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■ SPECIAL FEATURE

How global is the attorney-client privilege?

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It is no secret that in-house counsel are bringing more work in-house while also handling more international legal work. At the intersection of that trend dwells the risk that in-house counsel will rely on the attorney-client privilege in communicating with the company's foreign operations, only to find that the privilege offers no protection.

Europe

For many attorneys, it is the nightmare scenario. A European regulator, such as the directorate general of the EU Competition Commission, is inves-

tigating possible violations in your industry. It conducts a "dawn raid" on your offices in Germany and seizes several sensitive memos prepared by your in-house lawyers.

You breathe a sigh of relief, thinking that the legal analyses of your company's resale restrictions are protected by attorney-client privilege.

In fact, the European Union's "legal professional privilege" would only protect your memos from being used as evidence if they were communications made (1) for the purpose of the client's defense, and (2) with an "independent lawyer."

Importantly, the European Court of Justice has held that, to be "independent," a lawyer cannot be bound to the client by a relationship of employment. Case C-550/07, *Akzo Nobel Chems. v. Comm'n*, 2010 E.C.R. I-1.

The privilege, therefore, does not protect communications with in-house counsel.

Furthermore, the European Court of Justice has intimated that United States attorneys who are not entitled to practice in an EU member state do not have the benefit of a privilege, regardless of their status as inside or outside counsel.

There are limited exceptions to the rule affirmed in the *Akzo* decision. Documents prepared by in-house

counsel exclusively for the purpose of obtaining legal advice from outside counsel, and documents prepared by in-house counsel that incorporate or summarize the advice of outside counsel, may be privileged, though those exceptions may be narrowly applied.

Further complicating the European landscape is the overlap of national and supra-national jurisdiction. The rule affirmed in *Akzo* may apply only to competition proceedings conducted by the European Commission. Meanwhile, individual EU countries have various approaches to privilege.

England and Ireland, for example, have a familiar-looking privilege that covers communications with in-house counsel about legal issues.

Meanwhile, the majority of EU countries — including France, Austria, Finland, Poland and Germany — appear to have no privilege for communications with in-house counsel.

An example of a country that takes a middle-road approach is the Netherlands, where there is reportedly a privilege for communications with in-house counsel if there are special steps taken to preserve the lawyer's independence.

Another challenge in Europe is that while some civil law countries may recognize attorney-client privilege, the law applying the privilege may



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be sparse and undeveloped, making it difficult to know whether privilege applies.

The upshot is that companies with European operations need to take the time to understand the landscape of attorney-client privilege and to remember that, depending on the jurisdiction, using outside counsel may be necessary to protect the privilege.

BRIC countries

Understanding the applicable law of attorney-client privilege is no less important for operations in the so-called “BRIC” countries.

Brazil is reported to recognize a strong form of attorney-client privilege that applies to communications with in-house counsel, while in Russia there seems to be no privilege for in-house counsel.

Meanwhile, commentators are unsure whether Indian in-house counsel can claim attorney-client privilege.

Though recent reports state that the Chinese Lawyer’s Law makes no distinction between in-house and outside counsel, the rules protecting client confidences in China will provide little comfort to a general counsel with Chinese operations.

There appears to be no attorney-client privilege in China, and foreign attorney-client privilege may not be recognized. There is an ethical duty of confidentiality, which was somewhat strengthened in 2008 and includes protection of clients’ trade secrets and “private information.”

That duty, however, may conflict with Article 84 of the Chinese Criminal Procedure Law, which creates a duty for all individuals to report suspected criminal activity to

state authorities. The law is currently in a revision process.

Implications in U.S.

The implications of foreign laws on attorney-client privilege may extend to litigation in the United States, as domestic courts will sometimes apply foreign privilege law.

Most U.S. courts apply a choice of law analysis in deciding what privilege law to apply. Under principles of comity, courts will consider which country has the predominant interest in whether a communication remains confidential and will likely apply that country’s privilege law.

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Though U.S. privilege law is considered generally more protective than foreign privilege law, U.S. law will not always be advantageous. Some foreign jurisdictions do not permit in-house counsel to be members of their bar or law society, but will still provide at least some privilege protection for communications with in-house counsel.

Since in the U.S. a privileged communication must generally be with a member of the bar, communications with these in-house counsel would not be treated as privileged under U.S. law.

Another consideration regarding U.S. law is that voluntary submission

of privileged communications to a foreign law enforcement agency can often result in a waiver of the privilege in the U.S.

Compelled submission may not result in a waiver of the privilege, but the party claiming the privilege must generally show that any available privilege was asserted and that failure to produce the documents would have led to penalties.

Practical measures

The key step is to understand the law of privilege in all the jurisdictions where your company operates. Only then can you create a strategy for managing information within your legal department and the company as a whole.

When you receive a call that your top European executive has been accused of sexual harassment, will you know immediately whether it is safe to instruct your European in-house counsel to begin interviewing employees? If it is not safe, will you already have outside counsel identified to handle such matters?

In general, it may make sense to limit your foreign offices’ access to servers containing U.S. legal data. Another step to consider is limiting what privileged information U.S. inside counsel sends to foreign offices.

Instructing in-house counsel to prefer telephone calls over email when dealing with any potentially sensitive matters will allow communication channels to remain open.

In fact, even companies without foreign operations would probably benefit from this broadly prophylactic step, despite the resistance of lawyers who are used to tapping out an email on a PDA instead of making a call. **NEIH**