U.S. 391, 403 (1976) (noting that the purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys). The attorney-client privilege also grants clients the power to decide who may access their confi-

cur that attorneys need to know all relevant facts to provide their clients with proper legal advice.[35] Providing sound advice, the argument concludes, encourages the client to conform his or her behavior to the law and thereby promotes the general advancement of public ends by the client.[36] Each state has adopted its own privilege rules based on this rationale.[37] At the federal level, the privilege is embodied in Rule 501 of the Federal Rules of Evidence and generally follows the common law doctrine.[38]

B. The Attorney-Client Privilege for In-House Counsel

Although courts in the United States have recognized the attorney-client privilege for private practitioners since the early 1800's, the Supreme Court only extended a federal court privilege to in-house counsel in 1915.[39] In that case, *United States v. Louisville & Nashville R. Co.*, the United States government did not contest a railroad company's right to invoke the

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dential information. Attorneys must honor their clients' right to decide which individuals should have access to disclosed information because, as the argument concludes, the privilege would be meaningless if an attorney could freely discuss the information given in confidence. *See* Grace M. Giesel, *The Legal Advice Requirements of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1172 (1997) (explaining that the attorney-client privilege traditionally has been justified on the grounds that it encourages clients to "make full disclosure to their attorney...").

[35] *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980) (noting that the professional privilege's purpose is to maximize representation by lawyers). *See also* Black, *supra* note 9, at 95 ("The privilege is based on the premise that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client...").

[36] *See* Black, *supra* note 9, at 76 (observing that courts typically reason that "sound legal advice or advocacy has the effect of furthering the interests of justice."). For judicial support of this conclusion, see Upjohn Co. v. United States, 499 U.S. 383, 384.

[37] *See generally* RESTATEMENT, THE LAW GOVERNING LAWYERS Note to Title A (Tentative Draft No. 1, 1988) ("Every American jurisdiction provides--either by statute, evidence code, or common-law doctrine--that neither a client nor the client's lawyer generally may be asked under the compulsion of a subpoena to testify or otherwise to provide evidence in a way that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance."). *See also* Hill, *supra* note 9, at 168 (noting that all states have adopted some form of the attorney-client privilege and noting its inclusion in the Model Code and Model Rules).

[38] FED. R. EVID. 501. The rule reads:

> Except as otherwise required by the constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[39] *See* United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336 (1915).

attorney-client privilege.[40] In referring to the railroad's claim of privilege, the Court stated:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.[41]

At the present time, all jurisdictions within the United States, both state and federal, recognize the attorney-client privilege for in-house counsel.[42] The extent of the attorney-client privilege for in-house counsel, however, may vary from jurisdiction to jurisdiction.[43] Moreover, communications between an in-house lawyer and a corporate employee must meet the general requirements of the privilege to be protected from court ordered discovery.[44] Not everything that passes through an in-house legal department is protected by the privilege.

C. The Conditions on the Attorney-Client Privilege for In-House Counsel

Courts in the United States consider several factors to determine whether the attorney-client privilege applies to communications between an attorney and a client. According to Dean Wigmore's classic definition of the attorney-client privilege, the privilege only applies: "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) are made in confidence (5) by the client, (6) are at his instance permanently

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[40] *Id.* at 319.

[41] *Id.*

[42] *See* Giesel, *supra* note 34, at 1172 (observing that the attorney-client privilege applies to U.S. in-house lawyers); Black, supra note 9 (listing state case law since 1964 which governs the attorney-client privilege for in-house lawyers); Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 318-19 (7th Cir. 1963) (listing State and Federal cases recognizing the attorney-client privilege for in-house counsel and remarking "[t]hat the privilege has been recognized as available to corporations for more than a century is not open to serious question."). *See also* GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, & ROGER C. CRAMTON, THE LAW AND ETHICS OF LAWYERING 222-79 (Foundation Press, 2d ed. 1994); Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine*, 540 PLI/LIT 589, 589 (February, 1996); EPSTEIN, *supra* note 15, 73-86; RESTATEMENT, THE LAW GOVERNING LAWYERS § 123 (Tentative Draft No. 1, 1988).

[43] *See* EPSTEIN, *supra* note 15, at 18-19 (noting that "[a]lthough state and federal law are generally the same regarding most aspects of the attorney-client privilege, they are not identical."). Some states have only enacted a "qualified" attorney-client privilege. *See id.* at 18. If important public interests are at stake, for example, the court may waive the privilege. *See id. See also* Daiske Yoshida, Note, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals*, 66 FORDHAM L. REV. 209, 214 (October, 1997) (stating that some states do not fully recognize the attorney-client privilege for in-house counsel communications with company employees).

[44] *See infra* Part III.C.

protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."[45] Although Dean Wigmore lists eight considerations, courts in the United States often condense these elements into four factors: (1) a communication; (2) made between privileged persons; (3) in confidence; and (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.[46] Since these four factors are clear and contain the necessary elements to examine how the attorney-client privilege is applied to in-house counsel in the United States and abroad, this note focuses on the four elements.

1. The Meaning of "Communication" in the Corporate Context

For the attorney-client privilege to apply there must first be a "communication" between an attorney and a client.[47] The form of the communication can be either spoken or written.[48] Nonverbal actions such as head nods and hand gestures can also serve as forms of communication for privilege purposes.[49] The meaning of communication in the corporate context is virtually the same as that for attorneys in private practice. As in all attorney-client privilege matters, the privilege only protects the contents of the communication from disclosure.[50] In other words, the underlying facts of the communication are not necessarily protected.[51] Moreover, if the underlying facts can be discovered from sources other than the privileged communication, those facts are not privileged.[52]

It should be noted that the privilege generally protects confidential communications from the client to the attorney and, in so far as they would

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[45] 8 J. WIGMORE, *EVIDENCE* § 2292, at 554 (McNaughton rev. ed. 1961). For application of Wigmore's fundamental conditions, *see, e.g.,* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 318, (7th Cir. 1963).

[46] *See* RESTATEMENT, THE LAW GOVERNING LAWYERS § 118 (Tentative Draft No. 1, 1988). The Restatement's definition covers elements of the attorney-client privilege which are common to United States court decisions. *Id.* Note to Title A. For additional analysis of these four factors, see EPSTEIN, *supra* note 15, 35. For an example of judicial application of these elements, see United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

[47] *See* HAZARD, KONIAK & CRAMTON, *supra* note 42, at 223; EPSTEIN, *supra* note 15, at 35; RESTATEMENT, THE LAW GOVERNING LAWYERS § 119 (Tentative Draft No. 1, 1988).

[48] *See id.*

[49] *Id.*

[50] *See* HAZARD, KONIAK & CRAMTON, *supra* note 42, at 264 (noting that "[t]he attorney-client privilege protects only 'communications' that are intended to be 'confidential.'"); EPSTEIN, *supra* note 15, at 36 (observing that "[t]he privilege protects only the contents of the communication itself from compelled disclosure...").

[51] *See id.*

[52] EPSTEIN, *supra* note 15, at 36, *quoting* J.P. Foley & Co., Inc. v. Vanderbilt, 65 F.R.D. 523, 526 (S.D.N.Y. 1974) ("It should be noted that the privilege pertains solely to the substance of communications. It does not preclude inquiry into the subject matter of communications.").

reveal the client's confidences, communications from the attorney to the client.[53] In other words, courts may deny the privilege for communications from the attorney to the client which do not contain confidential information shared by the client.[54]

2. The Meaning of "Confidential" in the Corporate Context

For a communication between an attorney and a client to be protected by the attorney-client privilege, the communication must be made in confidence.[55] A communication is confidential for privilege purposes when the client states that it is made in confidence or the corporate counsel reasonably concludes that the communication was intended to be in confidence.[56] Thus, in deciding this issue, the attorney and client's states of mind are important.[57]

A communication will not be considered confidential if either the general counsel or a client reveal its contents to a third party at any time.[58] Moreover, once either the attorney or client has revealed confidential information, neither the attorney nor the client may reassert its confidentiality.[59] This is true even when either the attorney or client fails to take adequate precautions to protect the information or when one party commits a careless act that results in the release of the confidential information.[60]

One question that commonly arises in the corporate context is whether the privilege holds when company employees, who would be considered clients for privilege purposes, discuss confidential information among themselves. Although courts in the United States have devised different standards for handling this question, generally, when an employee who qualifies as a "client" for attorney-client privilege purposes discloses an in-

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[53] *See, e.g.*, United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163 (E.D.N.Y. 1994) (upholding privilege application "where the documents reveal client confidences or provide legal assistance."); Henson v. Wyeth Labs., Inc., 118 F.R.D. 584, 587 (W.D. Va. 1987) (citing other case law and holding that "[t]he privilege protects the substance of confidential communications both from the client to the attorney and, according to the better rule, from the attorney to the client if such would reveal the confidential client communication.").

[54] *See, e.g.*, Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 226 (D.D.C. 1995) (burdening the defendant with proving "that his attorney's correspondence to him was based on confidential information he imparted to his attorney" and denying the privilege because the documents were business related).

[55] *See* HAZARD, KONIAK & CRAMTON, *supra* note 42, at 224-25; EPSTEIN, *supra* note 15, at 117; RESTATEMENT, THE LAW GOVERNING LAWYERS § 121 (Tentative Draft No. 1, 1988).

[56] *See* EPSTEIN, *supra* note 15, at 117.

[57] *Id.*

[58] *See generally* HAZARD, KONIAK & CRAMTON, *supra* note 42, at 271-72; EPSTEIN, *supra* note 15, at 173.

[59] EPSTEIN, *supra* note 15, at 173.

[60] *Id.*

house attorney's advice to another member of the "client group," the privilege still holds.[61] Interestingly, the Supreme Court in *Upjohn* seemed to employ a more liberal standard by suggesting that employees who were not members of the "client group" could be informed of legally related information on a "need-to-know" basis without breaking the privilege's confidentiality bond.[62] Many lower courts likewise hold that confidential communications should be limited to necessary individuals.[63]

3. The Meaning of "Privileged Persons" in the Corporate Context

The attorney-client privilege in the United States only exists among what are referred to as "privileged persons."[64] Privileged persons are defined as (1) the client, (2) the client's lawyer, (3) agents of the lawyer for purposes of the representation, and (4) communicating agents of either the client or the lawyer.[65] In the United States, the communications from a client must be made to someone who is "duly licensed as a lawyer when the communication was made."[66] So, for example, an attorney whose bar

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[61] *See* Black, *supra* note 9, at 76 (noting that courts consider factors such as intent and necessity in deciding whether conversations between corporate employees about legal advice retain the attorney-client privilege for that legal advice). *See also* Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 634 (E.D. Pa. 1979) (noting that an interoffice memorandum which memorialized a discussion between corporate counsel and a member of the control group was entitled to the privilege so long as it was only distributed among other members of the control group); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 518 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (2nd Cir. 1976) ("A privileged communication should not lose its protection if an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation.... It would be an unnecessary restriction of the privilege to consider it lost when top management personnel discuss legal advice.").

[62] Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981).

[63] *See, e.g.*, United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (N.J. 1984) (limiting protection to communications held in presence of necessary individuals); Southern Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377 (Fla. 1994) (holding that a corporate communication is confidential, and therefore entitled to the attorney-client privilege, if it is not disseminated beyond those persons who, because of the corporate structure, need to know its contents); Santrade, Ltd. v. General Elec. Co., 150 F.R.D. 539 (E.D.N.C. 1993) (holding that certain corporate documents were privileged because they repeated legal advice to those who needed to have it).

[64] *See* RESTATEMENT, THE LAW GOVERNING LAWYERS § 120 (Tentative Draft No. 1, 1988). *See also* EPSTEIN, *supra* note 15, at 72.

[65] *Id.* It should be noted that for the most part, an attorney's agents or subordinates are also included within the scope of the attorney-client privilege. *See* 8 J. WIGMORE, EVIDENCE § 2301, at 538 (McNaughton rev. ed. 1961). Agents and subordinates, however, must usually be working under the direct supervision and control of the attorney. *See id.* ("[T]he privilege protects communications to the attorney's clerks and his other agents for rendering his services.").

[66] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (observing that in the United States, the scope of people considered privileged is limited to "a member of the bar of a court, or his subordinate..."); Honeywell, Inc. v. Minolta Camera

membership has been withdrawn or suspended does not qualify as a privileged person for such purposes.[67] Since general counsel in the United States are members of a bar association and licensed as attorneys, in-house lawyers are also considered "privileged persons" for the doctrine's purposes.[68]

In the corporate setting, difficulty often arises, however, in determining which company employees qualify as "clients" for privilege purposes. Contrary to popular assumptions, courts do not consider every company employee to be a "client" for every legal matter that arises within the corporation.[69] In the United States, federal and state courts generally apply one of three tests to determine whether a particular corporate employee qualifies as a "client" for privilege purposes.[70] The first test, the "Control Group Test," was announced in *City of Philadelphia v. Westinghouse Electric.*[71] This test focuses on the status of the employee within the hierarchy of the corporation. If the employee is in a position to take a substantial part in the decision about any action which the corporation may take upon the advice of counsel, then that individual is a member of the control group.[72]

The second standard was formulated in *Harper & Row Publishers v. Decker* and is generally called the "Subject Matter Test."[73] This test expands the Control Group Test:

> An employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt

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Co., Ltd., 1990 U.S. Dist. LEXIS 5954 (D.N.J. 1990) (withholding the attorney-client privilege from Japanese patent agents because they are not members of the local Japanese bar). *See also* EPSTEIN, *supra* note 15, at 90, *citing* Dabney v. Investment Corp. of Am., 82 F.R.D. 464, 465-66 (E.D. Pa. 1979) (holding that communications made to a law student are not protected by the attorney-client privilege). Although most authority seems to restrict the privilege to members of the bar, Dean Wigmore would extend the privilege to "a professional legal adviser in his capacity as such." 8 J. *WIGMORE ON EVIDENCE* § 2292 (McNaughton rev. 1961). For a detailed comparison of the Wigmore and *United Shoe* standards of privilege, see Gregg F. LoCascio, *Reassessing Attorney-Client Privileged Legal Advice in Patent Litigation*, 69 NOTRE DAME L. REV. 1203, 1230-38 (1994).

[67] *See* EPSTEIN, *supra* note 15, at 90.

[68] Courts in the United States, in contrast to some foreign jurisdictions, consider in-house and private attorneys to be virtually the same for privilege purposes. *See, e.g.*, United Shoe Mach. Corp., 89 F. Supp. at 358.

[69] *See* Upjohn Co. v. United States, 499 U.S. 383 (1981).

[70] *See id.* For a more comprehensive analysis of these three tests and their development, see EPSTEIN, *supra* note 15, at 73-81.

[71] City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

[72] *Id.* at 485. *See also* Upjohn, 499 U.S. 390 (describing the Control Group Test).

[73] Harper & Row Publishers v. Decker, 423 F.2d 487 (7th Cir. 1971).

with in the communication is the performance by the employee of the duties of his employment.[74]

The final test was enunciated in *Diversified Industries v. Meredith* where the Eighth Circuit modified the Harper & Row test and created a more comprehensive rule.[75] The test in *Diversified* holds:

> The attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[76]

At the federal level, the Supreme Court has specifically refused to apply any one of these three tests and has instead opted for a case-by-case analysis.[77] The Court in *Upjohn* explained this decision by saying, "[w]e decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so."[78] State courts and federal courts applying state law generally adhere to one of these three tests. For example, Illinois courts apply the Control Group Test.[79] In selecting the Control Group Test, the Illinois Supreme Court, in fact, explicitly refused to follow the Supreme Court's flexible holding in *Upjohn*.[80]

4. The Meaning of "For the purposes of seeking legal advice" in the Corporate Context

To qualify for protection under the attorney-client privilege in the United States, the communication between a client and a lawyer must be for the purpose of seeking or obtaining legal assistance.[81] In her book on the attorney-client privilege and work product doctrine, Professor Epstein provides a thorough description of this requirement:

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[74] *Id.* at 491-92.

[75] Diversified Industries v. Meredith, 572 F.2d 596 (8th Cir. 1977).

[76] *Id.* at 609.

[77] Upjohn, 499 U.S. at 386.

[78] *Id.*

[79] Consolidation Coal Co. v. Bucyrus-Eire Co., 89 Ill.2d 103, 119-20 (Ill. 1982).

[80] *Id.* at 118-19.

[81] HAZARD, KONIAK & CRAMTON, *supra* note 42, at 223; EPSTEIN, *supra* note 15, at 93, 147; RESTATEMENT, THE LAW GOVERNING LAWYERS § 122 (Tentative Draft No. 1, 1988). For judicial examples of this standard, see Securities and Exchange Council v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981) (extending attorney-client privilege to legal advice only); Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 226 (D.D.C. 1995) (denying the privilege for documents which were business related and did not contain personal legal advice).

> At the core of the privilege is that the giving of legal advice protects the communications from compelled disclosure at the instance of third parties. A lawyer's communications -- and those of the client -- when the lawyer functions in any other capacity are not protected from disclosure. Thus, for the privilege to be applicable, the lawyer must act in a legal capacity rather than perform any of the other functions of law-trained persons in our society. The mere fact that an individual with a law degree performs a certain function will not render the communications made to that individual privileged, particularly when the communications could equally well have been made to an individual without a law degree.[82]

Not surprisingly, neither the presence of a lawyer at a meeting nor the inclusion of a lawyer in written communication will necessarily transform the communication into one where legal advice is sought or given.[83] For example, where a non-lawyer corporate officer prepared "risk management" documents in an attempt to keep track of, to control, and to anticipate the costs of litigation for business-planning purposes, the privilege did not stand.[84]

In the corporate setting, one problem that often arises is whether a piece of communication primarily involves legal advice or business advice.[85] In general, where the main purpose of the communication is to secure legal advice, but the communication also refers to non-legal matters, the attorney-client privilege still holds.[86] Conversely, where a communication primarily involves business advice, the attorney-client privilege does not apply, even if the communication emanates from, or is directed to, an attorney.[87] Some courts may also employ a third alternative, separating the legal advice from the business advice and only extending protection to the

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[82] EPSTEIN, *supra* note 15, at 93.

[83] One common misconception in the corporate context is that whatever touches a lawyer's hands is protected by the attorney-client privilege. If a lawyer is merely copied on documents prepared for reasons other than obtaining legal advice, the privilege will not normally attach. *See, e.g.*, United States Postal Serv. v. Phelps Dodge Ref. Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (holding that documents which had been merely forwarded, copied, or edited by a lawyer were not protected by the privilege when there was no indication that legal advice had been sought or provided). For further discussion on this issue, see EPSTEIN, *supra* note 15, at 153-54.

[84] Simon v. G.D. Searle & Co., 816 F.2d 397, 402-04 (8th Cir. 1987).

[85] *See generally* Giesel, *supra* note 34 (providing a comprehensive review of the problems in-house counsel face with the legal advice requirement of the attorney-client privilege).

[86] *See, e.g.*, Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703 (N.Y. 1989). *See also* Daly, *supra* note 2, at 1070 (observing that in these cases, courts in the U.S. frequently resolve doubts in favor of the privilege, but some courts may also separate the two types of information and only allow the privilege to stand for legal portions of the communication).

[87] *See, e.g.*, Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 226 (D.D.C. 1995) (denying the privilege because the relevant documents were business related). *See also* EPSTEIN, *supra* note 15, at 97, *citing* United States v. International Business Mach. Corp., 66 F.R.D. 206, 212-213 (S.D.N.Y. 1974).

legal material.[88] In *Hardy v. New York News, Inc.*, the court took this approach, "[w]hen the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved."[89]

In addition to requiring that communications involve legal advice, some courts have added that, "[n]ot only must the communication be made primarily for the purpose of obtaining legal advice or assistance, the client must also reasonably believe the communication to be necessary for that purpose."[90] The D.C. Circuit, for example, has characterized this requirement as: "Communications made in the reasonable belief that they contain [] information [necessary to the decision-making process for a particular legal problem] will be protected. However, communications which contain no such reasonable belief, either because of the status of the employee or because of the nature of the information, will not be protected."[91]

In the United States, in-house counsel at corporations rely on the statutory and common law attorney-client privilege to protect communications with managers on issues ranging from internal investigations into corporate wrongdoing to everyday labor and employment law. The privilege enables the corporate attorney, for the same reason as private practitioners, to withhold production of this sensitive material in a court of law and thereby protect the company's sensitive communications.

III. THE ATTORNEY-CLIENT PRIVILEGE FOR IN-HOUSE COUNSEL AT THE INTERNATIONAL LEVEL

At the beginning of the 21st Century, nearly every country in the world recognizes some form of the attorney-client privilege.[92] In countries like

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[88] *See* EPSTEIN, *supra* note 15, at 97, *citing* Hardy v. New York News, Inc., 114 F.R.D. 633, 643-644 (S.D.N.Y. 1987).

[89] Hardy, 114 F.R.D. at 643-644 (S.D.N.Y. 1987), *citing* SCM v. Xerox, 70 F.R.D. 508, 517 (D. Conn. 1976).

[90] *See* EPSTEIN, *supra* note 15, at 149.

[91] *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 385 n.10 (D.D.C. 1978).

[92] *See generally* Julian D. Nihill, *Corporate Counsel: II. Recent Developments in Attorney-Client Privilege*, 31 INT'L LAW. 245, 248-59 (Summer, 1997) (noting developments in the attorney-client privilege in Argentina, Australia, Austria, Bahamas, Belgium, Bermuda, Bolivia, British Virgin Islands, Canada, Cayman Islands, British West Indies, Ecuador, England, France, Germany, Hong Kong, Italy, Japan, Mexico, Monaco, Netherlands, Panama, People's Republic of China, Russia, Singapore, Spain, Switzerland, Trinidad, and Turkey); Daly, *supra* note 2, at 1086 (noting that countries often recognize either the existence of an attorney-client privilege or "professional secret" between an organization and a lawyer); and Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 5 (Summer, 1993) (pointing out that the European Council of Bars and Law Societies of the European Community ("CCBE"), a group that represents lawyers associations across Europe, recognizes the attorney-client privilege). Foreign jurisdictions, however, may refer to the attorney-client privilege differently. In France, for example, the relevant term is the

Great Britain and Australia, which follow the common law tradition, the attorney-client privilege is normally found in case law.[93] In countries like Germany and Japan, which belong to the civil law school, the attorney-client privilege is typically embodied in a civil or penal statute or in ethics rules promulgated by the local bar association.[94] Even in the former Communist countries of Eastern Europe and the People's Republic of China, governments have recently enacted laws recognizing a bond of confidentiality between attorneys and their clients.[95] Some commentators attribute this seemingly universal recognition of the attorney-client privilege to democratic processes and movements in this direction.[96] The European Court of Justice in *AM & S*, for example, has posited that "a study of comparative law shows that the protection of legal confidence is a characteristic feature of democratic systems and that, on the other hand, it has little place in the law of absolutist or totalitarian States."[97]

Although most legal systems recognize the attorney-client privilege at the international level, the scope of the privilege for in-house counsel often differs between countries.[98] Some foreign courts extend the privilege to in-house counsel, others deny it, and still others place conditions on its application to corporate attorneys.[99]

"Professional Secret." *See* Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, 1622. The English and Irish call this legal doctrine the "Legal Professional Privilege." *Id.*

[93] *See* Nihill, *supra* note 92, at 248.

[94] *See id.*

[95] For the example of Russia, see Edict No. 188 of the President of the Russian Federation, March 6, 1997, on LEXIS/NEXIS at 1997 SovData DiaLine – SovLegisLine, March 6, 1997; for China, see Charles D. Paglee, *Chinalaw Web – Law on Lawyers and Legal Representation,* Ch. IV, Art. 33; Ch. VII, Art. 44(6) (last modified April 7, 1998) <http://www.qis.net/chinalaw/prclas58.htm>.

[96] Two commentators have reflected that "[i]n both Europe and the United States, professional secrecy is one of the foundations upon which the legal profession is based." Carsten Eggers and Tobias Trautner, *"An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of "Professional Secrecy" in Germany*, 7-SPG INT'L L. PRACTICUM 23 (Spring, 1994).

[97] AM & S, 1982 E.C.R. at 1600.

[98] *See generally* Kurt Riechenberg, *The Recognition of Foreign Privileges in the United States Discovery Proceedings*, 9 J. INT'L L. BUS. 80, 108 (Spring, 1988) ("Even the almost universally recognized attorney-client privilege has given rise to discovery disputes in international antitrust cases. The reason is that the scope of this privilege may differ from one legal system to the other."). *See also* AM & S, 1982 E.C.R. pt. 19, at 1610 ("Although the principle of such protection is generally recognized, its scope and the criteria for applying it vary..."). The Court in *AM & S* noted that one reason the attorney-client privilege differs is the fact that the privilege is a continually evolving doctrine rather than a "static" concept. *Id.* at 1601.

[99] *See infra* Part II.A.

A. The Scope of the Attorney-Client Privilege for In-House Counsel at the International Level

The parameters of the attorney-client privilege for in-house counsel at the international level mirror the four elements which are necessary for the privilege to apply in the United States.[100] Although many of the variances between national jurisdictions are minor, some of the differences are drastic. By understanding how other countries view these basic requirements, general counsel can devise strategies to help their corporate employers protect sensitive communications.

1. The Meaning of "Communication" at the International Level

The main difference in the meaning of "communication" at the international level appears to be whether the attorney-client privilege applies to confidential legal documents in the client's possession. Confidential documents in the hands of an attorney are normally shielded from discovery by some account of the attorney-client privilege.[101] Documents in the client's possession, however, may not be protected by the privilege.[102] In Japan, for example, "[a]ny documents possessed by the bengoshi [lawyers] are free from seizure or discovery, however documents created by a bengoshi and held by the client do not receive this protection."[103] Similarly, in the European Community ("EC"), only common law jurisdictions like England and Ireland protect legal advice in the hands of the client.[104] The six original

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[100] This is not to say that all foreign tribunals undergo this analysis. These four elements, however, seem more or less necessary to assert a legal doctrine which resembles the Anglo-American concept of the attorney-client privilege.

[101] Opinion of Advocate General Sir Gordon Slynn, AM & S, 1982 E.C.R. at 1654 (observing that "[i]t is universally accepted that confidential documents of the kind to which I have referred in the hands of the lawyer are protected.").

[102] Consequently, in-house counsel should advise company officials in foreign jurisdictions to routinely destroy unnecessary legal files. *See generally* John Boyd, *A.M. & S. and the In-House Lawyer*, 7 EUR. L.R. 493, 494 (Street & Maxwell, Dec. 1982) (noting that an in-house lawyer should ensure that "files in offices within the EEC are not kept for longer than necessary."); Carr, *supra* note 15, at 38 ("All copies must be destroyed or returned to the legal department.").

[103] Jason Marin, Note, *Invoking the U.S. Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L. J. 1558, 1568 (April, 1998). The Japanese approach to documents in the hands of the client may have derived from Germany which also denies protection to legal communications held by clients. *See generally* Carr, *supra* note 15, at 33 (noting that in Germany, any copies in the possession of the company are not protected by the privilege). For a good overview of the German version of the attorney-client privilege, see Eggers and Trautner, *supra* note 75.

[104] AM & S, 1982 E.C.R. at 1584, citing a report published by the Consultative Committee of the Bars and Law Societies of the European Community.

Member States, including both France and Germany, only extend protection to documents in the possession of the lawyer.[105]

In addition to this difference in the meaning of "communication," at least one commentator has noted that some foreign jurisdictions may not extend the attorney-client privilege to communications from the attorney to the client.[106] This custom partially resembles the practice of some U.S. courts which generally honor the privilege for communications from the attorney to the client, but may deny the privilege when such communications do not reveal a client's confidences.[107]

2. The Meaning of "Confidential" at the International Level

Although the basic meaning of "confidential" in foreign jurisdictions appears similar to the meaning of "confidential" in the United States, the duty of confidentiality may differ in some foreign jurisdictions, especially the former Communist countries in Eastern Europe and the People's Republic of China. Most foreign jurisdictions require a basic level of confidentiality for a communication to be protected by the privilege.[108] In Australia, for example, knowingly or voluntarily disclosing confidential information to another party waives the attorney-client privilege.[109] Similarly, in England, mistakenly disclosing a confidential document normally forfeits privilege protection for that information.[110]

Although most countries require a similar level of confidentiality for the attorney-client privilege to apply, some governments are more likely to require in-house counsel to divulge information that would normally be considered confidential. In the People's Republic of China, for example, the government has historically taken a more public approach to corporate

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[105] *Id.* Italy also does not protect documents that are in the client's possession. For evidence of the Italian position, see Opinion of Advocate General Sir Gordon Slynn, *id.* at 1653 (noting that in Italy, "protection is wider in civil proceedings [than in criminal proceedings] but it does not, in any case, appear to extend to documents in the hands of the client.").

[106] *See* EPSTEIN, *supra* note 15, at 284.

[107] *See supra* note 53-54 and accompanying text.

[108] *See, e.g.*, Boyd, *supra* note 102, at 494 (remarking that within the EC's jurisdiction, "[t]he advice of [an] EC-qualified lawyer may be circulated or copied within the client company, but presumably not to such an extent as would prejudice its confidentiality and therefore its protection from disclosure."). The meaning of confidential perhaps leaves less room for interpretation that the other three factors. There has been little comment on its application at the international level.

[109] Caryl Ben Basat & Julian D. Nihill, *Corporate Counsel*, 31 INT'L LAW. 245, 249 (Summer 1997), *citing* In Ampolex Limited v. Perpetual Trustee Co. (Canberra) Limited (1996) 137 ALR 28.

[110] *Id.* at 251, *citing* International Business Machines Corp. and another v. Phoenix International (Computers) Ltd. [1995] 1 ALL E.R. 413 (considering the nature of mistakenly disclosed documents and the circumstances accompanying their disclosure to decide whether the negligent party should be allowed to reassert a privilege for the documents).

and personal information.[111] Moreover, lawyers in China have traditionally been required to place their allegiance to the state above loyalty to an individual client.[112] Adding to this problem, China has only recently enacted statutes giving effect to a legal doctrine like the attorney-client privilege.[113] Thus, the attorney-client privilege in China remains untested and may not afford much protection when competing state interests are at stake.[114]

Many Eastern European countries are also struggling to establish an independent legal profession.[115] Only in 1997, for example, did the President of the Russian Federation require all information connected with professional activities such as lawyering be kept confidential.[116] The edict, however, neither defines the meaning of "confidential" nor states whether this rule applies to lawyers who work as in-house counsel.[117]

Although the extent of protection for communications that are kept "confidential" may be less certain in countries like China and Russia, in most countries, "in confidence" carries the same meaning as in the United States. As a general rule, confidential communications should be limited to necessary individuals. Moreover, as in the United States, inadvertent disclosures are not likely to be protected by the privilege.[118]

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[111] *See Lawyer-Client Privilege Under Challenge*, SOUTH CHINA MORNING POST, November 25, 1996 (quoting Beijing lawyer Tang Jiaodong, "The Chinese way of thinking is very different from the Western way. The Government thinks it is entitled to know everything about everything.").

[112] *See generally* Daly, *supra note 2*, at 1093 n.155, *citing* Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L L. & POL. 751, 756, 791-92 (1991) (questioning the independence of Chinese legal professionals).

[113] Only in the past few years did the P.R.C. enact the *Law on Lawyers and Legal Representation*, which requires attorneys to keep "a litigant's commercial secrets learned through conducting the business activities of a lawyer's practice, and should not disclose the privacy of litigants." *See* Paglee, *supra* note 95.

[114] *Lawyer-Client Privilege Under Challenge*, SOUTH CHINA MORNING POST, November 25, 1996 (quoting a local Chinese practitioner, "[t]he concept of lawyer-client privilege ... is on the books in China, but not well developed.").

[115] *See* Daly, *supra* note 2, at 1092 ("Each country in Eastern Europe is engaged in its own unique struggle to establish a truly independent legal profession within its borders.").

[116] Edict No. 188 of the President of the Russian Federation: On the Approval of the List of Confidential Items of Information, March 6, 1997, on LEXIS/NEXIS at 1997 SovData DiaLine – SovLegisLine, March 6, 1997. The Edict states: "For the purposes of further improvement of the practice of publication and entry into force of Acts of the President of the Russian Federation, the Government of the Russian Federation and normative legal acts of federal executive agencies, I hereby decree: To approve the annexed list of confidential items of information." Item 4 on the annexed list reads: "Information connected with professional activity, the access to which is restricted under the Constitution of the Russian Federation and federal laws (physician's, notary's, lawyer's confidentiality, privacy of correspondence, telephone talks, mail, telegraph and other messages, etc."

[117] *Id.*

[118] For the U.S. position on inadvertent disclosures, see *supra* notes 108-109 and accompanying text.

3. The Meaning of "Privileged Persons" at the International Level

The most significant difference in the attorney-client privilege at the international level is in the meaning of "privileged persons." Foreign jurisdictions often differ as to whether in-house counsel constitute "privileged persons" for purposes of the attorney-client privilege. Countries generally take one of three approaches to the status of in-house counsel: (1) they are considered "privileged persons;" (2) they do not constitute "privileged persons;" and (3) they only qualify as "privileged persons" under certain circumstances. Although there does not seem to be any universal reason for these different approaches,[119] the attorney-client privilege in each country often reflects that country's view of whether in-house attorneys are independent enough to honor their obligations to the judicial system and, whether the country's judicial system employs extensive discovery.[120]

The first category of countries takes the position that in-house lawyers are "privileged persons" and thus entitled to protected communications. Most of these countries have adopted the English common law approach to in-house legal counsel and the attorney-client privilege. In England, where the privilege originated, lawyers who work as in-house counsel enjoy the attorney-client privilege provided they belong to the bar association and, thereby, operate under the same obligations regarding professional conduct and duties as attorneys who work in private practice.[121] This approach is also taken in the United States where in-house counsel must be members of the bar to qualify for the privileged.[122] Other jurisdictions like Hong Kong,[123] Ireland,[124] and Australia,[125] which follow the British legal system, have also adopted this approach.

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[119] It is difficult, for example, to draw a distinction between common and civil law countries. In Germany, which is a civil law country, in-house counsel may become members of the bar and enjoy privilege protection under certain circumstances. *See infra* note 141 and accompanying text. In Japan, another civil law country, however, in-house counsel do not belong to the bar and therefore are not protected by an attorney-client privilege. *See* Marin, *supra* note 103, at 1561 (explaining that Japanese in-house legal personnel are not admitted to the Japanese bar); Kahei Rokumoto, The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization? in LAWYERS IN SOCIETY: AN OVERVIEW 134 (Richard L. Abel & Philip S.C. Lewis eds., 1995) (noting that law students enter large business corporations without possessing the certificate of a lawyer). This difference has arisen even though, as Marin notes, "Japanese discovery...is based strongly on the German system." Marin, *supra* note 103, at 1575.

[120] *See infra* text accompanying notes 129-31, 136-39.

[121] *See* Roberts, *supra* note 25, at 16; Burkard, *supra* note 6, at 684 ("[I]n the U.K. and Ireland, in-house barristers and solicitors are full-fledged members of the legal profession, subject to the same rules of professional ethics and discipline as their colleagues in private practice, including the rights and obligations pertaining to legal privilege.").

[122] *See supra* note 66 and accompanying text.

[123] Under Article 34 of the Basic Law of The Hong Kong Special Administrative Region ("HKSAR") of The People's Republic of China ("PRC"), Hong Kong residents "shall have right to confidential legal advice, access to courts, and choice of lawyers for protection of

The second group of countries does not consider in-house counsel to be "privileged persons" for the doctrine's purposes.[126] Many of these jurisdictions, in contrast to the first category of countries, do not possess a single unified legal profession and consider in-house legal professionals to be distinct from private practitioners.[127] A example of this structure occurs in Austria, where there are six distinct careers which require legal education as a prerequisite.[128] These careers include: (1) prosecutors, (2) judges, (3) private practitioners, (4) government employees who are qualified to do legal work, (5) in-house counsel, and (6) tax lawyers.[129]

Countries in this group often distinguish in-house counsel from other lawyers because they believe that attorneys who work for a company are too dependent on their corporate employers to exercise the same objective judgment in the practice of law as private practitioners.[130] For this same reason, these jurisdictions usually deny in-house lawyers admittance to the local bar association and the attorney-client privilege that it affords.[131] Pro-

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their lawful rights." *See* Martindale-Hubbell, PEOPLE'S REPUBLIC OF CHINA LAW DIGEST, (Reed Elsevier Inc. 1998) on LEXIS/NEXIS.

[124]For a discussion of the legal professional privilege under Irish law, see Silver Hill Duckling v. Minister for Agriculture, 1987 ILRM 516.

[125]Martindale-Hubbell, *Attorneys and Counselors*, AUSTRALIA LAW DIGEST, (Reed Elsevier Inc. 1998) on LEXIS/NEXIS ("Legal professional privilege [is] conferred upon clients to protect confidential communications from disclosure if made for purposes of giving or obtaining legal advice or in contemplation of or for purpose of litigation.").

[126]In addition to jurisdictions that do not extend the attorney-client privilege to in-house lawyers, some foreign jurisdictions do not extend the attorney-client privilege to foreign licensed attorneys who are not registered in their jurisdiction. *See, e.g.*, Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, pts. 25-26, at 1612 (in *AM & S*, the European Court of Justice ("ECJ"), in dictum, noted that in cases before the ECJ, the attorney-client privilege would only be extended to attorneys who are members of a European bar association and therefore governed by professional rules within the EEC). *See also* Goebel, *supra* note 3, at 502 (noting that at the EC level, neither in-house counsel nor foreign attorneys who are not members of a local bar can assert the attorney-client privilege).

[127]*See* Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442, 443 (Del. 1982). In *Renfield*, for example, the court noted that there are several categories within the practicing legal profession in France and that each of these categories provides a function that would be contained in the duties of an American lawyer. *See id.*

[128]*See* Terry, *supra* note 92, at 10-11, *citing* Eugene Salpius, Austria, in TRANSNATIONAL LEGAL PRACTICE: A SURVEY OF SELECTED COUNTRIES 45 (D. Campbell ed., 1982).

[129]*Id.*

[130]The primary justification for withholding the attorney-client privilege from in-house counsel seems to be that corporate attorneys are considered too involved with their corporate employer to exercise independent judgment and faithfully assist courts in the administration of justice. *See* Terry, *supra* note 92, at 55.

[131]*See* Daly, *supra* note 2, at 1099. *See also* Carr, *supra* note 15, at 32 (Carr notes that "[w]hether or not an in-house counsel has legal privilege at the national level in Europe depends on one question. Are they members of their national bar?"). This questioning should not surprise legal practitioners in the United States where several cases have questioned whether in-house counsel should be allowed to assert the privilege given the potential con-

fessor Daly has noted this connection, "[i]n many countries outside the United States, there is an exceedingly strong but profoundly subtle link between an organization's right to invoke the attorney-client privilege and the legal profession's concept of independent professional judgment."[132]

In Europe, the Council of Bars and Law Societies of the European Community ("CCBE"), which serves as the coordinating body for the national bar associations of EC member states, takes this position and requires lawyers to be independent in order for ethical duties of confidentiality to apply.[133] Similarly, countries like France[134] and Italy[135] do not consider company lawyers to be independent enough to qualify for membership in a bar association and therefore do not extend the attorney-client privilege to in-house counsel. In fact, in Italy, private lawyers who take an in-house legal position automatically forfeit their bar membership.[136]

It should be noted that many of the countries that do not consider in-house counsel to be "privileged persons" for purposes of the attorney-client privilege only allow limited discovery in legal proceedings and thus rarely sacrifice the confidentiality of internal legal communications.[137] According

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flicts of interest. *See, e.g.*, Securities & Exchange Council v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 680 (D.D.C. 1981) (questioning the validity of the attorney-client privilege for in-house counsel); Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir. 1963) (arguing that the attorney-client privilege should not be extended to corporations).

[132] Daly, *supra* note 2, at 1099.

[133] *See* Terry, *supra* note 92, at 5. The code (Section 2.1.1) reads:

> The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

Id.

[134] *See* Black, *supra* note 9, at 161 (explaining that French in-house lawyers perform essentially the same functions as U.S. corporate attorneys -- providing legal advice on matters of concern to their corporate employers). It is interesting to note that although France does not extend the attorney-client privilege to in-house counsel regardless of nationality, U.S. courts have extended the privilege to French in-house counsel.

[135] Under Italian law, employment as a civil servant or in private industry is considered incompatible with the professional legal practice of an "avvocato" because it does not permit the carrying out of services in an autonomous and independent way. *See* Hill, *supra* note 9, at 160-61, *citing* ALAN TYRRELL & ZAHD YAQUB, THE LEGAL PROFESSIONS IN THE NEW EUROPE 199-200 (1993).

[136] *See id.*

[137] *See* Ian S. Forrester, *Legal Professional Privilege: Limitations on the Commission's Power of Inspection Following the AM & S Judgment*, 20 C.M.L.R. 75, 77 (1983) ("In Continental Europe, discovery of documents in civil cases is very limited in any event, and the notion of whether legal advice should be exempt from discovery is unlikely to arise."); Maurits Dolmans, *Attorney-Client Privilege for In-House Counsel: A European Proposal*, 4 COLUM. J. EUR. L. 125, 125 (Winter/Spring, 1998) (remarking that in Europe, "except [for] the United Kingdom and Ireland, most European countries do not have the adversarial and

to one commentator, these two phenomena may even be related in Europe because, "in the absence of the wide ranging discovery available in common law countries, most civil law jurisdictions have not seen the need to develop a more sophisticated set of rules concerning the attorney-client privilege."[138] Another observer has indicated that this may also be the case in Japan where the lack of privileges reportedly results from the low level of discovery allowed under Japanese civil procedure.[139] Recent developments in civil law jurisdictions may also confirm this connection. According to Julian Nihill, "[a]s discovery becomes more widely available, many civil law jurisdictions, *e.g.*, France, Germany, Japan and the Netherlands, have seen developments in the law concerning the attorney-client privilege."[140]

In addition to the first two groups of countries, a third category of foreign jurisdictions requires in-house counsel to meet certain conditions to qualify as "privileged persons" for the doctrine's purposes. In the Netherlands, for example, in-house counsel must "confirm that they will be treated as independent lawyers and accept that they will be subject to the bar's ethical code and discipline" to become members of the local bar and thereby claim privilege protection.[141] Similarly, in Germany, courts only extend the attorney-client privilege to in-house counsel under two conditions: (1) the in-house attorney must maintain separate offices to which he or she has sole access; and (2) the general counsel must be acting in his or her capacity as an attorney.[142] Thus, in the context of in-house counsel, the meaning of "privileged persons" at the international level varies from

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extensive discovery system that forms the foundation of U.S. litigation."). *See also* David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. INT'L LAW 745, 761 (1986) ("Not only are the basic obligations to produce information more limited in Germany than in the United States, but the standard of relevancy is significantly higher in Germany."); Marin, *supra* note 103, at 1585-87 (noting that Japanese pre-trial discovery is more limited than that of the United States).

[138] Nihill, *supra* note 92, at 248.

[139] *See* Gary D. Fox, *Discovery from Japanese Companies*, 22 TRIAL 18, 20 (Aug. 1986), *cited* in Marin, *supra* note 103, at 1600 n.278. *See also* Yoshida, *supra* note 43, at 210, 224 n.90 ("[U]nder both the old and new Civil Procedure Code, parties in Japanese litigation are given broad latitude to withhold documents that are for personal use (such as notes or internal memoranda), concern technical or trade secrets, or contain information that members of certain professions -- such as lawyers, patent advisors and doctors -- learned in the course of their business."). For further information about the Japanese discovery system, see Marin, *supra* note 103, at 1574-75, 1582-87.

[140] Nihill, *supra* note 92, at 248. *See also* Erhard Blankenburg & Ulrike Schultz, German Advocates: A Highly Regulated Profession, *in* LAWYERS IN SOCIETY: AN OVERVIEW 103 (Richard L. Abel & Philip S.C. Lewis eds., 1995) (providing a good overview of the German legal profession and noting that some in-house lawyers are admitted as advocates in Germany).

[141] Carr, *supra* note 15, at 34.

[142] *Id.* at 33.

country to country. Even among civil law countries, the privilege may or may not apply to corporate lawyers.[143] In understanding the global parameters of the privilege, in-house lawyers at multinational corporations should be aware of these differences.

4. The Meaning of "For the Purposes of Seeking Legal Advice" at the International Level

At the international level, communications must also be for the purpose of seeking legal advice to be protected by the attorney-client privilege. The degree to which a communication must concern legal advice, however, may vary between jurisdictions and even within countries. By way of illustration, the European Court of Justice has considered whether allegedly privileged documents had been written "exclusively, primarily or only partly for the purposes of legal advice or litigation."[144] Similarly, one court in England has emphasized that communications between attorneys and their clients must be for the "dominant" purpose of obtaining legal advice to fall under the privilege.[145] Another court in England, however, has held that "a solicitor's professional duties were not restricted to advice on matters of law or construction, but included advice on the commercial wisdom of entering a particular transaction in respect of which legal advice was sought."[146]

The nature of the attorney-client privilege is such that most foreign countries consider whether a particular piece of communication between an attorney and a client concerns legal advice before honoring the privilege for it. Generally, therefore, in-house counsel should expect protection for a relatively narrow range of documents. The farther that a communication strays from legal advice, the less protection it will likely be afforded.

B. An Example of the Pitfalls of the Attorney-Client Privilege for In-House Counsel at the International Level

The parameters of the attorney-client privilege for in-house counsel at the international level vary more than in the United States. Some countries apply the privilege, some jurisdictions deny the privilege, and still other states qualify the privilege for in-house counsel. These different applica-

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[143] *See supra* note 119.

[144] Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, 1588.

[145] *See* Waugh v. British Railways Board, [1979] 3 WLR 150 (commenting that communications must be for the dominant purpose of obtaining legal advice to be protected by the privilege).

[146] Basat & Nihill, *supra* note 109, at 251, *citing* Nederlandse Reassurantie Groep Holding NV v. Bacon & Woodrow [1995] 1 ALL E.R. 976. Likewise in Australia, courts appear to apply a more relaxed standard; the privilege normally applies when a communication is made for purposes of giving or obtaining legal advice or in contemplation of or for purpose of litigation. *See* AUSTRALIA LAW DIGEST, *supra* note 125.

tions of the privilege can lead to disastrous consequences for in-house counsel and the corporations they advise.[147] Written memoranda sent to employees in countries that do not protect communications from in-house attorneys could, for example, end up as evidence in a local legal contest.[148] Two cases in Europe during the 1980's exemplified this danger. Although other articles have discussed these opinions in great detail, both examples merit another mentioning in this context.[149]

The first case involved an Australian subsidiary in England called Australian Mining & Smelting Europe Limited ("AM & S").[150] In 1979, the European Community Commission ("EC Commission"), which executes European Community law, decided to investigate AM & S for possible violations of the EC Treaty's antitrust provisions.[151] During the course of its investigation, the EC Commission traveled to AM & S's premises in Bristol, England, and demanded documents concerning the company's business practices.[152] AM & S refused, however, to produce several of the requested papers because the documents contained advice from the company's lawyers and were therefore, AM & S believed, protected from discovery by the attorney-client privilege.[153] Among the documents that AM & S withheld were legal memoranda from in-house counsel to company employees.[154] When the EC commission persisted in demanding the documents, AM & S sought an injunction at the EC level against the Commis-

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[147] *See generally supra* note 13 and accompanying text.

[148] *See* Carr, *supra* note 15, at 33 (noting that "[a] letter sent to a company in a country with a system of discovery may well end up being produced in court if a dispute arises.").

[149] There has already been much discussion in journal articles about the *AM & S* and *John Deere* decisions. For good coverage of these decisions from an American perspective, see Goebel, *supra* note 3; Hill, *supra* note 9; and Burkard, *supra* note 6. *AM & S* also caused much debate in Europe, especially between civil law and common law jurisdictions. For good coverage of the *AM & S* decision from a European perspective, see Forrester, *supra* note 137; Sandy Ghandhi, *Legal Professional Privilege in European Community Law*, 7 EUR. L.R. 308 (Street & Maxwell, Aug. 1982); Jonathan Faull, *Legal Professional Privilege (AM & S): The Commission Proposes International Negotiations*, 10 EUR. L.R. 119 (Street & Maxwell, April 1985); Jonathan Faull, *A.M. & S.: The Commission's Practice Note*, 8 EUR. L.R. 411 (Street & Maxwell, Dec. 1983); and Boyd, *supra* note 102.

[150] Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575. *AM & S* was considered a very important case when it was decided in 1982. The governments of the United Kingdom and France both intervened in the case as did the Consultative Committee of the Bars and Law Societies of the European Community. *See id.* at 1577.

[151] *Id.* at 1579. (the European Commission investigated AM & S for "...competitive conditions concerning the production and distribution of zinc metals and its alloys and zinc concentrates in order to verify that there [was] no infringement of Articles 85 and 86 of the EEC Treaty.").

[152] *Id.* at 1579.

[153] Opinion of Mr. Advocate-General Warner, *id.* at 1626.

[154] This statement also comes from the fact that the opinion talks at length about whether the attorney-client privilege applies to documents from in-house counsel. *Id.* pt. 27, at 1612.

sion.[155] After a lengthy discussion of the issues, the European Court of Justice held that in EC proceedings, communications with in-house lawyers are not protected by the attorney-client privilege.[156] The court reasoned, in accordance with principles common to EC Member States,[157] that in-house counsel were, by nature, too dependent on their corporate employers to faithfully assist in the administration of justice and therefore should not be entitled to protected communications under the attorney-client privilege.[158]

The second example of problems with the privilege at the international level arose shortly after *AM & S* when the EC Commission launched an investigation of the American company John Deere and it's European operations for alleged violations of EC antitrust provisions.[159] This time, however, during the on-site investigation, inspectors seized legal memoranda from John Deere's general counsel to European and U.S. managers.[160] Some of the in-house documents cautioned the company's managers that John Deere's efforts to constrain parallel exports in Europe and prevent intra-EC exports of John Deere machinery might violate EC and national competition laws.[161]

When the EC Commission considered the case against John Deere, it relied on John Deere's in-house legal memoranda to conclude that John Deere had "intentionally" violated EC antitrust statutes. In its opinion, the Commission, for example, noted: "Deere's own in-house counsel expressed doubts as to the legitimacy of such a device."[162] The Commission's conclusion also referred to legal advice from John Deere's corporate attorneys, "Deere and Company knew that such conduct, and, in particular, the contractual export ban, was contrary to EEC and national competition law. It

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[155] *Id.* at 1580.

[156] *Id.* pts. 24 & 27, at 1612.

[157] In deciding the question of whether communications between in-house attorneys and company clients were protected, the European Court of Justice noted that the attorney-client privilege is not specifically recognized anywhere in the procedural regulations that govern the Commission's conduct in the antitrust area and that the privilege did not exist as a matter of basic rights absorbed from "principles and concepts common" to all Member states. *Id.* pt. 18, at 1610.

[158] *Id.* pt. 24, at 1612 (basing its decision on "the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, 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.").

[159] *Re* Deere & Co. v. Cofabel NV, Commission Decision of December 14, 1984, [1985] 2 C.M.L.R. 554, pt. 15, at 558 (the EC Commission accused Deere & Co. of pressuring its regional dealers to restrict sales between EC Member States).

[160] *Id.* pt. 9, at 557; pt. 21 at 560.

[161] *Id.* pt. 39, at 563.

[162] *Id.* pt. 27, at 562.

was advised on this by its in-house counsel."[163] The EC Commission even used this evidence, and the intent to violate EC antitrust provisions that it allegedly showed, to justify much higher punitive sanctions against John Deere.[164]

The decisions in *AM & S* and *Deere & Co.* considerably "chilled" communications between in-house counsel at multinationals and their corporate clients.[165] Many corporate attorneys, for example, feared documenting internal legal "soft-spots" that involved Europe.[166] Professor Gruner summarized this predicament as follows: "In a system which affords only narrow privilege and immunity protections for compliance evaluations, information about corporate misconduct which is collected in compliance evaluations becomes a source of threats to companies which is separate from the misconduct itself."[167]

Even more troubling for in-house counsel, the *AM & S* and *John Deere* cases were not isolated events. At the EC level alone, companies such as Shell International Petroleum, Montell, United International Pictures, and Digital Equipment Co. Ltd. have been raided by EC investigators.[168] Nor are the problems caused by cases like *AM & S,* and contained in litigation like *Deere & Co.,* in the past.[169] As one observer has recently noted, "the emergence of national competition laws cloned from EC law...combined with increasing number of business transactions requiring antitrust advice [have] amplified concerns over the limits of the legal privilege."[170]

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[163] *Id.* pt. 21, at 560.

[164] *Id.* pts. 39-40, at 563.

[165] *See* Burkard, *supra* note 6, at 685 (noting that AM&S has had a "chilling effect" on communications about European antitrust matters at many multinational corporations). *See also* Boyd, *supra* note 102, at 493 (observing that *AM & S* should be of concern to every company with European operations that utilize in-house legal advice); Faull, *The Commission Proposes International Negotiations*, *supra* note 149, at 124 (remarking that "[t]he *AM & S* case may be seen to have opened a Pandora's box with enormous implications for the Community in both its internal and its external relations."); Ghandhi, *supra* note 149, at 313 (noting that "[t]he decision of the Court [in *AM & S*]...is bound to cause deep consternation to the legal profession in the United Kingdom generally and in particular to corporate lawyers.").

[166] Gruner, *supra* note 6, at 1175-1176 (observing that the result of the attorney-client privilege not being extended to in-house counsel is that "firms might avoid aggressive self-analyses of internal corporate misconduct...due to the threat of disclosure of the resulting evaluations.").

[167] Gruner, *supra* note 6, at 1176.

[168] Carr, *supra* note 15, at 32.

[169] *See* Faull, *The Commission Proposes International Negotiations*, *supra* note 149, at 139 (remarking that *AM & S* has "never ceased to be controversial.").

[170] *See* Dolmans, *supra* note 137, at 125.

IV. STRATEGIES FOR PROTECTING CONFIDENTIAL COMMUNICATIONS IN A GLOBAL SETTING

Given the many differences in the attorney-client privilege for in-house counsel at the international level, corporate counsel at multinationals face the real possibility of seeing their communications with employees in other countries appear in foreign legal proceedings. However, in-house attorneys are not without recourse. This note focuses on four common measures that general counsel can take to protect their communications with employees in foreign countries: (1) communicate orally, (2) hire local outside counsel, (3) select favorable choice of law and forum contract provisions, and (4) lobby for changes in the rules of foreign jurisdictions. The use of these alternatives may be influenced by considerations such as the potential of litigation arising in a particular matter or the complexity of the legal advice. As Professor Daly notes, "[p]reservation of the privilege is not always an overriding consideration."[171] In-house counsel should thus weigh the advantages and disadvantages of these options before using them.

A. Communicate Orally

The most secure and least expensive way to protect sensitive communications from court ordered discovery in foreign jurisdictions is to use oral communications instead of written documents.[172] Wherever possible and especially when the communication involves a potentially litigious issue, companies should bring the concerned individuals together to discuss the matter in person.[173] When personal meetings are not possible, a telephone or conference call may be the next best alternative.[174]

Oral communications offer greater security for discussions with employees in foreign countries for two reasons. First, many foreign jurisdic-

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[171] Daly, *supra* note 2, at 1086.

[172] Both academic commentators and practitioners recommend using oral communications whenever the information may be so communicated and, especially when the communication involves a potentially litigious issue. *See* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1279 n.135 (April, 1998) (recommending that communication should be restricted to oral advice whenever practical); Burkard, *supra* note 6, at 680; Boyd, *supra* note 102, at 494; Carr, *supra* note 15, at 38 ("[E]ven where the lawyer suspects a breach by a business unit, his suspicions and any evidence collected in an attempt to establish the breach and correct it must be communicated orally to the relevant people within the company and kept with external counsel.").

[173] *See* Boyd, *supra* note 102, at 494 (noting that "a face to face meeting will give the lawyer an opportunity to understand and make an impression on the client (and vice versa)."); Carr, *supra* note 15, at 33 (reporting that one general counsel in Italy has taken the approach, "as there is no privilege at all in Italy for in-house lawyers, he always deals with branch offices by visiting them and never allows them to send any sensitive documents to Italy.").

[174] *See generally* Carr, *supra* note 15, at 38.

tions, and especially civil law countries, do not practice extensive discovery and therefore do not typically ask for oral testimony from a litigant, even in ordinary civil proceedings.[175] Under the German Code of Civil Procedure, for example, "parties are not under an unqualified obligation to answer interrogatories and may not be compelled to testify."[176] Similarly, as one observer has pointed out, "Japan does not even have a term in its lexicon equivalent to discovery."[177]

The *AM & S* and *Deere & Co.* cases also support this conclusion. In both instances, the EC Commission seems to have based its allegations solely on written legal memoranda which it obtained during raids on the companies' premises.[178] Many commentators have subsequently pointed out that if the companies' in-house attorneys had discussed the anti-trust matters with their European managers in person or over the phone, the damaging legal opinions would have likely remained confidential.[179]

Second, the use of oral communication is better than a written exchange because many foreign jurisdictions do not extend the attorney-client privilege to attorney correspondence in the hands of the client.[180] In other words, oral discussions prevent the seizure of legal advice which might be found in a foreign manager's office.[181] It should be noted that because of this problem, in-house counsel should instruct the company's foreign operations to routinely destroy any handwritten notes that summarize legal discussions.[182]

Communicating orally does not, however, come without its disadvantages. As Josephine Carr observes, "this approach inevitably reduces effec-

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[175] *See supra* notes 136-39 and accompanying text.

[176] Riechenberg, *supra* note 98, at 88, *citing* Martens, *Erfahrungen mit Rechtshilfeersuchen aus den USA*, 27 RECHT DER INTERNATIONALEN WIRTSCHAFT 725, 729-730 (1981); Gamp, *Die Bedeutung des Ausforschungsbeweises im Zivilprozess*, 60 DEUTSCHE RICHTERZEITUNG 165 (1982); Judgments of July 9, 1974 and of February 18, 1970, Bundesgerichtoshof ("BGH"), 27 Neue Juristische Wochenschrift ("NFW") 1710, and BGH, 27 NJW 751.

[177] Yoshida, *supra* note 43, at 210, 224 n.90. *See also supra* note 138 and accompanying text.

[178] Neither the *AM & S* opinion nor the *Deere & Co.* decision refer to any testimony from in-house legal counsel or other company employees. For *AM & S*, see Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575. For *Deere & Co.*, see *Re* Deere & Co. v. Cofabel NV, Commission Decision of December 14, 1984, [1985] 2 C.M.L.R. 554.

[179] Burkard, *supra* note 6, at 680 ("[T]oday one might say that the advice should have been spoken and not written."); Boyd, *supra* note 102, at 494 (in the wake of *AM & S*, suggesting that in-house counsel should ensure that communications between "him and his client are, so far as practicable, oral rather than written;...").

[180] As previously noted, many countries do not honor the attorney-client privilege for documents in the hands of company employees. *See supra* notes 101-105 and accompanying text.

[181] *See supra* notes 101-105 and accompanying text.

[182] *See supra* note 102 and accompanying text.

tiveness and is frustrating."[183] Corporate counsel may find it difficult to bring the relevant parties together to discuss an important legal matter, especially on short notice.[184] Moreover, oral conversations with company employees may not be as effective as written communications in reminding company employees about important legal policies.[185] Given that oral communication involves these tradeoffs, in-house counsel should evaluate the necessity of employing oral communication before using this method to protect the contents of sensitive legal matters.

B. Hire Local Outside Counsel

Perhaps the second most effective way to protect the confidentiality of sensitive legal communications is to hire outside counsel in the foreign jurisdiction.[186] In complex matters that may potentially lead to litigation, use of local outside counsel and a written legal opinion may be the best way to advise the corporate client and ensure the confidentiality of those communications.[187] In the EC, many American and Europe companies regularly employ outside counsel to secure the privilege.[188]

Channeling advice through local outside counsel is generally preferable to communications between in-house counsel and corporate clients because every jurisdiction with the privilege honors the confidentiality of communications between private practitioners, who belong to a local bar association, and their respective clients.[189] In some jurisdictions such as Italy documents must still be retained in the local counsels' offices for the privilege to apply.[190] Thus, in-house counsel should again direct company employees to routinely destroy any correspondence from outside counsel and handwritten notes that summarize conversations with the company's private attorneys.[191]

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[183] Carr, *supra* note 15, at 34.

[184] *See generally* Boyd, *supra* note 102, at 494 (remarking that oral communications present "obvious practical difficulties associated with a clientele which is numerous and geographically scattered;...").

[185] *See id.* (noting that oral communication carries "the risk of misunderstanding if the subject-matter is complicated or technical;...").

[186] Carr, *supra* note 15, at 38 (suggesting use of local private practitioners for certain communications); Boyd *supra* note 102, at 495 (recommending use of outside counsel in certain situations).

[187] Carr, *supra* note 15, at 38; Boyd, *supra* note 102, at 494.

[188] *See* Carr, *supra* note 15, at 34.

[189] *See generally supra* notes 99, 101 and accompanying text.

[190] For Italy and other countries, see *supra* notes 102-05 and accompanying text.

[191] Again, these types of documents would be discoverable because they are held by the client. *See supra* notes 102-05 and accompanying text.

To obtain the privilege, in-house counsel may either render the legal advice themselves and channel it through the outside counsel[192] or ask the local firm to form the legal opinion and communicate directly with the corporate client. Depending on a corporation's operations in the local jurisdiction, the company may also consider hiring an attorney on secondment from a local law firm.[193] Secondments can use their law firm's letterhead to obtain the privilege and generally have a better understanding of the company's operations.[194]

The drawbacks to hiring local outside counsel for sensitive communications are generally two-fold. First, retaining a local law firm can be expensive, especially if there is little or no chance of litigation.[195] Second, employing outside counsel often requires in-house lawyers to invest considerable time clarifying the local counsel's role in relation to the company as well as special U.S. extraterritorial legislation like the Foreign Corrupt Practices Act.[196] Professor Daly refers to these problems as "the embedded culture clash."[197] Consequently, in-house counsel should first consider the degree of risk in a particular matter before turning to outside counsel.[198] It may be that hiring outside counsel is only necessary, as Professor Daly notes, when the prospect of litigation is "highly likely."[199]

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[192] Carr, *supra* note 15, at 34 (noting that some European corporate attorneys simply send their own legal advice "out to an external firm to be put onto that firm's letterhead."). In her article, Carr explains how the practice of hiring outside counsel to maintain the confidentiality of internal communications in the Netherlands even led some local private practitioners to agree in principle that in-house lawyers should be allowed to become members of the bar and have their communications protected by the attorney-client privilege. *See infra* text accompanying notes 207-08.

[193] *See* Diana Bentley, *A Network of Expertise: Diana Bentley on a Group for In-House Counsel in Europe*, FINANCIAL TIMES (LONDON), September 3, 1996, at 12 (suggesting use of secondments in foreign countries). In the context of a corporate law department, a secondment is normally when an attorney who regularly works for a private law firm is temporarily assigned to an in-house legal group. The American Corporate Counsel Association's European Branch, which represent approximately 100 in-house practitioners in Europe, has advocated the use of secondments. *See id.*

[194] *See generally* Carr, *supra* note 15, at 38. Secondments can also normally be negotiated for a sensible monthly fee. *See* Bentley, *supra* note 193.

[195] Bentley, *supra* note 193; Daly, *supra* note 2, at 1086-87.

[196] *See* Daly, *supra* note 2, at 1078-79 (describing the need to "educate" foreign outside law firms because of differences between U.S. and foreign outside counsel). The Foreign Corrupt Practices Act generally prohibits U.S. companies from bribing foreign government officials. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

[197] Daly, *supra* note 2, at 1081.

[198] *See id.* at 1086-87.

[199] *Id.* at 1086.

C. Select Favorable Choice of Law and Forum Contract Provisions

To protect company information from discovery in cross-border contract disputes, in-house legal groups should generally stipulate to forum and choice of law provisions that ensure all ensuing disagreements will be litigated in jurisdictions that extend the attorney-client privilege to in-house counsel and under rules that recognize this privilege for corporate attorneys.[200] For example, in-house counsel should avoid litigation in forums like Italy or France that do not honor the confidentiality of communications between general counsel and corporate employees.[201] On the other hand, corporate negotiators should advocate using jurisdictions like England or Hong Kong which offer a more favorable privilege climate.[202] The selection of agreeable forum and choice of law clauses in contracts will not, or course, protect corporations with offices in foreign jurisdictions from non-contractual civil or criminal actions against the company. This would not have helped, for example, in cases like *AM & S* and *John Deere* which both involved civil law violations.[203] Between contracting parties, however, choosing a pro-corporate forum will help protect internal legal communications.

D. Lobby for Changes to the Rules in Foreign Jurisdictions

A fourth option for in-house counsel is to lobby foreign jurisdictions that do not recognize a privilege for corporate attorneys to change their rules.[204] In the age of multinational corporations, most countries possess an

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[200] Some foreign jurisdictions may employ rules that do not allow contracting parties to freely negotiate forum and choice of law provisions when the contract relates to that local jurisdiction. This suggestion, of course, would not help under these circumstances.

[201] For the law in Italy and France, see Carr, *supra* note 15, at 34, 38.

[202] Both England and Hong Kong extend the attorney-client privilege to in-house counsel. For England, see Roberts, *supra* note 25. For Hong Kong, see *supra* note 123 and accompanying text.

[203] For *AM & S*, see Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575 (the EC Commission instituted the action against *AM & S* rather than a contracting party). For *Deere & Co.*, see *Re* Deere & Co. v. Cofabel NV, Commission Decision of December 14, 1984, [1985] 2 C.M.L.R. 554 (the case brought against *Deere & Co.* was also brought by the Commission).

[204] *See* Daly, *supra* note 2, at 1108 (remarking that "in-house lawyers are not resigned to the status quo."). Even in jurisdictions that have not traditionally afforded in-house counsel the right to protect communications under the attorney-client privilege, there has been discussion about the merits of such a movement. The *AM & S* and *Deere & Co.* cases resulted in much debate within Europe. *See* Faull, *The Commission Proposes International Negotiations*, *supra* note 149 at 124 (observing that the *AM & S* decision carried "enormous implications for the Community in both its internal and its external relations."); Faull, *The Commission's Practice Note*, *supra* note 149, at 411 (calling the court's decision in AM & S "controversial"). *See also* Forrester, *supra* note 137, at 75; Ghandhi, *supra* note 149, at 308; and Boyd, *supra* note 102, at 493.

interest in extending privilege protection to in-house legal practitioners.[205] Although companies from jurisdictions that do not extend the privilege to in-house counsel have traditionally enjoyed quasi-confidential communication under limited local discovery practices,[206] as these companies expand abroad they will increasingly face the discovery wrath of foreign tribunals, precisely because their home jurisdictions do not extend the privilege to their own legal professionals.[207] Some courts in the United States, for example, deny the attorney-client privilege to in-house legal practitioners who are not entitled to the privilege in their own country.[208]

During the last fifteen years, government representatives and bar association officials have conducted negotiations on extending the privilege to in-house counsel. These efforts have met with some success and can be strengthened and continued.[209] In the Netherlands, for example, the in-house lawyer's association, Nederlands Benootschap va Bedrijfsjuristen, has persuaded the government and the local bar association to allow in-

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[205] In addition to the reason provided in the text, many scholars argue that recognizing a privilege for in-house counsel would promote compliance with the law. *See, e.g.*, Dolmans, *supra* note 137, at 125-26 ("This would allow in-house counsel the freedom to advise its client about the legal consequences of conduct without fear that its advice and any confessions made by the client will be subject to [] scrutiny later."); Hill, *supra* note 9, at 186-89 (asserting that in-house counsel may be better able to persuade clients to behave lawfully). This is the reasoning which supports the privilege for attorneys, including in-house counsel, in the United States. *See supra* notes 33-36 and accompanying text. The counter-argument, which many other countries cite, is that a corporate attorney's dependence on the company prevents him or her from performing this function adequately. *See infra* notes 129-31. This comment suggest that as new arguments, such as the one provided in the text, arise at the international level, the balance in these jurisdictions may shift in favor of extending the privilege to in-house counsel. For a good review of the arguments for and against extending the privilege to in-house lawyers, see Hill, *supra* note 9.

[206] *See supra* notes 136-39 and accompanying text.

[207] There is evidence that many civil law jurisdictions have already seen developments in the attorney-client privilege because discovery has become more widespread. *See infra* note 140 and accompanying text.

[208] *See, e.g.*, Honeywell, Inc. v. Minolta Camera Co., Ltd., 1990 U.S. Dist. LEXIS 5954 (D.N.J. 1990) (withholding the attorney-client privilege from Japanese in-house patent agents who performed the "functional equivalent" of an attorney, but did not belong to the Japanese Bar Association). *But contrast with* Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442, 443 (D.De. 1982) (explaining that French in-house legal professionals who did not belong to a French bar association should be entitled to the privilege because they performed essentially the same functions as United States corporate attorneys—providing legal advice on matters of concern to their corporate employers).

[209] Despite generally positive reports, recent comments by a long-time European observer suggest that little progress has been made at the EC level since the *AM & S* decision in 1982. *See* Jonathan Faull, *In-House Lawyers and Legal Professional Privilege: A Problem Revisited*, 4 COLUM. J. EUR. L. 139 (Winter/Spring, 1998). Interestingly, Faull seemed much more optimistic about the EC Commission's desire to negotiate acceptable privilege agreements with other countries shortly after *AM & S* was decided. *See* Faull, *The Commission Proposes International Negotiations*, supra note 149.

house counsel to become members of the bar and enjoy confidential communications under the attorney-client privilege.[210] The in-house lawyer's association successfully argued that corporate counsel in Holland were only using outside counsel to ensure that company information remained confidential under the attorney-client privilege and that "there was no reason to give members of the bar a monopoly on protected communications."[211]

In Belgium, the American Bar Association ("ABA") has likewise met with the Brussels Bars to discuss the status of privileges for foreign attorneys practicing in Belgium.[212] These negotiations have led the Brussels Bars to agree in principle to protect and defend the professional privileges, including the attorney-client privilege, of U.S. lawyers practicing in Belgium.[213] Many American attorneys working in Europe assisted the ABA in these negotiations.[214]

At the EC level, the ABA has also asked the EC Commission to review its decision in *AM & S* and recognize the privileges of foreign attorneys for the sake of preventing disharmony.[215] In particular, the ABA has requested the EC Commission to grant a client's written correspondence with American attorneys the same procedural protections against disclosure as a client's correspondence with EC lawyers.[216] The ABA has asserted that in the United States, "courts recognize that, to maintain order and stability within the international community, they must in appropriate circumstances accommodate the rights and privileges afforded by foreign legal systems."[217]

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[210] *See* Carr, *supra* note 15, at 34.

[211] *Id.*

[212] *See* Terry, *supra* note 2, at 1419, *citing* Agreement, Aug. 6, 1994, American Bar Ass'n-French Language Order of the Brussels Bar-Duty Language Order of the Brussels Bar.

[213] *Id.* (noting that in the agreement, the Brussels Orders agreed to "protect and defend" the professional privileges, including the attorney-client privilege of U.S. lawyers registered on the Foreign Lawyer Lists).

[214] *Id.*

[215] *See* Report from the European Law Committee, ABA International Law and Practice Section (Feb. 1983). During the *AM & S* litigation, many observers, including the government of the United Kingdom and several European commentators, called for extending the privilege to in-house counsel from countries that required corporate attorneys to be members of the Bar and therefore uphold the same ethical standards as private attorneys. *See* Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575. One of the Advocate General's in the AM & S case also came out strongly in favor of extending the privilege to in-house counsel provided that the corporate attorneys were subject to rules of professional discipline and ethics. *See* Opinion of Advocate General Sir Gordon Slynn, *id.* at 1644.

[216] *See* Report from the European Law Committee, ABA International Law and Practice Section (Feb. 1983).

[217] *Id.* at 9.

The American Corporate Counsel's European Branch has supplemented the ABA's lobbying efforts at both the EC and local level.[218]

The primary shortcoming of negotiating privilege protection for in-house attorneys is that most national, if not provincial, jurisdictions apply their own privilege rules in disputes within their jurisdiction.[219] For example, neither the EC nor the U.S. government can negotiate an agreement that covers all of the courts within their geographical boundaries.[220] Thus, it is been difficult to achieve comprehensive, region-wide protection.

In its brief for the *AM & S* case, the CCBE asserted that countries appear to be moving in the direction of providing more protection for confidential communications between attorneys and clients.[221] There is room for bargaining and substantial reasons for extending the privilege to in-house counsel.[222] Therefore, in-house counsel should continue to lobby foreign jurisdictions to change restrictive privilege rules.

V. CONCLUSION

Although the attorney-client privilege for in-house counsel is fairly predictable in the United States, the scope of the privilege differs in foreign countries. Even among civil law jurisdictions like Germany and Japan, the application of the privilege for corporate attorneys differs in meaningful ways.[223] These variations present general counsel with the difficult challenge of providing corporate clients in foreign offices with effective legal advice while also maintaining the confidentiality of those communications and the company's information. To mitigate this problem, in-house counsel should become familiar with the contours of the privilege at the international level and, when necessary, take protective steps such as communicating information orally or employing local outside counsel to maintain the confidentiality of internal discussions. With foresight and use of these measures, general counsel can avoid many of the pitfalls of the attorney-client privilege at the international level.

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[218] *See* Bentley, *supra* note 193 (noting that the American Corporate Counsel Association's European branch is pushing for a new EU directive that would extend the privilege to in-house counsel in Europe).

[219] *See* Faull, *The Commission Proposes International Negotiations*, *supra* note 149, at 121 (commenting on the difficulty of negotiating at the EC level).

[220] *See id.*

[221] Case No. 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, 1584. *See also In-house Lawyers Score in Full-Recognition Battle*, LAW. INT'L, Dec. 1995, at 3.

[222] *See supra* notes 205-208 and accompanying text.

[223] *See supra* note 119.