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Preserving the Corporate Attorney-Client Privilege: Here and Abroad

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The corporate attorney-client privilege, well developed in our jurisprudence, may be an endangered species, under attack on a number of fronts. Despite having been firmly established by the United States Supreme Court in its opinion in *Upjohn v. United States*,[1] the Department of Justice ("DOJ") and regulators have tried to make assertion of the attorney-client privilege by investigated companies painful.[2] Commentators similarly continue to criticize application of the privilege to corporate entities. Finally, internationally many countries do not provide an equal degree of protection to corporate attorney-client communications, particularly when the "attorney" is a company's in-house counsel. This lack of observance of the privilege by certain countries may undermine effective use of the privilege by companies involved in cross-border investigations.

This article examines the dynamics of the corporate attorney-client privilege and corporate liability in the United States and abroad, and the various factors that have served to weaken the privilege. The article also details the evolving law relevant to the assertion and protection of that privilege in multi-national investigation. Despite the lack of support, the corporate attorney-client privilege—especially in a legal system that so

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1. *See generally* Upjohn Co. v. United States, 449 U.S. 383 (1981).
2. *See generally id.*

readily exposes corporate entities to their own criminal and regulatory jeopardy—is a creature whose existence should be preserved.

I. CORPORATE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES

The corporate attorney-client privilege is well-developed in American law. The Supreme Court's 1981 decision in *Upjohn*, provided an expansive view of the privilege as it applied to communications between a company's attorneys and its employees.[3] Since *Upjohn*, investigating attorneys representing corporate clients have developed an almost ritualized approach to gathering information by interviewing corporate employees in order to ensure that the attorney's corporate client is able to control the confidentiality of those communications. This process—which includes informing the corporate employee that the attorney works for the company and not for the employee; alerting the employee to the obligation to maintain confidentiality; and explaining that only the corporation can decide when and to whom to disclose the information—has become so well-entrenched and routine in the legal community and is generally assumed to satisfy the legal standards necessary for the corporation to rely on the attorney-client privilege.[4]

Equally well-established in this country is the notion that work done by in-house counsel is as deserving of confidentiality protection as the work of outside counsel. Although American law draws no distinction between in-house counsel for a corporation and outside counsel for privilege purposes, complications may arise where in-house lawyers are called on to give "business advice," which is not covered by the attorney-client privilege. In these situations, courts have expressed concern that companies will funnel information through in-house lawyers in order to shield them from disclosure.[5] Accordingly, in examining whether a particular communication with an in-house lawyer is privileged, the courts ask whether (i) the task could be handled by a non-lawyer; (ii) counsel was contacted for legal purposes; (iii) counsel holds another office in the corporation; (iv) the discussion relates to laws or anticipated litigation; and (v) the issue of privilege was discussed.[6] With this caveat, however, under United States law, in-house lawyers are treated the same as outside lawyers with respect to the attorney-client privilege and the

3. *See generally id.*

4. *See* Robert G. Morvillo & Robert J. Anello, *Beyond 'Upjohn': Necessary Warnings in Internal Investigations*, N.Y.L.J., Oct. 4, 2005.

5. *See* Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp., 1996 WL 29392, *3 (S.D.N.Y. 1996).

6. EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 10:5 (2007).

corporation may assert the privilege with respect to communications involving in-house and outside counsel.[7]

II. ASSAULTS ON THE PRIVILEGE BY THE DEPARTMENT OF JUSTICE

For many years, the sanctity of the attorney-client privilege and its application to corporate America seemed beyond question. Within the past decade, however, federal prosecutors, among others, have mounted a multi-pronged assault against the privilege, especially in the context of corporate America.[8] The assault began with the DOJ's first iteration of guidelines concerning the prosecution of corporations. The government's policy in this regard initially was first set forth in the Holder Memorandum, captioned "Bringing Criminal Charges Against Corporations," issued in 1999 by then-Deputy Attorney General Eric Holder Jr.[9] The Holder Memorandum was supplanted in 2003 by the Thompson Memorandum, more formally known as "Principles of Federal Prosecution of Business Organizations," authored by then-Deputy Attorney General Larry D. Thompson.[10] The guidelines were created to guide DOJ prosecutors in making the decision whether to seek charges against a business organization.[11]

In essence, both the Holder and Thompson Memoranda encouraged federal prosecutors to seek waivers by corporations of their attorney-client privilege in a sort of quid-pro-quo for favorable treatment by the prosecutor in considering whether to indict the corporation.[12] Prosecutors then use a corporation's refusal to provide privilege waivers as an aggravating factor in favor of charging a corporation with a

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7. *See Upjohn Co.*, 449 U.S. at 392-97.

8. Robert J. Anello, *Justice Under Attack: The Federal Government's Assault on the Attorney-Client Privilege*, 1 CARDOZO PUB. L., POL'Y & ETHICS J. 1, 5 (2003). Ironically, in the United States, the assault on privilege is from the very lawyers who have been deemed guardians of the privilege. *Id.* For instance, in the wake of September 11th, and the subsequent passage of the PATRIOT ACT, the Federal Bureau of Prisons published a regulation allowing the Attorney General to unilaterally monitor the conversation of detainees, including witnesses or suspects, based on nothing more than "reasonable suspicion" of terrorism or "acts of violence." *See* 28 C.F.R. § 501.3(d) (2001). These rules were enacted without judicial input or oversight and essentially made it impossible for these individuals to hold a privileged conversation with counsel. *See id.*

9. Memorandum from Eric Holder Jr., Deputy Attorney General, to Heads of Department Components and United States Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999).

10. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003).

11. *Id.*

12. *Id;* Memorandum from Eric Holder Jr., *supra* note 9.

crime.[13] The Thompson Memorandum also focused on a corporation's relationship with its employees during a government investigation, considering whether the business organization agreed to pay its employee's attorneys' fees, shared information with the employee and his counsel outside the context of common interest agreements, or sanctioned the Fifth Amendment assertions of its employees.[14] The DOJ's "Principles" were effective in coercing many companies to waive the privilege in order to obtain favorable treatment.

Not surprisingly, other regulatory agencies, including the Securities and Exchange Commission ("SEC"), soon followed suit in using waiver of the corporate attorney-client privilege as a proxy for full cooperation. For example, in October 2001, the SEC issued a report outlining some of the criteria to be considered when assessing the extent to which a corporation's cooperation will influence its decision as to whether or not to bring an enforcement action against a company.[15] Pursuant to the report, a company would get "credit" for cooperation with law enforcement authorities, "including providing the Commission staff with all information relevant to the underlying violations." Provision of all relevant information essentially required a full waiver of the privilege by a company.

A. A Swing in the Pendulum?

Despite these assaults, and complaints by defense attorneys, few lawyers objected to the government's coercive tactics until the government's KPMG-related prosecution in the United States District Court for the Southern District of New York, *United States v. Stein*.[16] The lack of objection was due less to agreement with the government's tactics than to an understanding that non-waiver was too dangerous for a corporation facing potential prosecution. Judge Lewis Kaplan's momentous decisions in the *Stein* case seemed to precipitate a shift in the government's attack on the privilege. Although *Stein* focused on other aspects of the Thompson Memorandum's guidelines, such as the relationship between a corporation and its employees, the decision demonstrates that, although distinct, criticism was equally applicable to

13. Memorandum from Eric Holder Jr., *supra* note 9; Memorandum from Larry D. Thompson, *supra* note 10.

14. *See* Memorandum from Eric Holder Jr., *supra* note 9.

15. *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Divisions*, SEC Act Release No. 44969 (Oct. 23, 2001).

16. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

the pressure put on companies geared at undermining the corporate attorney-client privilege as well.[17]

In *Stein*, the government's practice of seeking corporate waiver of attorney-client and work product protection came under fire as having a chilling effect on attorney-client and employer-employee communications.[18] This decision was affirmed by the Second Circuit.[19] In *Stein II*, the court suppressed certain parts of the individual defendants' statements, finding the statements had been "deliberately" coerced by the government when it insisted that KPMG pressure employees to grant government requests for pre-indictment interviews without privilege protection or otherwise lose their right to have KPMG pay their legal fees.[20] Judge Kaplan's decisions helped to re-focus the legal community on the issues surrounding the privilege and its deterioration under pressure by DOJ.

An example of this renewed focus is the recent decision of a California Court of Appeals in *Regents of the University of California v. Superior Court of San Diego County*.[21] In *Regents*, public and private energy users brought an antitrust action against a group of energy suppliers alleging that they unlawfully inflated the retail price of natural gas in California between 1999 and 2002.[22] Plaintiffs moved to compel the production of privileged documents that the defendant corporations previously had produced to federal investigators.[23] The California Court of Appeals considered whether disclosure of privileged communications is free of coercion when, as a matter of policy, the federal government advised corporations that they might avoid indictment or regulatory sanctions if they fully cooperated with the government and waived the attorney-client privilege.[24]

In finding that the prior coerced disclosures made by the defendant corporations did not waive the privilege with respect to plaintiffs, the Court wrote

> [t]he means of coercion the government used here were, as a practical matter, more powerful than a court order. A court order can be challenged, without penalty, by way of extraordinary writ or appeal.

17. *See generally id.*
18. *See id.*
19. *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008).
20. *See* United States v. Stein, 440 F. Supp.2d 315, 337-38 (S.D.N.Y. 2006).
21. *See* Regents of the Univ. of Cal. v. Superior Court of San Diego County, 81 Cal. Rptr. 3d 186 (Cal. Ct. App. 2008).
22. *Id.* at 186.
23. *Id.*
24. *Id.* at 188.

> In contrast here, the defendants here had no means of asserting the privileges without incurring the severe consequences threatened by the government agencies.[25]

Other organizations also took steps to address the issues raised by the *Stein* decisions. The Sentencing Commission voted unanimously to reverse a November 2004 amendment to the United States Sentencing Guidelines that had added commentary stating that an organization's willingness to waive the privilege could be relevant to a determination that the entity was cooperating with the government and therefore eligible for a reduced penalty.[26] The United States Senate Judiciary Committee held hearings on the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations during which notable speakers including Edwin Meese III, former U.S. Attorney General, Karen Mathis, president of the American Bar Association ("ABA"), and private practitioners, charged the government with "overzealousness" in investigation and prosecuting corporations resulting in the erosion of constitutional rights.[27] Around the same time, a bipartisan group of 11 former senior Justice Department officials wrote then-Attorney General Alberto Gonzales to protest the government's application of the Thompson Memorandum, seen as "seriously eroding" the attorney-client privilege.[28]

In response, on December 7, 2006, Senator Arlen Specter, introduced legislation, written in conjunction with the ABA, National Association of Criminal Defense Lawyers, the American Civil Liberties Union ("ACLU"), Association of Corporate Counsel, and the U.S. Chamber of Commerce. The purpose of the legislation, entitled the Attorney-Client Protection Act of 2006 ("Act"), is to "place on each agency clear and practical limits designed to preserve the attorney-client privilege."[29] Specifically, the Act provides that in a federal investigation, including criminal prosecutions or civil enforcement actions, an agent or attorney of the United States shall not request that an organization waive

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25. *Id.* at 194.

26. Angie Halim, *Recent Sentencing Commission Amendment is Promising for Corporate Organizations*, THE WHITE COLLAR LITIG. NEWSL., Apr. 2006, at 1.

27. *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *see also* Robert G. Morvillo & Robert J. Anello, *Preserving Your Job While Asserting the Fifth Amendment*, N.Y.L.J., Dec. 5, 2006 (detailing testimony).

28. Jason McLure, *Ex-DOJ Officials Blast Current Policy: Letter Signed by Bell, Thornburgh, and Others Criticizes Approach Outlined In Thompson Memo*, LEGAL TIMES, Sept. 11, 2006, at 18.

29. Attorney-Client Privilege Protection Act of 2006, H.R. 3013, 109th Cong. § 2(b) (2006).

its attorney-client privilege or work product doctrine.[30] Furthermore, under the proposed legislation, the government cannot condition any charging decision or cooperation credit on the corporation's waiver or non-waiver of privilege, the payment of employee's legal fees, the continued employment of a person under investigation, or the signing of a joint defense agreement.[31] The Act does not, however, limit a corporation from voluntarily entering into a waiver agreement.[32] The legislation is pending.[33]

B. Response by the Department of Justice

Five days after Senator Specter introduced his bill, in an apparent attempt to demonstrate that such legislation was unnecessary, United States Deputy Attorney General Paul J. McNulty announced that the DOJ was releasing revised corporate charging guidelines for federal prosecutors throughout the country.[34] The new memorandum, referred to as the McNulty Memorandum, replaced the Thompson Memorandum in its entirety.[35] The McNulty Memorandum limited the circumstances under which the DOJ could seek waiver in the typical case, adopting a "tiered approach" to when prosecutors may request protected materials from a business organization, distinguishing between documents containing legal or non-factual advice versus those containing purely factual information.[36] Finally, the DOJ's revised guidelines also state that prosecutors generally, cannot consider a corporation's advancement

30. *See id.*

31. *See id.*

32. *See id.*

33. On September 19, 2008, President Bush signed Senate Bill No. 2450 into law as Public Law No. 110-322. This law creates a new rule of evidence—Federal Rule of Evidence 502, or FRE 502—limiting certain attorney-client privilege and work product waivers. The rule applies in "all proceedings commenced after" its enactment and, "insofar as is just and practicable, in all proceedings pending" on that date. Its two major purposes are to (1) harmonize the law governing certain disclosures of privileged and protected communications, and (2) reduce litigation costs incurred in reviewing documents for privilege before production. The new rule was proposed by an Advisory Committee on Evidence to the Judicial Conference of the United States. When proposing the new rule, the Advisory Committee specifically expressed concern about the production of confidential or work product material by a corporation subject to government investigation and the wavier implications of such disclosure.

34. *See* Ashish S. Joshi, *An End to "Backseat Driving"? The Thompson Memorandum and Government Tactics in White-Collar Crime Investigation and Prosecution*, MICH. BUS. L.J., Spring 2007, at 44.

35. *See* William M. Sullivan, Jr., *The McNulty Memorandum: New DOJ Policies On Attorney-Client Privilege And Attorney Work Product Protections*, THE METROPOLITAN CORP. COUNS., Feb. 2007, at 34.

36. *See id.*

of attorneys' fees to employees when making a decision whether to charge a corporation.[37] The "rare exception" to this rule is when the totality of the circumstances demonstrates that the advancement of attorneys' fees was intended to impede the government's investigation.[38]

Many observed, however, that the McNulty Memorandum did not go far enough in eliminating the troubling provisions of the Thompson Memorandum.[39] Critics expressed concern that because the provisions set forth in the McNulty Memorandum were only internal DOJ guidelines, a corporation or employee had no recourse in the event that a federal prosecutor failed to follow the guidelines.[40] For this reason, many legal organizations and professionals felt the Specter legislation was a better option.[41] The passage of the Act would create a means by which businesses and their employees could seek judicial intervention in the case of prosecutorial misconduct.[42] As noted by one commentator, under existing law, the DOJ can secure the claimed privileged materials in court where the crime-fraud exception applies.[43] The attempt by DOJ to bypass judicial review in other cases was seen as an attempt by an executive agency to legislate.[44]

In response to this continued opposition, the DOJ tried yet again to appease the concerns of the legislature and the legal community. On July 9, 2008, Deputy Attorney General Mark Filip sent a letter to the Chair of the Senate Committee on the Judiciary outlining forthcoming changes to the practices contained in the Thompson and McNulty memoranda.[45] Filip's letter stated that under the new revisions,

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37. *See id.*

38. *See id.*

39. *See id.*

40. *See* Sullivan, *supra* note 35.

41. *See, e.g.*, Letter to Senator Patrick Leahy from Former United States Attorneys (June 20, 2008) *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/letter_to_senator_leahy_from_former_united_states_attorneys.pdf; Statement of ABA President Karen J. Mathis regarding introduction in U.S. House of Representatives of Attorney-Client Privilege Protection Act of 2007 (July 13, 2007), *available at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=151); NACDL News Release, Defense Lawyers Bar Supports Attorney-Client Privilege Protection Bill (July 12, 2007), *available at* http://www.nacdl.org/public.nsf/Newsreleases/2007mn017?OpenDocument.

42. *See* Attorney-Client Privilege Protection Act of 2006, H.R. 3013, 109th Cong. (2006).

43. White Collar Crime Prof Blog, The McNulty Memo—Attorney-Client Privilege Waivers & Attorney Fees (Dec. 12, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/privileges/index.html.

44. *Id.*

45. Letter from Mark Filip, Deputy Attorney General to Chairman Patrick J. Leahy and the Honorable Arlen Specter (July 9, 2008).

"cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges."[46] He also offered that "federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation."[47] Senator Specter responded the following day, requesting additional specific information from the DOJ, while opining that the remedies as outlined in Filip's letter did not go far enough and that the agency was not moving quickly enough.[48] Further, Specter stated that even if the DOJ were to sufficiently address his concerns, legislation still would be required because the revised guidelines would do nothing to curb other federal agencies, such as the SEC and the Internal Revenue Service, from engaging in the same abuses.[49]

On August 28, 2008, Filip published revisions to the Justice Department's "Principles of Federal Prosecution of Business Organizations."[50] The Filip Memo shifts the focus from the disclosure of privilege to the disclosure of "relevant facts." It provides that an assessment of a corporation's cooperation be based on the disclosure of relevant facts concerning the alleged misconduct, rather than the waiver of any privilege. Further, the Filip Memo prohibits prosecutors from requesting waivers of "core" attorney-client communications or work product or from crediting corporations that do waive privilege with respect to this information. It states that prosecutors "should not ask for such waivers and are directed not to do so." The Memo also provides that "[c]ounsel for corporations who believe that prosecutors are violating such guidance . . . to raise their concerns with their supervisor, including the appropriate United States Attorney or Assistant Attorney General."

III. CRITICISM OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE BY LEGAL COMMENTATORS

Beyond attacks on the privilege by the government attorneys, some members of the academic legal community have argued for the abolition of the corporate privilege. In *Bellis v. United States*, the United States Supreme Court held that the Fifth Amendment privilege against self-

46. *Id.*
47. *Id.*
48. *See* Press Release, Arlen Specter, United States Senator, Specter Response Letter to Deputy Attorney General (July 9, 2008).
49. *See id.*
50. *See* Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Aug. 28, 2008), *available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

incrimination did not apply to corporations, limiting it to "its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."[51] Commentators have suggested that this rationale be extended to the corporate attorney-client privilege.[52]

The Supreme Court has reasoned that primary purpose of the corporate attorney-client privilege is to "encourage full and frank communications between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."[53] Critics of the application of the privilege to fictitious entities believe that these purposes do not translate well to the corporate context.[54] First and foremost, they argue that the element of secrecy, which is essential to any claim of privilege, is not possible in a corporate entity, but only in a personal exchange between individuals.[55] "The human claim to confidentiality stems from 'human values and human traits shared by members of every society.' Although corporations are in many instances treated as fictitious persons, they are not in fact persons, and the arguments made for personal confidentiality cannot simply be transferred to corporate clients."[56]

Commentators also argue that the benefits of the privilege, including an increase in employee-attorney communications, are marginal in the corporate context and last only as long as the employee and the corporation's interests do not diverge.[57] In fact, they argue that because the privilege belongs only to the corporation, confidentiality is an illusion for the individual employee.[58] Since "[t]he employee's interest is protected only by the corporation's grace, not by the attorney-client privilege," frank and full disclosure may not occur as often as predicted as a result of privilege protection.[59]

Moreover, critics argue that an overly-expansive view of the privilege may interfere with the judicial system's truth-seeking

51. Bellis v. United States, 417 U.S. 85, 89-90 (1974) (citing United States v. White, 322 U.S. 694, 701 (1974)).

52. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 188 (Princeton Univ. Press 1988).

53. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

54. *See, e.g.*, Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771, 775 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963), *cert. denied*, 375 U.S. 929 (1963).

55. *See, e.g., id.*

56. Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 185 (1993).

57. *See id.* at 173-74.

58. *See id.*

59. *See id.*

functions.[60] This notion resounds in criticism that the application of the attorney-client privilege in the corporate setting imposes tremendous costs on the judicial system.[61] One commentator has noted that "[b]y encouraging client disclosure through secrecy guarantees, the state protects clients who otherwise would jeopardize their case by withholding information."[62] To obtain this information, their opponent must spend extra money in the discovery process and courts must adjudicate these disputes. Thus, the privilege shifts the cost of potentially harmful information from the client withholding the information to the party harmed by the non-disclosure and the system in general.

For all of these reasons, some argue that the corporate attorney-client privilege should be abolished, opining that attempts to restate the privilege to address these points would be unsuccessful.[63] Taken in conjunction with the assaults on the privilege by the government, attorneys representing corporations correctly are wary of their ability to maintain the confidences of their client. Further, the fact that privilege law outside the United States is not as well-established as within the United States threatens the stability of the attorney-client privilege in the United States due to the increasingly international scope of corporate practice.

IV. APPLICATION OF THE CORPORATE PRIVILEGE OUTSIDE THE UNITED STATES

"At the beginning of the 21st Century, nearly every country in the world recognizes some form of the attorney-client privilege," including former communist countries and the People's Republic of China.[64] In addition, most countries also recognized the existence of some sort of privilege or "professional secret" between a corporate entity and an attorney.[65] Most foreign jurisdictions, however, do not recognize an

60. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 366 (1989).

61. *See id.*

62. *See id.*

63. Thornburg, *supra* note 56, at 220-21. *See also*, LUBAN, *supra* note 52; Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 20, 33 (1998) (arguing that the justifications for the privilege are flawed and the attorney-client privilege in total should be abolished).

64. Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-House Counsel at the International Level: Protecting the Company's Confidential Information*, 20 NW. J. INT'L L. & BUS. 145, 159-60 (1999).

65. 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, 1086 (1997).

attorney-client privilege for in-house counsel at all, and where it is recognized, it is not absolute. These protections for corporations may be less well-developed in other countries, in part, because of an absence of perceived need for such protection by an artificial agency in light of a traditional reluctance to hold corporate entities criminally liable; an approach quite different from America's voracious appetite to prosecute corporations for their employees' misdeeds. The less well-developed privilege also may in part be a function of the fact that in some countries, a lower expectation exists that broad discovery will be made available to civil litigants.

A number of other policy reasons exist for the in-house counsel variation outside the United States. First, some nationalities believe that in-house counsel lack the independence required to provide privileged legal advice. Foreign courts have focused on the issue of whether independence is consistent with an in-house counsel employment relationship, "leading to much debate over whether communications between in-house counsel (even if legal in nature) are somehow compromised or biased simply because of the employment relationship of the 'client' it is advising."[66]

This unwillingness of foreign jurisdictions to include in-house counsel within the umbrella of the corporate attorney-client privilege also is due to the widely varying legal culture in foreign countries, dictating a sharp distinction between in-house and outside counsel. In part, this is the result of the different legal education and professional training that exists in other countries. "Other than the United States, the legal curriculum in most jurisdictions is part of an undergraduate study. To be admitted to the bar in most countries, a supervised apprenticeship and passage of at least one bar exam must follow this designated undergraduate course work."[67]

Law school graduates who choose not to pursue the apprenticeship, still may serve as in-house counsel, negotiating and interpreting contracts and advising on regulatory and liability issues. These individuals are not necessarily members of the bar, however, and may not be recognized within the legal profession. Further, in-house counsel are not necessarily

66. Lisa J. Savitt & Felicia Leborgne Nowels, *Attorney-Client Privilege for In-House Counsel is Not Absolute in Foreign Jurisdictions*, THE METROPOLITAN CORP. COUNS., Oct. 2007, at 18.

67. Louise L. Hill, *Disparate Positions on Confidentiality and Privilege Across National Boundaries Create Danger and Uncertainty for In-House Counsel and Their Clients*, *in* BNA CORPORATE PRACTICE SERIES: LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL 2 (2008) (external page number citation provided by 2008 Thomson Reuters/West).

subject to the rules of ethics and professional discipline as are other members of the bar.[68]

Because of this dichotomy, and the limited job opportunities open to foreign in-house counsel, foreign courts likely are concerned not only with in-house counsel's ability to maintain independence, but the potential temptation of in-house counsel to hide corporate indiscretions. Moreover, as in-house counsel often wears both a lawyer and a business hat, these attorneys have been subject to criticism because their interests mirror that of the commercial interests of their client/employer.[69]

Those who believe that the privilege should apply to in-house counsel counter that their ability and duty to independently counsel their client is not hampered by the nature of their employment and that application of the privilege would encourage full and frank communications. For example, Carl Belding, counsel at IBM Europe stated,

> As matters stand, a lawyer who does a thorough job of analyzing the facts and risks, so that he can better advise his business client, runs a significant risk that his work will be used against his client. The current policy, [which fails to extend the privilege to in-house counsel], frustrates the lawyer's fundamental professional obligation of counseling clients to comply with the law.[70]

A. Examples of Foreign Application (or lack thereof) of the Corporate Privilege

In 1982, the European Court of Justice, a court overseeing matters pertaining to the European Union, noted that while the attorney-client privilege exists as a basic right, it was not available for communications with in-house counsel since such an individual was unable to render independent advice due to his employment by the corporation.[71] The case before the Court was an antitrust investigation of an English company by the European Commission. The company, AM&S, refused to produce certain documents, which they believed to be protected by the attorney-client privilege. The documents included legal memorandum

68. *See* Daly, *supra* note 65, at 1090-92; *see also* Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 504 (1989).

69. Savitt & Nowels, *supra* note 66.

70. Josephine Carr, *Should In-House Lawyers Have Lawyer/Client Privilege?*, INT'L BUS. LAW., Dec. 1996, at 1.

71. Case No. 155/79, AM&S Europe Ltd. v. Commission of the European Communities, 1982 E.C.R. 1575, 2 C.M.L.R. 264 (1982).

from the company's in-house counsel to certain employees. In addition to finding that the documents were not privileged because in-house counsel was incapable of rendering independent advice, the Court also found that the privilege was only available to those lawyers governed by the applicable professional rules, which excluded in-house attorneys.[72]

More recently, the European Court of First Instance considered whether to extend legal privilege to in-house counsel communications in *Akzo Nobel Chemicals, Ltd. and Akros Chemicals, Ltd. v. Commission of the European Communities*.[73] As in the AM&S case, the European Commission was investigating the anticompetitive practices of two English companies. Azko claimed that certain documents seized by the European Commission were privileged.

Although the President of the Court of First Instance acknowledged that "confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence" and that "professional privilege is intimately linked to the 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," the Court still declined to extend the professional privilege to in-house lawyers.[74] Rather, the Court found that such attorneys could not provide independent legal services to the company that employed them.[75]

Despite the European Union's position, specific countries within Europe handle attorney-client privilege differently. For instance, the United Kingdom affords in-house lawyers some protection, while in France, in-house lawyers are neither members of the bar nor "*avocats*" whose communications are afforded attorney-client protection.[76] Under German law, communications with in-house counsel may qualify for privilege protection if the in-house attorney maintains separate offices to which he has sole access and the general counsel acts in his capacity as an attorney.[77]

These three countries essentially represent the three different ways in which a foreign country may handle in-house counsel and the attorney-client privilege. The privilege may be recognized, it may be

72. *Id.* at 1612.

73. Joined Cases T-125 & T-253/03, Akzo Nobel Chemicals, Ltd., Akcros Chemicals Ltd. v Comm'n, 2007 E.C.R. II-4471.

74. *Id.* at 100-01.

75. *See id.*; *see also* Savitt & Nowels, *supra* note 66 (discussing the *Akzo* decision).

76. Savitt & Nowels, *supra* note 66.

77. *Id.*

rejected, or, as in Germany, the privilege may be applied to in-house counsel in qualified circumstances. In a survey compiled by a prominent European law firm, only thirteen out of thirty-nine European countries surveyed, or one-third, recognized the attorney-client privilege for in-house counsel.[78]

The fact that the majority of European countries do not bestow on in-house counsel the protections of attorney-client privilege should raise red flags for American lawyers with international clients. Of particular concern is whether American attorneys not licensed to practice in the foreign country or before its bar similarly may, like their foreign counterparts, not be able to assert the attorney-client privilege.[79] Indeed, in *AM&S*, the European Court of Justice stated as much.[80] In determining whether documents, including legal memorandum from a company's in-house counsel, were protected by the attorney-client privilege, the Court ruled that not only was the attorney-client privilege inapplicable to in-house counsel, but also did not extend to any lawyer not licensed by a "Member State."[81]

V. WHY THE CORPORATE PRIVILEGE SHOULD BE PRESERVED

The corporate attorney client privilege, as established in the United States, has been assaulted and criticized and is yet to be recognized internationally. Despite this, the corporate privilege remains an integral part of a judicial system which continues, rightly or wrongly, to expose corporate entities to criminal liability. Given the significant consequences such prosecutions have on innocent shareholders and blameless employees, the benefits derived from the ability of attorneys and corporate representatives to communicate with a reasonable expectation of confidentiality outweighs the expediency of unbridled disclosure. Recent efforts by Congress to strengthen the privilege,

78. *See generally* EVERSHEDS, ATTORNEY-CLIENT PRIVILEGE IN EUROPE (2007), *available at* http://www.eversheds.com/documents/AttorneyClientPrivilege.pdf; *see also* Josephine Carr, *Are Your International Communications Protected?*, 14 No. 6 ACCA Docket 32, Nov./Dec. 1996 (charting each country's application of the in-house counsel privilege).

79. *See, e.g.*, Richard E. Donovan, *International Criminal Antitrust Investigations: Practical Considerations for Defense Counsel*, 64 ANTITRUST L.J. 205, 223 (1995) (quoting Jonathan Barsade, *The Effect of EC Regulations upon the Ability of U.S. Lawyers to Establish Pan-European Practice*, 28 INT'L LAW. 313, 323 (1994)) ("[C]ommunications with United States attorneys will not be recognized as a protected privileged communication, unless of course the United States attorney has attained the status and credentials of a Member State lawyer.").

80. *See* Case No. 155/79, AM&S Europe Ltd. v. Commission of the European Communities, 1982 E.C.R. 1575, 2 C.M.L.R. 264 (1982).

81. *Id.* at 25.

including the introduction of the Specter legislation, reveal this recognition of the privilege's continuing significance.[82]

Corporate criminal liability is a controversial subject within the United States. Some critics argue that using the criminal justice system to punish corporations obscures the moral content of criminal liability because a corporation cannot have the requisite *mens rea* or guilt.[83] Others suggest that imposing criminal sanctions on a corporation actually counteracts any deterrent effect because criminal sanctions frequently are the *least* costly penalty a corporation could face for alleged wrongdoing.[84] Along this vein, some assert that civil corporate liability is a more efficient and economic response to corporate misconduct.[85] In spite of these criticisms, corporations continue to face criminal sanctions in the United States, which ironically is in essence the greatest threat to the corporate attorney-client privilege, as corporations repeatedly and freely waive in the hope of avoiding criminal liability.

A. Corporate Criminal Liability Here and Around the World

As early as 1909, in *New York Central & Hudson River Railroad Co. v. United States*, the United States Supreme Court determined that a corporation should be deemed to have the knowledge and purpose of its agents because a corporation "can only act through its agents and officers."[86] Since then, American courts have imputed liability to the corporation, even where a single low-level employee acts contrary to corporate policy or express instructions, and where the corporation has made extensive efforts to ensure its employees' compliance with the law.[87]

In contrast, with the exception of Great Britain, Western European legal systems resisted the idea of corporate criminal liability until the

82. *See, e.g.*, Attorney-Client Privilege Protection Act of 2006, H.R. 3013, 109th Cong. (2006); *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations*, *supra* note 27; *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers: Hearing Before the H. Judiciary Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. (2006).

83. *See* John Baker, *Corporations Aren't Criminals*, WALL ST. J., Apr. 22, 2003, at A18; Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996).

84. *See* V.S. Khanna, *Corporate Crimes Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004).

85. *See* Fischel & Sykes, *supra* note 83, at 321-322.

86. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494-95 (1909).

87. *See, e.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660-61 (2d Cir. 1989); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972).

1970s. Before then, these nations followed the principal that a legal entity could not be blameworthy: *societas delinquere non potest.*[88] Ultimately, "the increasing economic influence of corporations in Western Europe and the unique threats posed to society from unregulated corporate misconduct in such areas as consumer markets and the environment," led many, but not all, of these nations to change their tune with respect to imposing criminal liability on corporate entities.[89]

Despite some general agreement regarding the necessity for holding corporations criminally liable, the degree to which particular acts committed by individuals may be attributed to, and constitute crimes committed by, a corporation continues to be treated differently across the globe. Still today, some countries, such as Brazil, Bulgaria, Luxembourg and the Slovak Republic, do not recognize any form of corporate criminal liability.[90] Still, other countries impose only administrative penalties on corporations whose employees commit criminal acts. These countries, including Germany, Greece, Hungary, Mexico and Sweden, do not hold the corporation liable under criminal statutes.[91]

A survey of those countries choosing to hold a corporate entity criminally liable shows that a number of different approaches are taken. The traditional approach examines the relationship between the corporation and its employees, and has resulted in the creation of "a legal fiction that the state of mind of employees and agents can be said to be the state of mind of the corporate entity."[92] Courts in the United States typically have taken this approach, holding that a corporation can be held vicariously liable for the criminal acts of any of its employees when such acts are taken within the scope of the employment and for the benefit of the corporation.

In another variation of the traditional approach, courts in the United Kingdom, Canada and other British Commonwealth nations have held that a corporation is directly liable for wrongful conduct engaged in by

88. Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 105 (2004).

89. *Id.* at 108.

90. ALLENS ARTHUR ROBINSON, 'CORPORATE CULTURE' AS A BASIS FOR THE CRIMINAL LIABILITY OF CORPORATIONS 9 (2008), *available at* http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf [hereinafter Report for the U.N.] (report prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business); *see also* Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641 (2000).

91. Report for the U.N., *supra* note 90.

92. *Id.* at 6.

senior officers and employees, on the basis that the state of mind of the senior employee was the state of mind of the corporation.[93] This theory of liability has been referred to as the "identification model."[94] The scope of identification model liability centers around the definition of "senior" officers and employees.

More recently, some countries have adopted a new, more enlightened basis for criminal liability which focuses on the "corporate culture" and whether this culture directed, encouraged, tolerated or somehow led to the commission of the crime by an employee or agent.[95] This latter approach to corporate criminal liability has been termed "organizational liability" and bases liability not on the acts of the individual offenders, but on the corporation's policies, practices, or management that permitted the crime to be committed.[96] In this model—referred to by some as "arguably the most sophisticated model of corporate criminal liability in the world,"[97]—a corporation is criminally liable based on its corporate culture which permitted the wrongdoing to occur. A model of such a system can be seen in Australia.[98]

Although the tide of corporate criminal liability around the world seems to be on the rise, it is clear that theories of liability are still developing and in flux in most foreign countries. The opposite is true in the United States, where criminal liability has been attributed to corporations for almost a century.[99] Indeed, if the past ten years are any indication, prosecutors and regulators are insatiable in their efforts to prosecute and sanction corporate misconduct.[100] The maintenance and preservation of the corporate privilege in the United States is, therefore, imperative.

VI. PRESERVATION OF THE CORPORATE PRIVILEGE

Preservation of the corporate attorney-client privilege, as it has been developed in the United States, serves an important function. First, the prosecutions of corporations have dire consequences for both the companies and their innocent employees and shareholders. A notable

93. *Id.*
94. *Id.*
95. *Id.* at 7-9.
96. Report for the U.N., *supra* note 90, at 7-9.
97. JONATHAN CLOUGH & CARMEL MULHERN, THE PROSECUTION OF CORPORATIONS 138 (2002).
98. *Id.* at s.12.3(2).
99. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494-95 (1909).
100. *See* Jodi Misher Peikin & James R. Stovall, *Penance But No Absolution*, ALM BUS. CRIMES BULL., Jan. 2007, at 1-2.

example is the demise of Arthur Andersen after it was charged with a single count of obstructing justice in connection with the government's Enron investigation. Although the accounting firm's conviction eventually was overturned by the United States Supreme Court in 2005,[101] it had long since ceased doing business and all but 200 of its almost 90,000 world-wide employees were out of a job.[102] In addition, the firm faced civil lawsuits from shareholders of companies that the firm had audited.[103]

In addition, the corporate privilege allows a corporation to maintain the integrity of its business operations. The corporate privilege allows corporations to monitor employee conduct and investigate potential misconduct without fear that the fruits of their efforts will be used against them criminally, administratively, or by civil plaintiffs. Clearly, the inverse—that a corporation turns a blind eye to wrongdoing for fear it will come back to haunt them—is unacceptable.

Regardless of one's position on the appropriateness of the corporate attorney-client privilege, and whether it is on the wane, the privilege is alive and well in the United States. Attorneys are guardians of that privilege. In international investigations, certain challenges are posed to American attorneys attempting to ensure that our clients' privilege is honored here and abroad.

VII. MAINTAINING THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN INTERNATIONAL INVESTIGATIONS

From a practitioner's point of view, one aspect of furthering the corporate privilege is taking the steps required to maintain the confidentiality of a client's information, in all relevant jurisdictions. When, as is increasingly common, white collar investigations cross national boundaries, the sanctity of attorney-client communications, particularly those involving foreign based in-house counsel, is not guaranteed. To increase the odds of preserving the confidences and secrets of corporate clients,[104] attorneys representing multi-national clients, or involved in multi-jurisdictional document collection and internal investigations, need to be alert to some basic rules that courts are likely to employ when analyzing assertions of attorney-client privilege. They likewise should be aware of the factors courts consider in deciding

101. *See* Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).

102. Jonathan D. Glater & Alexei Barrionuevo, *Decision Rekindles Debate Over Andersen Indictment*, N.Y. TIMES, June 1, 2005, at C1.

103. *Id.*

104. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1998).

which country's privilege law applies in order to maintain the privilege in all jurisdictions.

A. Cases Arising in United States Federal Courts

Little law exists that directly instructs on the rules for application of the privilege in international investigation. In other contexts, however, United States federal courts addressing the application of the attorney-client privilege, in cases with international dimensions, seek to answer two questions: first, whether foreign or domestic law applies to the privilege question; and second whether, under the applicable law, the privilege protects the communication in question.[105]

To resolve the first question, in instances where the alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, courts defer to the law of the country that has the "'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential."[106] That country may be the United States, or it may be the foreign country in which the communications took place. This approach, known as a "touching base" analysis, closely resembles a traditional choice-of-law analysis.[107] Courts place the burden of persuasion on the party claiming the application of the privilege.[108]

Courts engaging in the "touching base" analysis consider a number of fact-specific factors. These include: i) whether the relevant communications involved United States attorneys; ii) whether the client was a United States resident attempting to protect a right under this country's law; and iii) whether the relevant proceedings were in the United States.[109]

Most cases considering these questions have arisen in the context of cross-border patent law cases.[110] Such litigation frequently involves numerous foreign parties and laws which confer varying degrees of confidentiality on communications with patent agents.[111] In one such

105. *In re* Rivastigimine Patent Litig., 239 F.R.D. 351, 356 (S.D.N.Y. 2006).

106. Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92, 98 (S.D.N.Y. 2002) (citing Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 522 (S.D.N.Y. 1992)).

107. *Golden Trade*, 143 F.R.D. at 518-19.

108. *Astra*, 208 F.R.D. at 103.

109. *Golden Trade*, 143 F.R.D. at 520.

110. *See, e.g.*, *Golden Trade*, 143 F.R.D. 514; *In re Rivastigimine Patent Litig.*, 239 F.R.D. 351; *Astra*, 208 F.R.D. 92; Bristol-Myers Squibb Co. v. Rhone-Poulence Rorer, Inc., No. 95 CIV 8833 (RPP), 1998 WL 158958 (S.D.N.Y. Apr. 2, 1998); Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F. Supp. 1429 (Del. 1989).

111. *See, e.g.*, sources cited *supra* note 110.

case, *Golden Trade, S.r.L. v. Lee Apparel Company*, the plaintiffs refused to produce documents reflecting communications between various foreign patent agents and an Italian corporation acting as agent for the plaintiff corporation in seeking foreign patents.[112] The plaintiffs asserted that these communications were privileged, because the patent agents were acting to assist an attorney in providing legal services: namely, the application and procuring of patents. The defendants moved to compel production of the documents.[113]

A Magistrate Judge in the District Court in the Southern District of New York noted that the crucial question was "whether an American court may ever apply foreign privilege law to determine whether communications with a patent agent should be protected and, if so, in what circumstances."[114] The Court noted that many foreign countries treat patent agents as the functional equivalent of an attorney.[115] It then engaged in a traditional choice-of-law "contacts" analysis.[116] Because the documents in question reflected communications between an Italian corporation and foreign patent agents, none of whom were a party to the lawsuit, and were concerning patent applications in those foreign countries, the Court found that the countries in which the patent agents worked had the dominant interest in determining whether the communications should be treated as confidential.[117] As a matter of comity, the Court looked to the law of those jurisdictions, ultimately concurring with the plaintiff that the documents were protected by a privilege not unlike the American version of the attorney-client privilege.[118]

In examining the law of Korea in another patent law case, *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, the court found that no attorney-client privilege existed.[119] Moreover, the court noted that none of the documents at issue would be discoverable in a Korean civil suit because the disclosure laws of Korea were notably narrower than those that existed in the United States.[120] Indeed, in contrast to the United States, many foreign countries have more limited discovery rules, which

112. *Golden Trade*, 143 F.R.D. at 519-20.
113. *Id.*
114. *Id.* at 519.
115. *Id.* at 520.
116. *Id.*
117. *Golden Trade*, 143 F.R.D. at 519-20.
118. *Id.* at 521.
119. Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92, 101-02 (S.D.N.Y. 2002).
120. *Id.* at 102.

serve to counterbalance the lack of privilege protection.[121] The court in *Astra* opined,

> Under these circumstances, where virtually no disclosure is contemplated, it is hardly surprising that Korea has not developed a substantive law relating to attorney-client privilege and work product that is co-extensive with our own law. It also seems clear that to apply Korean privilege law, or the lack thereof, in a vacuum-without taking account of the very limited discovery provided in Korean civil cases-would offend the very principles of comity that choice-of-law rules were intended to protect.[122]

The court further found that ordering the disclosure of the documents would offend the public policy of the United States forum, which promotes full discovery, but allows for the protection of privileged documents.[123] Holding that the application of foreign privilege law in this case would result in the disclosure of documents that were both protected under American law and not discoverable under Korean law, the district court applied its own privilege law, even though the communications did not "touch base" with the United States.[124] Because the nature of the privilege varies so greatly in and among foreign countries, the decision to apply the privilege law of foreign jurisdictions likely will have significant impact.

B. Cases Arising Outside the United States

How foreign courts or tribunals will resolve the question of privilege in cases involving international players is less clear. The policy rationale underlying the non-application of the privilege to in-house counsel leads one to believe that American attorneys will not have privilege protection in those countries that do not extend the privilege to in-house counsel.[125] When the European Court of Justice ruled in *AM&S* that the privilege was available only to those lawyers governed by the

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121. Hill, *supra* note 67, at 2-3.

122. *Astra*, 208 F.R.D. at 102.

123. *Id.*

124. *Id.* (citing *Golden Trade*, 143 F.R.D. at 520-23). *But see In re* Rivastigmine Patent Litig., 237 F.R.D. 69, 78 (S.D.N.Y. 2006) (discussing the court's refusal to extend *Astra* to communications between Swiss in-house counsel and company employees—"the absence of privilege results not from the lack of comparability of the Swiss and US legal systems, but from the fact that Swiss law specifically excludes the documents at issue from the privilege it recognizes").

125. *See, e.g.*, Donovan, *supra* note 79 (stating that "communications with U.S. attorneys will not be recognized as a protected privileged communication, unless of course the U.S. attorney has attained the status and credentials of a Member State lawyer" (internal citations omitted)).

applicable professional rules, the House of Delegates of the ABA submitted a formal protest to Court expressing concern that the Court's findings regarding in-house counsel and the privilege applied to all lawyers outside the European Union.[126] The ABA believed that the Court's decision meant that when an American lawyer represented a client before the European Commission, client communications would not be deemed privileged because American lawyers are not subject to the European Union disciplinary rules and procedures.[127] As of today, the ruling still stands, although "'debate about whether the rules . . . are outdated and should be changed' has been recently revived."[128]

The exclusion of United States attorneys from privilege protection in foreign countries is "unfair" according to one commentator, because United States courts do not categorically exclude foreign attorneys from enjoying the privilege.[129] Indeed, such disparity could be exploited by United States authorities who might argue a waiver has occurred when a document which would be recognized as privileged in the U.S, but is not in a foreign jurisdiction, is produced in the foreign action.

C. *Practical Suggestions for Ensuring a Clients' Privilege Interests are Preserved*

"Whether foreign law should play a role in defining the contours of the attorney-client privilege in any given case is a determination within the sound discretion of the court."[130] That being said, based on the instructive case law, steps exist that an American attorney can take to ensure his client's communications are protected. First and foremost, the likelihood that an American court will protect material involved in an international investigation from disclosure can be increased through reliance on connections to the United States. The involvement of in-house and external lawyers from the United States is one way to ensure that the documents "touch base" with the United States. In addition, to the extent possible, retainer letters or documents defining the nature of the attorney-client relationship should refer to potential investigations or

126. *See* Roger J. Goebel, *Legal Practice Rights of Domestic and Foreign Lawyers in the United States*, *in* RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 51, 76 n.140 (Mary C. Daly & Roger J. Goebel eds., 2004).

127. *Id.*

128. Hill, *supra* note 67, at 8 n.37 (citing Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT'L L.J. 967, 968 (2005)).

129. Maurits Dolmans, *Attorney-Client Privilege for In-House Counsel: A European Proposal*, 4 COLUM. J. EUR. L. 125, 129 (1998).

130. Madanes v. Madanes, 199 F.R.D. 135, 145 (S.D.N.Y. 2001).

litigation in the United States as one of the bases for undertaking the representation. Moreover, where there is a less tenuous connection to the United States, creating the possibility that a court will find that a foreign government has a more compelling interest in the production or preservation of the documents, attorneys always should evaluate whether that jurisdiction's law circumvents American public policy.