



In-House Counsel and the Attorney-Client Privilege Global Practice Guide

A Global Practice Guide prepared by the Lex Mundi Litigation Arbitration and Dispute Resolution Group

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About this Guide

This Global Practice Guide presents a country-by-country overview of the availability of protection from disclosure of communications between in-house counsel and the officers, directors or employees of the companies they serve. Each Lex Mundi member firm was asked to describe briefly the applicability of the attorney-client privilege to communications with in-house counsel in its jurisdiction. The summaries presented below, address the following questions:

Are communications between in-house counsel and officers, directors and employees of the company they serve privileged?

If so, are there limitations on the privilege?

If not privileged in and of themselves, are there alternative methods of protecting the communications?

No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any specific case or circumstance should consult with counsel admitted in the relevant jurisdiction.

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In-House Counsel and the Attorney-Client Privilege

Australia

Prepared by Lex Mundi member firm Clayton Utz

In Australia there are established principles by reference to which certain communications involving attorneys are protected from disclosure in the course of both discovery processes and as evidence in a trial. Such protection, known as 'legal professional privilege' or 'client legal privilege' has been recognized by Australia's highest appellate court as a doctrine of substantive law, not easily dislodged except by clear legislative intent.¹ The precise scope of such privilege varies slightly from state to state within Australia. Some jurisdictions have enacted legislation that deals with privilege, however, the statutes are not exhaustive and the common law informs their interpretation. In other jurisdictions the common law applies exclusively. However, in broad terms the privilege extends to confidential communications passing between a client and a legal adviser:

- a) to enable the client to obtain, or the adviser to give, legal advice; or
- b) with reference to litigation that is actually taking place or within the contemplation of the client.²

Documents prepared by, or communications passing between, the legal adviser or client and third parties also attract privilege if they come within b) above.³ Until recently, the orthodox view was that privilege could only apply to communications between the legal adviser or client and third parties falling within a) above if the third party could be characterized as the client's "agent" in the sense of alter ego for the purpose of making or receiving the communications.⁴ However, in cases falling within the jurisdiction of the Australian Federal Court, there is now appellate authority to the effect that privilege may attach to such communications even if the third party cannot be characterized as the client's "agent".⁵ In either case, Australian courts apply a "dominant purpose" test to determine whether a particular document or communication falls within one of these criteria.⁶ The privilege in question vests in the "client".

The role of the lawyer is crucial to the existence of privilege. Where the lawyer in question is an "in-house" counsel employed by the "client" who is seeking to maintain a claim for privilege, the general principle is that the law in relation to privilege applies in the same way as for external lawyers. The mere fact that a lawyer is a salaried employee of the client is not sufficient to deny to communication between them and that company, or other officers within it, legal professional privilege if such privilege would otherwise be attracted.⁷ This is reinforced by the definition of "client" in the Federal *Evidence Act* which includes, among other things, a person or body who employs a lawyer (including under a contract of service).

However, because of the closer connection between the lawyer and the client, such claims for privilege usually attract closer scrutiny than claims involving external lawyers. In particular, it may be more difficult

¹ *Daniels Corp International v ACCC* (2002) 213 CLR 543

² Cross, Byrne & Heydon, *Cross on Evidence Loose Leaf Service* 1991 -, Butterworths (2000) at [25210]

³ *Ibid*

⁴ *Wheeler v Le Marchant* (1881) 17 Ch D 675

⁵ *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122

⁶ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 per Gleeson CJ, Gaudron, Gummow and Callinan JJ (McHugh and Kirby JJ dissenting)

⁷ *Ritz Hotel Ltd v Charles of the Ritz Ltd and anor* (1987) 14 NSWLR 100

to establish that the lawyer in question is acting in his or her capacity as a lawyer or that the dominant purpose of a particular communication was one of the protected purposes outlined above.

It is important to note that the 'in-house' lawyer must demonstrate that he or she is acting both independently and competently in his or her capacity as a lawyer. It has been suggested that an in-house lawyer who is also a director of a company may be incapable of giving independent (and therefore privileged) legal advice to the company.⁸ Factors that the courts may take into account in determining capacity and independence include the in-house counsel's job title, physical location within the organization, use of a separate 'Legal Department' letterhead, participation of in-house lawyers in remuneration schemes related to the financial success of the business, whether the in-house counsel holds a current practicing certificate and the nature and extent of his or her participation in meetings about business strategy and ongoing business operations. None of these factors is, however, determinative.

There have been occasions where legal professional privilege has been overridden by legislation. This has generally occurred where special commissions of inquiry have been instituted by the Government for the purpose of investigating particular circumstances.

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⁸ *Southern Equities Corp v Arthur Anderson (No 6)* [2001] SASC 398

In-House Counsel and the Attorney-Client Privilege

Belgium

Prepared by Lex Mundi member firm Liedekerke Wolters Waelbroeck Kirkpatrick

This memorandum relates to the relevant Belgian legislation regulating the profession of “in-house counsel” (*Juristes d’entreprise / Bedrijfsjuristen*) and its related “legal privilege”.

Under Belgian law, a distinction is to be made between “professional secrecy”, “confidentiality of documents” and “legal privilege.”

Professional Secrecy

Professional secrecy is an obligation imposed upon all persons who have obtained secret information as a result of their position or profession. The source of this obligation varies from one profession to another. Violation of this obligation is punishable by law (Art. 458 Criminal Code).

Confidentiality

Confidentiality (of documents) is often linked to professional secrecy, but is not equivalent thereto. The source of confidentiality can be a contract, a professional rule of conduct, or a legal stipulation. Violation of confidentiality can be punished if data covered by professional secrecy are disclosed.

Legal Privilege

This term is generally used in order to cover both confidentiality and professional secrecy.

1.1 Organization of the profession

The profession of “in-house counsel” is regulated in Belgium by the Act of March 1, 2000 creating the *Institut des Juristes d’entreprise / Instituut voor Bedrijfsjuristen* (hereinafter referred to as the “*Institut / Instituut*”).

These “in-house counsels” are the only ones entitled to bear the title of “*Juriste d’entreprise / Bedrijfsjurist*”⁹.

In order to become a *Juriste d’entreprise / Bedrijfsjurist*, the candidate must, amongst others, be registered with the *Institut / Instituut*.

The *Institut / Instituut* is an autonomous public institution enjoying legal capacity (*personnalité juridique / rechtspersoonlijkheid*) and created by the abovementioned Act.

As required by the Act¹⁰, the *Institut / Instituut* lays down rules of professional conduct, sets up a disciplinary regime to be approved by Royal decree and exercises disciplinary power through specific bodies, namely the *commission de discipline / tuchtcommissie* and the *commission d’appel / beroepscommissie*, both chaired by magistrates appointed by the King. The *Juristes d’entreprise / Bedrijfsjuristen* must abide by these rules, and penalties apply in case of infringement.

1.2 Legal Privilege

⁹ Article 6 of the Law of March 1, 2000

¹⁰ Article 2 of the Law of March 1, 2000

Article 5 of the Act of March 1, 2000, as commented by the rules of professional conduct issued by the Institute, provides that all correspondence between a client and a *Juriste d'entreprise / Bedrijfsjurist* containing or seeking legal opinion is confidential¹¹. Therefore, if a manager asks his/her *Juriste d'entreprise / Bedrijfsjurist* a legal opinion, both the correspondence seeking the legal opinion and that containing it will be confidential.

As a difference compared to the *Avocat / Advocaat*, the legal privilege of the *Juriste d'entreprise* is limited to his/her legal opinion and the document(s) seeking it.

Article 5 of the Act of March 1, 2000 does not expressly refer to Article 458 of the Criminal Code. Eminent authors considered that Article 458 of Criminal Code also applies to the *Juriste d'entreprise / Bedrijfsjurist* where he/she gives a legal opinion, such that any infringement to his/her duty not to reveal what is confidential will give rise to criminal sanctions in the same way as for external lawyers¹² (Annex B). Then came the Akzo Nobel case, in which the Grand Chamber of the Court stated in 2010 (after a similar decision of the Court of First Instance) that (the legal professional privilege of) an in-house lawyer cannot be treated in the same way as an external lawyer. In 2013, the Brussels Court of Appeal^[2] held that art. 458 does not apply to the *Juriste d'entreprise/Bedrijfsjurist*. However, the matter remains controversial under Belgian law

¹³.

1.3 Protection and seizure of documents

There is no legislation or regulation on the question of the rules governing civil or criminal enquiries carried out at the office of a *Juriste d'entreprise / Bedrijfsjurist*.

In December 2013, the Belgian Competition Authority (ABC/BMA) has nevertheless issued "Guidelines" on how to act in case of a search and seizure of documents.

The *Institut / Instituut* has also issued guidelines (which were recently updated) describing several means for safeguarding confidentiality:

- The *Juriste d'entreprise/Bedrijfsjurist* must always mention his/her capacity in his/her advice and correspondence with lawyers, and also refer to the protection under Art. 5 of the Act of March 1, 2000;
- In case of difficulty, he/she must call for an intervention of the President of the *Institut / Instituut*; it is not unusual that, in case of disagreement regarding the confidentiality of a document, the document is stored in an envelope regarding which the judge will take a decision later on;
- In case of a search or an enquiry, he/she must refuse to hand over confidential documents. If this is in vain, he/she must have it mentioned in the official report of the search;
- In case of an examination of witnesses, he/she has the right to refuse make a statement;
- He/she must object to the production of a confidential document in court.

Annex

Article 458 of the Belgian Criminal Code

Les médecins, (...) et toutes autres personnes dépositaires par état ou par profession, des secrets qu'on leur confie, qui, hors les cas où ils sont appelés à rendre témoignage en justice ou devant une commission d'enquête parlementaire et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d'un emprisonnement de huit jours à six mois et d'une amende de cent à cinq cents francs.

¹¹ Article 5 of the Law of March 1, 2000

¹² A Benoit-Moury and N. Thirion, « Secret professionnel, confidentialité et juriste d'entreprise : la nouvelle donne », *Journal des Tribunaux*, Brussels, Larcier, 2001, 785, n°33.

^[2] Brussels, March 5, 2013, nr. 2011/MR/3, *Jurisprudence de Liège, Mons et Bruxelles*, 2013, 1136, ann. J.P. Buyle and D. Van Gerven ; *Revue de droit Commercial*, 2013, 472.

¹³ J.P. Buyle and D. Van Gerven, « La confidentialité des avis des juristes d'entreprise doit prévaloir sur l'ingérence des autorités de la concurrence belge », *Jurisprudence de Liège ; Mons et Bruxelles*, Larcier, 2013, 1143 – 1147.

(Translated from French to English)

“Doctors, (...) and all other persons who, either by profession or otherwise, have knowledge of confidential information, will be punished by eight days to six months of imprisonment and 100 to 500 Francs if they disclose the confidential information, except in cases where they are called to testify in court or before a parliamentary investigation committee or where they are required by law to disclose such confidential information.”

Article 5 of Act of March 1, 2000 creating the *Institut des Juristes d'entreprise / Instituut voor Bedrijfsjuristen*

Les avis rendus par le juriste d'entreprise, au profit des son employeur et dans le cadre de son activité de conseil juridique, sont confidentiels.

(Translated from French to English)

Opinions given by in-house counsel for the benefit of their employers and within the framework of their activity as legal counsel are confidential.

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In-House Counsel and the Attorney-Client Privilege

British Virgin Islands

Prepared by Lex Mundi member firm O'Neal Webster

In the British Virgin Islands (BVI) the law on attorney-client privilege is based primarily on the common law principles, which in turn are derived from the English common law. Under BVI law the principles and rules applicable to independent attorneys apply equally to in-house counsel and their clients.

Hence, any communication verbal or written passing between a party (including his predecessor-in-title) and his attorney or other legal professional adviser is privileged from disclosure if the following circumstances exist:

- the communication is confidential;
- the communication is to or by the attorney or other legal adviser in his professional capacity; and
- the purpose of the communication is to obtain or provide legal advice or assistance.

It should be noted that if the communication was made through an employee or agent of either the attorney or his client, that fact alone would not affect any privilege that would otherwise apply to the communication. In other words, provided the above conditions are fulfilled attorney-client communications via agents are also privileged.

The privilege is not absolute and there are limitations. No protection will apply to situations where -

- the communication is made for some fraudulent or illegal purpose;
- the client waives the privilege and permits disclosure; or
- the communication is made for the purpose of being repeated to a particular party, for instance an instruction to settle a claim for a specified sum.

However, the common law position must be viewed against the background of the statutory regime in the British Virgin Islands, which is aimed at preventing and detecting money laundering, and drug trafficking and which regulates to some degree providers of financial services (which includes attorneys-at-law). The statutory regime consists of a wide body of legislation. As a result, there is a degree of overlap that renders the determination of whether an in-house attorney can be required to disclose information protected by the attorney-client privilege, a complex matter. Relevant legislation includes: the Anti-money Laundering Code of Practice, 1999; the Drug Trafficking Offences Act, 1992; the Financial Services (International Co-operation) Act, 2000; and the Proceeds of Criminal Conduct Act, 1997. By and large the legislation does not attempt to strip away the attorney-client privilege and in some cases such as the Drug Trafficking Offences Act, legally privileged material is expressly excluded from its disclosure provisions.

However, the legislative regime does seek to restrict secrecy for unlawful purposes. For instance, the Proceeds of Criminal Conduct Act encourages 'whistle-blowing' where an attorney suspects that funds he holds on his client's behalf are derived from criminal conduct. In such a case, any report made by an attorney under the circumstances outlined in the Act will not amount to a breach of any restriction on disclosure of information imposed by statute or otherwise, and will not give rise to any civil liability.

One obvious in-road into the attorney-client privilege is contained in the provisions of the Financial Services (International Co-operation) Act. Under this Act an attorney may be required, in order to assist a

foreign regulatory body within the meaning of the Act, to disclose the name and address of his client, though he cannot be required to produce any other privileged information. Finally, it must be emphasized that the foregoing is intended only as a general overview of the law in the British Virgin Islands. Each case should be considered on its own merits. Any person who requires advice on his/her own legal position should seek the opinion of a British Virgin Islands attorney.

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In-House Counsel and the Attorney-Client Privilege

Bulgaria

Prepared by Lex Mundi member firm Penkov, Markov & Partners

The communication between attorney-at law, including European Union lawyers (one who is any citizen of the European Union, of another State which is a party to the Agreement on the European Economic Area, or of the Swiss Confederation who has been granted authorization to pursue the profession of lawyer according to the legislation of any of the aforementioned countries), junior attorneys-at-law and attorney-at-law assistants and their clients is subject to privilege in Republic of Bulgaria, as regulated in the Bulgarian Bar Act (in force from July 1, 2004 and last amendment was made in 2012).

The respective provisions in this act provide for that the files, documentation, electronic documents, computer equipment and other information carriers, as well as the client-attorney correspondence are inviolable and may not be therefore subject to inspection, copying, verification or seizure and also cannot be used as evidence. The rules apply also the conversations between the attorney-at-law and his client which cannot be eavesdropped and/or records of conversations, eventually made, cannot be used as evidence and must be immediately destroyed.

As a witness, the attorney-at-law cannot be interrogated about his conversations and correspondence with the client, with another attorney-at-law, as well as about the client's cases, facts and circumstances, having become known to him in relation to the defense and assistance performed.

The meetings with clients could be conducted privately, including where the clients are held in custody or are deprived of their liberty. During meetings, attorneys-at-law have the right to hand over and receive written material in relation to the case, the content of which may not be subject to inspection. In addition, the conversations during meetings may not be intercepted or recorded, but the meetings may be subject to observation.

The in-house counsel activities on the other hand are very scarcely regulated. The most important provision in this regard is Article 32 from the Civil Procedure Code, paragraph 1, which gives in-house counsel the right to appear before the court as legal representatives of the company, something, which in principle is exclusive privilege of the attorney-at-law. There are few regulations, the existing related mainly to the legal qualification of the in-house counsel.

There is no legal provision concerning privilege or any other aspect of communication between in-house counsels and the other officers and employees of the company. The in-house counsel in principle is treated as a regular employee of the respective company and the information he keeps as well as his correspondence within the company is subject to the general regime of internal company information, except as where the company has elaborated a special regime.

Still, even in these cases, the information and correspondence of the in-house counsel is not especially protected against intrusion from outside except for as a part of the company internal information to extent of:

General protection of correspondence – pursuant to Article 34 of the Constitution stating that the freedom and privilege of correspondence are inviolable, except where otherwise is necessary for revealing and preventing a grave crime and permission is obtained by the judicial authorities; Special protection, provided by various laws of the so called state secret, official secret, commercial secret and banking secret – such provisions are spread over a number of acts, but the common feature is that all of them (with certain exclusions of state secret) are to one or another extent protected, except for where the state through

its authorities requires this information for taxation, crime prevention, dispute resolution and some other purposes, which makes such secrets protected against third parties but not that much against the state, which could hardly qualify as client-attorney privilege as regulated in the Bar Act.

With regard to the above we could conclude that pursuant to Bulgarian legislation attorney-client privilege of communication is provided only for attorneys-at-law but not for in-house counsel.

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In-House Counsel and the Attorney-Client Privilege

Canada, British Columbia

Prepared by Lex Mundi member firm Farris, Vaughan, Wills & Murphy LLP

British Columbia is governed by two decisions of the Supreme Court of Canada regarding the privilege of communications between in-house counsel and client. First, in *R. v. Campbell*, where privilege was considered in the context of an in-house government legal service, Justice Binnie, for a unanimous court, held that:

Whether or not solicitor-client privilege attaches ... depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that [counsel] is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges.¹⁴

Later, in *Pritchard v. Ontario (Human Rights Commission)*, it was held that the mere fact a lawyer is “in house” does not remove the privilege that might attach to a communication or otherwise change the nature of the privilege.¹⁵ The Court did caution, this time through the words of Justice Major, that:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.¹⁶

BC courts have long recognized that, although communications with in-house counsel are privileged to the same extent as those with outside counsel, in-house counsel nevertheless wear different “hats” as part of their employment and often perform a variety of non-legal functions for their employers¹⁷. A central issue, therefore, is whether a given communication is made by or to in-house counsel in his/her role *qua* “lawyer”.

The Supreme Court of British Columbia considered this issue in the case of *Reid v. British Columbia Egg Marketing Board*. The Court noted that not every communication by in-house counsel is privileged; however it also held that solicitor-client privilege protects not only “legal advice relating to interpretations of the law”, but also “advice as to the appropriate conduct to take in a given legal context”.¹⁸ The plaintiff had sought disclosure of a document received by the defendant from its in-house counsel on the basis that it solely contained policy advice. The Court held that, while such a reading of the document was “semantically available”, it could also be interpreted as providing advice on the “legal ramifications of a certain course of action” and was therefore privileged.¹⁹

As with outside counsel’s communications, solicitor-client privilege does not protect in-house counsel’s communications in the following circumstances:

- 1) Where legal advice is not sought or offered²⁰;
- 2) Where the communication is not intended to be confidential²¹;

¹⁴ [1999] 1 S.C.R. 565 at 602, citing, in part, *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No.2)*, [1972] 2 All E.R. 353 (C.A.) at 376, per Lord Denning M.R.

¹⁵ [2004] 1 S.C.R. 809 at 819

¹⁶ *Ibid.* at 818

¹⁷ *Crown Zellerbach Canada Ltd. v. Canada (Deputy Attorney General)*, [1982] C.T.C. 118 at para. 9 (B.C.S.C.); *No. 1 Collision Repair & Painting (1982) Ltd. v. ICBC* (1996), B.C.L.R. (3d) 150 at para. 8 (S.C.)

¹⁸ 2006 BCSC 346 at para. 12

¹⁹ *Ibid.*, at paras. 13-14

²⁰ *Pritchard*, *supra* note 2, at 817

- 3) Where the communication is itself criminal or is intended to obtain legal advice to facilitate the commission of a crime²²;
- 4) Where it is absolutely necessary that the privilege be set aside (most notably where “innocence is at stake”)²³; and
- 5) Where the privilege is waived, either expressly or impliedly, by the client²⁴.

Waiver of in-house counsel privilege was considered by the BC Supreme Court in *United Furniture Warehouse LP v. 551148 B.C. Ltd.* The Court held that the regular test for waiver applied equally to in-house counsel as it did to outside counsel. It followed that, when an in-house lawyer deposed in an affidavit to the legal advice he had given to his employer, the affidavit constituted waiver of privilege over “the material that was assembled or reviewed and the discussions that occurred” in the course of providing the legal advice.²⁵ The Court ordered that parts of in-house counsel’s legal file be disclosed to the opposing party.

While waiver and the other circumstances noted above will negative solicitor-client privilege, there may be alternative methods of protecting in-house counsel’s communications from disclosure. One is for a different form of privilege, such as litigation privilege, to attach. Litigation privilege “arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel”.²⁶ Notably subject to this privilege are communications made for the “dominant purpose” of litigation, either extant or anticipated.²⁷

For certain in-house counsel in BC, another means of avoiding disclosure of documents may be by statutory authority. The *Freedom of Information and Protection of Privacy Act*²⁸ exempts public bodies from disclosing information in certain situations. *FIPPA* was applied in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, where disclosure was sought of certain documents obtained by in-house counsel during the course of an investigation. The BC Court of Appeal held that, although the documents were not protected by either solicitor-client or litigation privilege, they were nevertheless exempt from disclosure pursuant to section 13(1) of *FIPPA*, which allows a public body to refuse to disclose information that would “reveal advice or recommendations developed by or for a public body or minister”.²⁹

Note as well that in-house counsel in British Columbia are bound by confidentiality obligations reflected in The Law Society of BC’s *Code of Professional Conduct for British Columbia*. Rule 3.3-1 provides:

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society, or
- (d) otherwise permitted by this rule.

Although communications with in-house counsel in British Columbia may be protected by solicitor-client privilege, it should be noted that the decision of the European Court of Justice in *Akzo Nobel Chemicals*

²¹ *Ibid.*

²² *Campbell, supra* note 1, at 605

²³ *Lavallee, Rackel & Heintz v. Canada (Attorney General)* [2002] 3 S.C.R. 209 at 232; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32 at para. 20

²⁴ *Campbell, supra* note 1, at 613

²⁵ 2007 BCSC 68 at para. 16

²⁶ *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para. 32, per Fish J.

²⁷ *Blank, supra* note 11, at para. 59.

²⁸ R.S.B.C. 1996, c. 165 (“*FIPPA*”)

²⁹ (2002), 9 B.C.L.R. (4th) 1 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 83.

Ltd. and Akcros Chemicals Ltd. v. European Commission, may affect companies with affiliated companies or subsidiaries in the European Union. In *Akzo*, the European Court of Justice ruled that solicitor-client privilege does not protect communications with in-house lawyers as “the in-house lawyer’s economic dependence and the close ties with his employer [mean] that he does not enjoy a level of professional independence comparable to that of an external lawyer.”³⁰ Thus, in-house counsel in BC must be cognizant of this ruling and keep in mind that any communications between the European companies may not be protected despite the status of the law of attorney-client privilege in British Columbia.

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³⁰ Case No: C-550/07P, (delivered September 14, 2010) at para. 49.

In-House Counsel and the Solicitor-Client Privilege

Canada, Manitoba

Prepared by Lex Mundi member firm Thompson Dorfman Sweatman LLP

The law in Manitoba (and Canada for that matter) is well settled that in-house counsel enjoy the same professional privileges and share the same professional duties as do lawyers in private practice, at least in connection with any advice given in their capacity as *legal* counsel and therefore falling within the scope of the solicitor-client relationship. Accordingly, with respect to the topic of solicitor-client privilege in particular, there is little distinction to be drawn between in-house counsel and private practitioners.

The Supreme Court of Canada provided a useful summary of the law concerning the scope of solicitor-client privilege, in general, in *Pritchard v. Ontario (Human Rights Commission)* (2004), 2004 SCC 31 ("*Pritchard*"), at paragraphs 15-16:

Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, as "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties." Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky, supra*, at p. 834.

Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux c. Mierzewski*, [1982] 1 S.C.R. 860 (S.C.C.), the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established." The scope of the privilege does not extend to communications (1) where legal advice is not sought or offered, (2) where it is not intended to be confidential, or (3) that have the purpose of furthering unlawful conduct: see *Solosky, supra*, at p. 835.

The foregoing principles apply as equally to in-house counsel as they do to counsel in private practice. At paragraph 21 of *Pritchard*, the Supreme Court held:

Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

The leading Anglo-Canadian case in the specific context of in-house counsel and privilege is *Crompton (Alfred) Amusement Machines Ltd. v. Commissioners of Customs and Excise* (No.2) [1972] 2 All E.R. 353 (CA) in which Lord Denning, M.R., said at page 376:

They [in-house counsel] are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honor

and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges....

This principle has been adopted in Canada, perhaps most notably by the Supreme Court of Canada in *R. v. Shirose* [1999] 1 S.C.R. 565 ("*Campbell*"), per Binnie J. who, speaking for the court, said at paragraph 50:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems...

The *Campbell* decision (and the foregoing passage in particular) continues to be cited often in Canadian jurisprudence.

While Binnie J. did not elaborate upon the special problems created by "corporate context", it would appear to include the following:

- a) The multiplicity of corporate actors, which can contribute to considerable confusion over the identity of corporate counsel's actual client;
- b) Corporate counsel may be involved in managerial, as opposed to legal, matters, either pursuant to formal job responsibilities or informally as part of day-to-day operations;
- c) The structure of many organizations, methods of operation and the desire to broaden in-house counsel's knowledge and accessibility contributes to confusion of counsel's role;
- d) From time to time, there may be an adoption of careless practices in circumstances to which solicitor-client privilege would otherwise attach; and
- e) As a practical matter, corporate decisions are often made by executives after consultation with, and consideration by, employees and other interested persons. Legal counsel is often part of that group. Some matters are considered and reconsidered over a period of time, and those involved at any stage are usually kept informed of the progress of the matter by receiving copies of correspondence, memoranda and so on.

It is in this context that the "special problems" referred to above arise. The two most frequently encountered issues (at least in terms of recent privilege litigation) are:

- 1) Identification of counsel's "actual" client; and
- 2) Separation of actions taken or advice given by counsel in his or her legal capacity, as distinct from some other capacity.

In regards to proper identification of the client, the law is clear that the client is the corporation and, accordingly, privilege is for the corporation's benefit and may be only waived by the corporation. A corporation, however, essentially only acts through its officers and employees. Canadian Courts

accordingly extend broad protection to communications with employees regardless of the level of the employee in the corporate hierarchy (assuming the general solicitor-client privilege tests are otherwise met).

In regards to issues arising by virtue of the multiplicity of roles often filled by in-house counsel, and the perhaps inevitable role confusion, it is clear that privilege will only attach where in-house counsel is acting in his or her legal capacity. As a consequence, care must be taken in relation to the governance of day-to-day affairs and in the structuring of corporate practices to ensure that communications are accorded privilege where privilege is due. In *Gower v. Tolko Manitoba Inc.* (2001), [2001] 4 W.W.R. 622, for example, the Manitoba Court of Appeal dealt with the issue of whether a lawyer's report concerning an investigation into a sexual harassment complaint was privileged. In finding that the information was privileged, the Court held, at paragraphs 39 and 42:

The appropriate test is not whether the investigative function performed by Janzen could have been performed by a non-lawyer. It clearly could have, but as the motions judge held, relying on Wigmore on Evidence, 1999 supplement (New York: Aspen Law & Business, 1999) at para. 2296, and *Allen v. McGraw*, 106 F.3d 582 (U.S. 4th Cir. W. Va., 1997) at para. 26:

The relevant question is not whether Allen was retained to conduct an investigation, but rather, whether this investigation was "related to the rendition of legal services."

...

... It is true that just because a person is a lawyer this does not mean that any information obtained will be protected by legal advice privilege. It will be a question of fact in each case, whether the person received the information within the context of a solicitor-client relationship. I agree with the plaintiff that conducting the investigation under a sexual harassment policy is not an activity that is peculiarly within the province of a lawyer. However, conducting such an investigation in order to ascertain facts upon which to base a legal opinion to one's client is peculiarly within the province of a lawyer.

A third "special problem" flows from the first, and that is the increased possibility for conflicts of interest to arise. Counsel must be mindful, and employees must know, that counsel's obligations are to the corporation and not to employees as individuals.

In summary, there is no "structural" distinction to be drawn between in-house and private practice counsel in terms of the availability of solicitor-client privilege to conduct and communications. Difficulties can arise, however, given the context in which counsel operate. The key is in determining whether the communication was made, or the conduct carried out within the realm of the lawyer's legal responsibilities.

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In-House Counsel and the Attorney-Client Privilege

Canada, Ontario

Prepared by Lex Mundi member firm Blake, Cassels & Graydon LLP

In Ontario, communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that the communications are undertaken by in-house counsel in their capacity as a solicitor of the company, they occur in the course of either requesting or providing legal advice, and they are intended to remain confidential. The legal advice covered by solicitor-client privilege is not confined to telling the client the law; it includes advice on what should be done in the relevant legal context. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. In instances where in-house counsel plays a dual role in the corporation, any communications made by in-house counsel in an executive or other capacity will not be protected by privilege. In determining whether or not privilege is applicable, the character of the work performed will be examined. Solicitor-client privilege can arise when in-house government lawyers provide legal advice to their client, a government agency. The protection of legal advice from an in-house government lawyer is comparable to the protection of legal advice from corporate in-house counsel.

The privilege, and thus the right to have the confidential communication protected, comes into existence at the time that the communication is made and does not require the commencement of litigation. As long as the counsel is acting as a lawyer, the communications will be privileged. If the advice given by an in-house lawyer is characterized as privileged, the fact that a lawyer is “in-house” does not remove the privilege, or change its nature.

Generally, privilege is waived when the legal advice is shared with a third party. However, there are three exceptions when privilege is not waived:

- 1) when the third party simply carries information from the client to the lawyer or vice versa;
- 2) when the third party uses its expertise in assembling information from the client and explaining that information to the lawyer; and
- 3) when the third party is authorized by the client to seek legal advice on its behalf and is “standing in the shoes of the client.”

The third category does not cover a third party who gathers information from outside sources and passes it along to the lawyer, nor does it cover a third party who is retained to act on instructions from the lawyer.

In Ontario, in-house counsel is also bound, under the Rules of Professional Conduct, by an ethical rule of confidentiality that is wider than the rule regarding solicitor-and-client privilege. They are required to hold all information concerning the business and affairs of their corporate client acquired in the course of the professional relationship in the strictest of confidence without regard to the nature or source of the information or the fact that others may share the knowledge. Such information can only be divulged if in-house counsel is expressly or impliedly authorized by their client or required by law to do so.

However, if in-house counsel becomes aware that a dishonest, fraudulent, criminal, or illegal act may be committed they are obligated to recognize that their duties are owed to the corporation and not to the officers, employees, or agents thereof.

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In-House Counsel and the Attorney-Client Privilege

Colombia

Prepared by Lex Mundi member firm Brigard & Urrutia Abogados

Numeral 9 of Article 28 of Law 1123 of 2007 imposes on all lawyers the duty of keeping and safeguarding attorney-client privilege. This regulation does not make a distinction between in-house counselors and external lawyers; thus, by virtue of their status as lawyers, in-house counsels are also bound to maintain and respect professional secrecy.

Furthermore, article 74 of the Colombian Constitution establishes that professional secrecy is inviolable. This rule has been interpreted by the Colombian Constitutional Court as imposing a very strict duty of non-disclosure upon all professionals that are legally bound to maintain such secrecy, since it is directly related to the protection of the fundamental right to privacy and of private communications and correspondence.

As regards legal practitioners, the duty to respect attorney-client privilege (regardless of the type of counseling that they carry out) has certain legal consequences, especially in connection to criminal matters. Article 68 of the Criminal Procedure Code exonerates persons who are bound to keep professional secrecy from the duty to inform judicial authorities of criminal conducts that they have known by reason of the exercise of their profession. Accordingly, article 385 of the above mentioned Code establishes that lawyers are not bound to declare before judicial authorities on matters of which they have knowledge by virtue of the exercise of their profession. Moreover, article 258 of the Criminal Code (Law 599 of 2000) qualifies as a criminal offense punishable by a fine, the act of using, in an undue manner and with the purpose of obtaining benefits, non-public information that has been known by the employees of private entities by reason of their functions, a figure that would be relevant for in-house counsels who unduly disclose protected information with a view to obtaining benefits from it.

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In-House Counsel and the Attorney-Client Privilege

Cyprus

Prepared by Lex Mundi member firm Dr. K. Chrysostomides & Co LLC

In Cyprus, unlike England, the distinction between Solicitors and Barristers does not exist. All persons that are admitted to the Cyprus Bar and registered in the Register of Members are considered to be advocates and are, consequently, regulated by the Advocates' Law (Cap. 2) and the Advocates' Professional Etiquette Regulations of 2002 ("the Regulations"). The Regulations provide that, as a general rule, the advocate - client privilege ("Legal Professional Privilege" or "LPP") applies to the dealings and communications of all advocates with their clients but in order to invoke the LPP, a client-advocate relationship must be established.

The strict adherence to the principle of professional confidentiality is considered an important prerequisite to the attainment of trust between an advocate and his client. In this regard, an advocate is basically regarded as a custodian of the confidential information and of the secrets that have been entrusted to him by his client and is, therefore, not permitted to divulge that information without his client's consent.

Legal Professional Privilege is in other words, both a fundamental right and a duty of an advocate who is allowed to not disclose/prohibited from disclosing any confidential information which has arisen from communications with his client, whether in the context of legal proceedings or at a discovery process. Having said that, it is clear that the LPP can generally be invoked by an advocate whenever he is dealing with a judicial or any other authority. Further, it is important to note that communications between an advocate and a third person are also considered privileged so long as these take place predominantly in the context of pending or anticipated judicial proceedings/litigation.

There is no time limit regarding LPP and an advocate must respect the privilege of every privileged information or fact that he/she has received in the context of his/her profession.

If an advocate practices in a firm or partnership, the rules of confidentiality and legal professional privilege extend and apply to all members of the firm or partnership as well. Confidential information arising from another advocate is therefore also regarded as privileged. Included in this privilege is also any entrusted confidential information which has resulted from constructive discussions that were geared towards an agreement which failed to materialize.

However, there are certain inroads to the above general rule:

Firstly, Legal Professional Privilege applies only in relation to an advocate's legal communications with his client and does not extend to any additional role the advocate may take up, e.g. as a trustee, agent, representative etc of his client. As a result, an advocate that holds the position of trustee or agent cannot claim under the said capacity the application of Legal Professional Privilege.

Further, legal privilege shall not apply where the advocate-client relation aims at committing or assisting the commission of an illegal act/offence/crime. In such cases, the advocate-client communications cease to be considered privileged and the Court may order their disclosure. By the same token, when an advocate knows that the legal advice provided by him shall be used for some illegal purpose, he shall also be considered an accomplice and the privilege shall not apply.

In addition, if a client wishes to raise any charges against his advocate, or if an advocate is facing either a criminal or disciplinary action, he shall then be allowed to divulge any information entrusted to him in

relation to either the charges or the case at hand, even if this would ultimately result in the disclosure of entrusted information given to him by the client.

Finally, in the absence of any specific Cypriot case-law on the matter, it is questionable whether the aforementioned Regulations also apply to in-house lawyers, given that they do not have “clients” per se.

In relation to this last point, one should also bear in mind the distinction drawn by recent EC case-law between independent/external and in-house counsel, and the - as yet unseen - jurisprudential consequences that this case-law shall have on the legal systems of the various Members States. In short, these recent cases seem to have laid down a very strict interpretation of the applicability of Legal Professional Privilege, basically excluding communications between in-house counsel and internal clients in the context of EC competition investigations from enjoying its benefits, because in-house counsel are not regarded as being sufficiently independent from their employer, as would be the case with an external lawyer (*Akzo Nobel v European Commission* (C-550/07)).

As a result, LPP seems to be applied only in so far as communications with independent external lawyers made for the purpose of exercising the client’s rights of defense are concerned, hence leaving the companies needing to obtain legal advice on such issues with the only option of conducting all necessary communications either orally or through external lawyers.

That being said, please note that disclosure of communications between in-house counsel and the company he serves may, however, be protected by the inclusion of confidentiality clauses in the employment contract of the in-house counsel. In the absence of any specific case-law on this subject however, it is doubtful whether such a clause would indeed stand in a court of law.

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In-House Counsel and the Attorney-Client Privilege

Czech Republic

Prepared by Lex Mundi member firm PRK Partners

Czech law strictly distinguishes between external and internal counsel as regards the availability of privilege to protect from disclosure of communication. Only external counsel, *i.e.* members of the Czech Bar Association, is subject to the Czech Advocacy Act, which provides for the right and obligation of attorneys not to divulge any information obtained in the course of providing legal services.

As to in-house counsel, no generally applicable legislation exists which would classify the communication between the counsel and his or her employer as privileged. In a limited number of cases, such communication may be subject to a special duty to maintain confidentiality (typically, in-house counsel at state organizations or regulated businesses may be subject to non-disclosure requirements).

Some believe that the duty not to divulge confidential information is implied in employees' general obligation to refrain from actions that are contrary to the employer's legitimate interests. Attempts are sometimes made to strengthen restrictions on disclosure by incorporating confidentiality clauses into employment agreements with in-house counsel or corporate by-laws. However, the proposition that such arrangements will create a privileged relationship is unsustainable.

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In-House Counsel and the Attorney-Client Privilege

Egypt

Prepared by Lex Mundi member firm Shalakany Law Office

The attorney-client privilege is a fundamental principle of the Egyptian Bar Association Law. According to Article 79 of the said law, an attorney is prohibited from disclosing any privileged information received from his client, unless he/she is requested to do so by the client in order to protect his/her interests before a court of law. This is further emphasized in Article 66 of the Egyptian Evidence Law, which explicitly states that such attorney-client privileged information is confidential and may not be disclosed.

In addition to such obligation of non-disclosure, the Egyptian Bar Association Law recognizes the principle of conflict of interest and therefore prohibits an attorney from giving advice to any party having an interest that conflicts with that of his/her client.

Consequently, any attorney who deliberately violates any of the above-mentioned provisions of the Egyptian Bar Association Law may be subject to the disciplinary sanctions provided for under Article 98 of the said law. These disciplinary sanctions vary according to the severity of the violation; the attorney may be temporarily prohibited from practicing law for a period of time not exceeding 3 (three) years or be permanently disbarred. However, such professional sanctions do not prejudice the right of the client to claim compensation for the damage caused as a result of such disclosure by his/her attorney.

The above-mentioned provisions of the Egyptian Bar Association Law also apply to in-house counsel, as they are attorneys subject to laws that regulate their profession. However, in their case the client is the juristic or natural person, which they serve.

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In-House Counsel and the Attorney-Client Privilege

Estonia

Prepared by Lex Mundi member firm LAWIN

According to the Estonian Bar Association Act, an attorney is required to maintain the confidentiality of information which has become known to him or her in the provision of legal services. The aforementioned obligation has an unspecified term and it shall apply even after the termination of the activities of the attorney. The obligation to maintain the confidentiality of information also extends to the employees of law offices and of the Estonian Bar Association and to public servants to whom an attorney's professional secret has become known in connection with their official duties.

Attorney-client privilege ensures that an attorney or employee of the Estonian Bar Association or a law office who is being heard as a witness may not be interrogated or asked to provide explanations on matters that he or she became aware of in the course of provision of legal services. This general principle applies to all court proceedings. In addition to the previous, an attorney cannot be detained, searched (in law office) or taken into custody on circumstances arising from his or her professional activities, except on the basis of a ruling of a county court.

It has to be noted however that there are some exceptions when disclosure of confidential client information is not seen as a breach of professional secrecy and/or attorney-client privilege. The first of the aforementioned exceptions is when such confidential information is demanded from the attorney by the Board of the Estonian Bar Association in the exercise of supervision over the activities of an attorney or by the Court of Honour of the Estonian Bar Association in the hearing of a matter concerning a disciplinary offence. In these cases an attorney has the obligation to disclose confidential client information if it is demanded by either of the aforementioned authorities. Also, attorney-client privilege only applies to a limited extent when an attorney receives information that a criminal offence in the first degree (e.g. manslaughter) is going to take place. In this case attorneys are obligated to request the Chairman of an administrative court to give permission to disclose information to relevant authorities. If such permission is given, the attorney has to notify the relevant authorities of the details of the offence. Lastly, attorneys also have an obligation to immediately notify the Financial Intelligence Unit if an attorney identifies upon performance of his or her obligations an activity or circumstance which might be an indication of money laundering or terrorism financing or an attempt thereof. Since the aforementioned obligation is stipulated in the law, notification of such activities or circumstances is not seen as a breach of professional secrecy and/or attorney-client privilege.

Attorney-client privilege does not apply to the communications between in-house counsel and officers, directors or employees of the companies they serve. Only the communication between the in-house counsel and the outside attorney is protected by attorney-client privilege. Therefore the communication between in-house counsel and officers, directors or employees of the companies they serve is not privileged. If however the aforementioned communication is forwarded to an attorney and the related information and/or documents are put to a file bearing a heading "communications with a law office," then the content will become protected by attorney-client privilege.

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In-House Counsel and the Attorney-Client Privilege

Finland

Prepared by Lex Mundi member firm Roschier, Attorneys Ltd.

The communications between in-house counsel and officers, directors or employees of the companies they serve are not privileged in the same scope as communications between bar members (advocates) and their clients. However, there are some general provisions that entitle in-house counsel to protect these communications in certain situations and within certain scope.

A Finnish bar member has a general duty to keep information of whatever nature entrusted to him in the course of an assignment confidential, and the provisions on confidentiality also, as a rule, prevent the bar members from being compelled to reveal such information. An in-house counsel is not entitled to invoke such general privilege. However, an in-house counsel may refuse to give evidence on business secrets and lawfully object to confiscation of documentation relating to such secrets if such information has been obtained in connection with correspondence with a client regarding a lawsuit, which the in-house counsel has handled. If the in-house counsel is heard as a witness in court, in police investigations or in tax matters he or she may lawfully refuse to give evidence, which would disclose business secrets.

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In-House Counsel and the Attorney-Client Privilege

Guatemala

Prepared by Lex Mundi member firm [Mayora & Mayora, S.C.](#)

In Guatemala there are two basic sources of law relating to the attorney-client privilege question. One is article 2033 of the Civil Code and the Code of Ethics of the Bar Association (Colegio de Abogados). The basic proposition is the same, namely, that the attorney is liable for revealing the secrets of his/her client. In the Code of Ethics, it is viewed, both as a right and a duty of the attorney. The scope of these provisions is rather undefined, but the Code of Ethics makes it clear that the professional secret may be alleged before judicial or other authorities.

There is no distinction whether the attorney exercises his/her profession independently or “in-house,” and therefore, it is understood that the same standards apply in both cases, as regards the attorney-client privilege matters, or more specifically, the professional secret.

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In-House Counsel and the Attorney-Client Privilege

Hong Kong

Prepared by Lex Mundi member firm Deacons

In Hong Kong, the attorney-client privilege (also known as legal advice privilege), in general terms, covers communications between a client and his lawyer (whether written or oral) that are made:-

- a) where the lawyer is acting in the course of their professional relationship and within the scope of his professional duties;
- b) under conditions of confidentiality; and
- c) for the purpose of enabling a client to seek, or the lawyer to give, legal advice or assistance in a relevant legal context.

To-date, there is no Hong Kong decision dealing directly with legal advice privilege in the context of in-house lawyers. The Hong Kong courts would likely consider the English common law authorities and principles to be highly persuasive and follow them.

Generally, legal advice privilege attaches to communications between in-house lawyers and their employer's other staff members.³¹

To overcome potential problems regarding the lack of "independence" of in-house lawyers,³² employment contracts of in-house lawyers may include an independence clause stating that the lawyers' ethical duties and duties to the court would prevail over their duties to their employers and in-house lawyers may consider obtaining a practicing certificate.

In any event, extra care is needed to ensure that the staff members who communicate with the in-house lawyers or external lawyers fall within the ambit of "client" as construed in the English case of Three Rivers District Council v The Governor and Company of the Bank of England (No.5)³³ ("**Three Rivers (No. 5)**"). The Three Rivers (No.5) was held to be good law in Hong Kong and applied in the case of Citic Pacific Limited v Secretary For Justice & Anor³⁴.

³¹ In Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.2) [1972] 2 All ER 353 (CA), it was held that salaried legal advisers were regarded by the law as in the same position as those who practised on their own account and the only difference was that they acted for one client rather than several clients.

³² The European Court of Justice decision, Akzo Nobel Chemicals Ltd and another v Commission of the European Communities [2008] All ER (EC) 1 held that communications between in-house lawyers and their employer's other staff members were not protected by legal advice privilege on the basis that in-house lawyers were not "*independent (structurally, hierarchically and functionally)*". The case was appealed to the European Court of Justice's Grand Chamber (Akzo Nobel Chemicals Ltd and another v Commission of the European Communities [2011] All ER (EC) 1107), where the appeal was dismissed. However, whether this case is applicable in Hong Kong and in the common law context is doubtful.

³³ [2003] QB 1556. It was held that where the "*client*" is, for example, a corporate entity, legal advice privilege will only cover communications between the legal advisor (whether in-house or external) and a narrow group of people, commonly a board of directors and those employees expressly charged with seeking legal advice on behalf of the company. Any other communications from or within the company relating to the subject matter of the advice sought or given are at risk of being outside the scope of the privilege.

³⁴ HCMP 767/2010, unreported. Applying the principles in the Three Rivers (No. 5), the judge held that it was clear from the facts and the documents that Citic's Group Legal Department were the employees nominated to deal with the external legal advisors, and were therefore the external legal advisor's clients. As the Group Legal Department acted under the direction of Citic's Board of

There are limitations on legal advice privilege, e.g. communications in furtherance of a crime or fraud are not protected.

Legal advice privilege may also be overridden by the order of the court where the interest, of a child are involved (e.g. in the context of matrimonial or wardship proceedings) and where there is a serious risk of death or bodily injury to identifiable persons or groups of persons.³⁵

Further, there may be instances where the protection of privilege is reduced³⁶

Depending on the content and context of the communications, litigation privilege may also be available (i.e. communications coming into existence with the dominant purpose of being used in aid of pending or contemplated litigation); as to privilege against self-incrimination³⁷ and public interest immunity.

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Directors, the Board was also deemed to be a client of the external legal advisors. Therefore, the communications between the Group Legal Department and the external legal advisors and the communications between the Board of Directors and the external legal advisors were protected by legal advice privilege. Communications between the external legal advisors and other employees risk falling outside of the protection of privilege. The case was appealed to the Court of Appeal, but this issue of who constitutes a "client" to an external legal advisor was not examined (*Citic Pacific Ltd v Secretary for Justice & Anor* [2012] 2 HKLRD 701).

³⁵ Commentary 16 of Principle 8.01, The Hong Kong Solicitors' Guide to Professional Conduct says that a solicitor may reveal information that he believes necessary to prevent a client from committing a criminal act that the solicitor believes on reasonable grounds is likely to result in the abduction of or serious violence to a person.

³⁶ e.g. section 15 of the Prevention of Bribery Ordinance (Cap. 201) and section 51 of the Inland Revenue Ordinance (Cap.112).

³⁷ The disclosure may tend to criminate him or his spouse or tend to expose him or his spouse to proceedings for an offence or for the recovery of a penalty - Section 65 of Evidence Ordinance (Cap.8).

In-House Counsel and the Attorney-Client Privilege

Indonesia

Prepared by Lex Mundi member firm Ali Budiardjo, Nugroho, Reksodiputro

It is common with companies in Indonesia that in-house counsel is very close to the management of the company and is directly consulted on all matters including confidential policy matters. As such, it is required that in-house counsel shall keep all privileged communication with the management of the company strictly confidential. Often the company has a policy that binds its employees, including in-house counsel, to keep privileged information concerning the company confidential. However, in cases when so required by law, the in-house counsel will have to disclose the privileged communication and information of which he/she has knowledge.

The respective company itself will, in general determine the privileged character of communications with respect to a company involving in-house counsel. Such communications could therefore be determined to be privileged to certain levels of personnel within the company only and not to be disclosed to other levels of personnel of the company, but it can also be that it is confidential only for outsiders.

In-house counsel will have to disclose privileged information in the event that the court in hearing a case requires the in-house counsel as one of the witnesses in the case, to do so.

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In-House Counsel and the Attorney-Client Privilege

Isle Of Man

Prepared by Lex Mundi member firm Cains

Under Isle of Man law, certain communications between a lawyer and his client are privileged from production for inspection in legal proceedings before the courts of the Isle of Man. There are two heads of legal professional privilege. These are generally referred to as “advice” privilege and “litigation” privilege.

Communications between a lawyer acting in his professional capacity and his client attract advice privilege if they are confidential and made for the purposes of seeking or giving legal advice.

Advice privilege will also protect communications by or with an agent of the lawyer or client if that agent was appointed for the purpose of communicating with the other in order to seek or to give legal advice.

Litigation privilege applies to communications that are confidential; made between a lawyer (acting in his professional capacity) and his client, or between a lawyer (acting in his professional capacity) and a third party, or between the client and a third party; made for the sole or dominant purpose of litigation; and made at a time when litigation is pending, existing or reasonably contemplated. All the criteria must be satisfied for litigation privilege to apply, so it is advisable that the lawyer takes control of communications with any third party as soon as possible when litigation is contemplated, to ensure that the criteria are met and the communications are protected.

Both heads of legal professional privilege are equally applicable to an employed solicitor’s relationship with his employer. Thus communications between an in-house lawyer and other persons within the firm will be protected if they meet the other conditions described above. The communications will not be protected if they merely relate to administrative matters. Communications between two in-house lawyers employed by the same firm will also be protected if they meet the other conditions described above. Communications by or with a non-qualified employee working under the supervision of an in-house lawyer will be protected if the non-qualified employee is effectively acting as the agent of the in-house lawyer, but not if he works independently of him.

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In-House Counsel and the Attorney-Client Privilege

Israel

Prepared by Lex Mundi member firm S. Horowitz & Co.

According to Israeli law (under both the Bar Association Law, 1961 and the Evidence Ordinance [New Version], 1971), all matters or documents exchanged between a client (or someone on his behalf) and his attorney, pertaining to the professional service granted by the attorney to his client, are privileged. Accordingly, communications between in-house counsel of a company and officers, directors or employees of the same company, pertaining to legal services rendered by the in-house counsel to his client - the company - are privileged. The fact that the in-house counsel is an employee of the company is irrelevant and does not influence the privilege. The communication is privileged only if both the officers, directors or employees are acting on behalf of the company and the communication relates to the professional attorney-client relationship between the in-house counsel and the company. In instances where the privilege applies, it is absolute, and can only be waived by the client.

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In-House Counsel and the Attorney-Client Privilege

Latvia

Prepared by Lex Mundi member firm LAWIN

In the jurisdiction of Latvia, communications between in-house lawyers and officers, directors and employees of the companies which they serve, are not legally protected from disclosure. The attorney-client privilege extends only to the members of the Latvian Bar Association - sworn advocates and assistant advocates, who practice independently or collectively in law firms.

Lawyers who are not members of the Latvian Bar Association, such as in-house counsels, employees of legal departments and legal counsels are not protected by the attorney-client privilege and are not subject to corresponding rights and immunities. Even if an internal confidentiality agreements between the employer and in-house lawyer are concluded that would not present grounds for the application of the attorney-client privilege.

Often, in-house lawyers, who are not sworn advocates or assistant advocates, when faced with a request for sensitive or potentially detrimental information for the company may refer the request to their employer. However, even in this case they are not legally protected by a formal client-attorney privilege, but rather a regular employment relationship, where issues above and beyond the competence of the employee are traditionally referred to a higher managerial level. Therefore the in-house lawyers may still be obliged to disclose information and be obliged to testify as a witness. Refusal to testify and intentional giving false testimony are both considered criminal offenses according to the Latvian Criminal law.

In order to mitigate the risks of unwelcome disclosure, companies can conclude assistance or service agreements with sworn advocates or law firms, where sworn advocates practice in teams. In Latvian practice, many companies utilize the services of an outside advocate or law firm that, for all effective and practical purposes, serves as in-house legal counsel, however the advocates are not allowed to enter into employment relationship with any company or state entity – only a conclusion of service contract is allowed. Such service provision is subject to the attorney-client privilege.

In-house lawyers in Latvia are particularly vulnerable vis-à-vis investigative officers and other authorities entitled to perform operational activities, e.g., public prosecutors, Corruption Prevention and Combating Bureau, police etc. In accordance with Article 17(1) of the law "On the Office of Prosecutors" (adopted in 1994) and Articles 186 and 190 of the Criminal Procedure Law (adopted in 2005), prosecutors and other prosecuting authorities entitled to perform operational activities have broad legal powers to request and obtain legal acts, documents and other information from state administrative institutions, banks, State Controller, municipal governments, enterprises, organizations, and other institutions as well as gain uninhibited entry in the facilities of these institutions. In theory and practice, in-house lawyers cannot maintain the confidentiality of in-house communications when faced with a request for information from the authorities noted above. The basis for immunity from criminal proceedings can only be special legal status of a person, information or place, which guaranties the rights of a person to fully or partially not comply with the duties imposed by the criminal procedure or limits the rights to carry out certain investigatory actions.

Even though sworn advocates and assistant advocates are subject to by the attorney-client privilege, pursuant to the Advocacy Act, any illegal activity by the advocate in the interests of the client as well as any activity of the advocate enabling the client to perform an illegal activity cannot be recognized as a legal service and, therefore, in these cases advocates are not protected by the attorney-client privilege.

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In-House Counsel and the Attorney-Client Privilege

Lebanon

Prepared by Lex Mundi member firm Moghaizel Law Office

Our laws do not regulate this matter, and therefore, there is no privilege by law for communications between in-house counsel and officers or employees of the company they serve.

It is possible, however, to have a confidentiality agreement between the employer and the employed in-house counsel. This would be treated as any other confidentiality agreement between an employer and an employee, since the in-house counsel status is not regulated under Lebanese law because the law governing our legal profession provides that legal counsels must be self-employed.

Turning to the protection of business secrets, such protection can be afforded by agreement and nothing prevents that such agreement be applied to in-house counsel communications, provided this is specifically stated in the agreement in question.

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In-House Counsel and the Attorney-Client Privilege

Lithuania

Prepared by Lex Mundi member firm LAWIN

Under Lithuanian legislation an attorney-client privilege is granted only in respect to communications among advocates, assistant advocates and clients. Notably, advocates and assistant advocates are not entitled to work or on any other basis serve as in-house counsel, except the legal assistance they render under the signed Retainer Agreement. On the contrary, in-house counsels do not enjoy such privilege, and the communications between an in-house counsel and officers, directors or employees of the companies they serve are not protected against disclosure. Even if a company and in-house counsel have signed Confidentiality Agreement, an in-house counsel has an obligation to disclose confidential information to governmental authorities under their request if such authorities (for instance, Labor Inspection, etc.) execute certain investigations. Governmental authorities have a right to request for confidential information only if it is expressly required under the laws of the Republic of Lithuania.

However, certain guaranties which relate to the attorney-client privilege may be enjoyed by in-house counsels during civil or administrative proceedings. It shall be prohibited to summon representative of the company as a witness and interrogate him/her on the circumstances he/ she has become aware of while performing his/her obligations as the representative of the company in a certain case. Notably, this rule is not applicable in criminal proceedings. An in-house counsel shall be supposed to be the representative of the company only if he/she is duly authorized to act as a representative of the company in the trial.

The law is silent on in-house counsel's rights to use any alternative methods of protecting the information. However, the in-house counsel may insist on a closed trial on the basis that such communication contains commercial or professional secret. Though, the scope of commercial or professional secret in this respect is rather limited and it would be difficult for the in-house counsel to persuade judge to proclaim closed trial (for example, on the basis of confidentiality clause included in the employment contract, etc.).

Under Lithuanian legislation an attorney-client privilege is granted only in respect to communications among advocates, assistant advocates and clients. In general in-house counsel do not enjoy such privilege, and the communications between an in-house counsel and officers, directors or employees of the companies they serve are not protected against disclosure. Notably, advocates and assistant advocates are not entitled to work or on any other basis serve as in-house counsel, except the legal assistance they render under the signed Retainer Agreement.

However, certain guaranties which relate to the attorney-client privilege may be enjoyed by in-house counsels during civil or administrative proceedings. It shall be prohibited to summon representative of the company as a witness and interrogate him/her on the circumstances he/ she has become aware of while performing his/her obligations as the representative of the company. Notably, this rule is not applicable in criminal proceedings. An in-house counsel shall be supposed to be the representative of the company only if he/she is duly authorized to act as a representative of the company in the trial.

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In-House Counsel and the Attorney-Client Privilege

Morocco

Prepared by Lex Mundi member firm Gide Loyrette Nouel

Attorneys are not permitted to act as in-house counsel, the following developments do not cover the disclosure of communications between such in-house counsel and officers, directors or employees of the companies they serve, which remain unprotected unless the in-house counsel is bound by a confidentiality clause in his employment contract. In the latter case, however, this confidentiality may be waived upon an order from the court.

In Morocco, pursuant to Article 36 of the Dahir-law n° 28-08 of 6 November 2008 organizing the legal profession, the attorney is prohibited, in all matters, from divulging anything that would contravene the attorney-client privilege and he must refrain from communicating any information from his files or from publishing evidence, documents or letters relating to an ongoing matter. As such, and as indicated by Article 14 of the Interior Regulations of the Casablanca Bar Association, the attorney-client privilege is general and absolute in all aspects of his professional activity, without any discrimination. The attorney cannot deliver the content of any evidence entrusted to him, nor testify in favor or against his client.

The only limitation to the attorney-client privilege is the denunciation to the judicial or administrative authority of criminal acts and bad treatment against minors of less than 18 years of age that an attorney would be privy to, in which case the attorney is free to testify or not. Aside from this exception, the attorney, should he breach the attorney-client privilege, is exposed to an imprisonment term of one to six months and a fine of 120 to 1,000 dirhams (Art. 446 of the Moroccan Penal Code), in addition to disciplinary sanctions of his order (warning, reprimand, temporary disbarment of up to three years or permanent disbarment), as provided for by Article 62 of the Dahir-law n° 28-08 of 6 November 2008 organizing the legal profession and by Article 80 of the Interior Regulations of the Casablanca Bar Association.

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In-House Counsel and the Attorney-Client Privilege

Netherlands

Prepared by Lex Mundi member firm Houthoff Buruma

Advocates admitted to the Bar in the Netherlands have, as in other European jurisdictions, a pledge to secrecy and a general privilege of non-disclosure. This obligation and this right are explicitly stated in the rules of professional conduct of the Netherlands Bar Association (*Gedragsregels*) and, in more general terms, in article 46 Counsel Act (*Advocatenwet*).

The general privilege of non-disclosure in proceedings is secured in civil, criminal and administrative law.³⁸

In matters between private parties, in accordance with art. 843a of the Code of Civil Procedure (CCP), a party can request the production of a specific document from another party or a third party who possesses a copy of the document. Lawyers however may invoke the legal professional privilege if and to the extent that a copy of the document is possessed in his professional capacity. As a result of the obligation to observe secrecy, a lawyer also has the right to refuse to testify for as far as it concerns information that has become known to him acting in his professional capacity (art. 165(2)(b) of the CCP).

The disclosure of confidential information by an advocate is punishable under criminal law (art. 272 Dutch Criminal Code). The scope of the general privilege of non-disclosure is restricted to information which has been obtained by the advocate in the pursuance of his profession (article 6 Dutch Code of Conduct for Advocates). A derived legal privilege can exist for those who assist the advocate in servicing clients.³⁹ As a general rule, legal privilege must be respected in the context of a search by criminal authorities and privileged documents cannot be seized (art. 98 Dutch Code of Criminal Procedure). However, documents which are the object of or have contributed to the committing of a criminal offence can be seized. Under very exceptional circumstances the legal privilege can be overruled in relation to a criminal offence. This may for instance be the case if the lawyer invoking legal privilege is suspected of a serious offence. If an advocate objects against seizure of (potentially) privileged documents, the documents are commonly saved in a sealed envelope pending a special procedure. In the course of that procedure, a court decides over the privileged nature of the documents.

The case law of the Dutch Supreme Court underlines that legal privilege also applies to correspondence between advocate and client located at client's premises.⁴⁰ The scope of the legal privilege in administrative law is less clear. In accordance with European case law, the legal privilege in relation to competition law has been explicitly codified in the Dutch Competition Act (art. 51 *Mededingingswet*).

In-house counsels in the Netherlands are not covered by a code of professional conduct and do not enjoy the same privilege as advocates. Therefore, communications of the in-house counsel with the officers, directors and employees of the company are not covered by legal privilege and have to be disclosed upon request in legal procedures. An in-house counsel can be called to testify against the company he works for.

In 1997 the Regulation on law practice in the exercise of an employment (*Verordening op de praktijkuitoefening in dienstbetrekking*) was introduced which enables in-house-counsel to be admitted to

³⁸ art. 165, sub 2 sub b Dutch Code of Civil Procedure (Wetboek van Rechtsvordering), art. 218 Dutch Code of Criminal Procedure (Wetboek van Strafvordering) and art. 5:20 General Administrative Act (Algemene Wet Bestuursrecht) and article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

³⁹ Bijz. Raad van Cassatie, 8 november 1948, NJ 1949, 66.

⁴⁰ Supreme Court 19 November 1985, NJ 1986,533.

the Bar and to have the same privilege as advocates. These in-house advocates have only one client, namely the company they work for. It is required that they in principle handle legal work only. Through a special impartiality-contract, the employer should guarantee that the in-house advocate can exercise his profession in full impartiality.

In-house advocates are deemed to fall under the legal privilege of article 165 of the CCP and to be allowed to refuse to disclose internal legal advice on the grounds of lawyer–client privilege. This position seemed to change with the judgment of the ECJ in *Akzo Nobel Chemicals Ltd and Akcros Chemical Ltd v Commission of the European Communities*. According to the ECJ, an in-house advocate's economic dependence on and close ties with the employer mean that he do not have the same level of professional independence as an outside counsel. In the view of the ECJ, even though Dutch legislation seeks to treat in-house advocates in the same way as external advocates, they do not enjoy legal professional privilege. However, the Dutch Supreme Court⁴¹ has ruled that the judgement of the ECJ in *Akzo Nobel* does not apply outside the scope of Community competition law. According to the Supreme Court, given the Dutch practice and safeguards for impartiality, there is no reason to deny legal professional privilege to a lawyer on the ground that he is in-house advocate.

Therefore outside the scope of Community competition law, the correspondence of a company's in-house advocate with its directors, employees and officers is covered by legal privilege, in so far as it relates to legal issues. It is uncertain whether correspondence relating to non-legal issues is covered by legal privilege.

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⁴¹ Supreme Court 15 March 2013, NJ 2013, 388.

In-House Counsel and the Attorney-Client Privilege

New Zealand

Prepared by Lex Mundi member firm Simpson Grierson

In-house counsel attorneys who hold current practicing certificates ("in-house lawyers"), are entitled to the same legal privileges and are subject to the same obligations as all other lawyers. It is inappropriate to draw distinctions between in-house lawyers and those practicing privately, provided that the former are acting as lawyers and not in some other capacity. In-house lawyers can, therefore, rely on both solicitor/client privilege and litigation privilege ("legal professional privilege") if acting in their capacity as a legal adviser at the relevant time.

The proper approach, where an issue arises as to whether an in-house lawyer was acting in their capacity as a legal adviser, is for the lawyer to demonstrate affirmatively that he or she was acting as a legal adviser providing legal services and not simply as an employee possessing specialist skills. If, for example, an in-house lawyer provides business, strategic or policy advice then they cannot be said to be acting in their capacity as a lawyer.

In the event that communications with an in-house lawyer are not covered by legal professional privilege, it may be possible to restrict inspection and the use of certain documentation on the basis that the information is commercially sensitive. Examples of such commercially sensitive information would be documents showing the detailed cost of products or services which are provided in a competitive market, the marketing plans for a proposed new product or a patent specification during the period before the application has been accepted and made available for inspection.

The protection that the Court may provide to commercially sensitive information can take many forms. The inspection of the documents may be limited to those persons who require inspection for the purposes of the proceeding such as solicitors, counsel and expert witnesses; confidential parts of documents may be sealed; references to third parties may be replaced by initials; and the Court may require an undertaking that there be no removal, copying or use of the information. Orders for non-disclosure of such information will only be granted by the Court in situations where it considers that this is necessary and that disclosure would be likely to prejudice the party making discovery in some significant way. Legal professional privilege generally is considered in section 54 of the Evidence Act 2006.

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In-House Counsel and the Attorney-Client Privilege

Nicaragua

Prepared by Lex Mundi member firm Alvarado y Asociados

In Nicaragua there is no a specific law regulating the attorney/client privilege nor regarding the protection or privileged status of any communications between in-house counsel and officers, directors and employees of the company they serve.

Therefore, almost all the time, when an attorney and a client will commence a professional relation through which the attorney will render legal services to the client, it is recommendable to execute an engagement letter that will govern the rendering of the legal services. This engagement letter contains, most of the time, a clause of confidentiality that prohibits the attorney to disclose the confidential information received from the client. The execution of a clause of confidentiality is similar with in-house counsels, who usually are hired as employees with labor contracts providing the confidentiality for the information acquired through the labor services executed.

When the parties (attorney or in-house counsel) execute the agreement of confidentiality, all the information acquired by the attorney or the in-house counsel during the professional or labor relationship will be considered privileged and the attorney cannot disclose it to any third party. If the attorney infringes the confidentiality agreement, then, he/she will be responsible to repair damages caused to the client, according to the article 1860 and 2509 of the Civil Code of Nicaragua. Additionally, Article 196 of the Nicaraguan Criminal Code punishes with prison from 1 to 3 years and a special prohibition to practice within the profession or occupation involved to those that due to their profession or position held have notice of a secret and disclose it without a legitimate justification. Within this Article, communications between in house counsel and officers as well as attorney/client privileged information may be included; however, counsel or attorney may be compelled to disclose and produce such communications only when it is ordered by a competent judge or by the District Prosecutor Office in charge of an investigation.

Similarly, Articles 3362 and 3363 of the Nicaraguan Civil Code provide that (i) a judicial attorney revealing to the counter-party the secrets of his client, or providing documents or data in prejudice of his client, shall be liable for all damages and prejudices, being also subject to the applicable provisions of the Criminal Code; and (ii) attorneys, amongst others professionals, are not obliged to declare on facts that have been confidentially communicated in exercise of their profession; being recommendable to execute a written confidentiality agreement to provide more support on the confidential nature of communications between client and attorney.

Furthermore, Article 198 of the Criminal Procedure Code states that any person who possesses confidential information, in reason of his/her profession that is considered as a professional secret, must stop to make a witness statement. However, if the owner of the confidential information gives the authorization to make the witness statement, the professional will be obligated to make the witness statement.

Finally, Nicaraguan Political Constitution, as amended, under the Section of "Individual Rights", Article 26 (4) provides for the inviolability of correspondence in all types of communications, and the examination of documents, books, private communications or letters, when necessary for matters submitted to court, shall be conducted according to applicable law. Likewise, Article 34 (7) establishes that no one can be forced to declare against him/herself, principle that could be interpreted to be applicable to the attorney of such person considering that the person could reveal, based on the professional trust, to his/her legal counselor very valuable information that could or could not affect the person's situation in the process and thereafter.

Nevertheless, it is worth mentioning to notice that the abovementioned provisions are of general application; that is, they have not been stipulated specifically for protecting disclosure of communications between in-house counsel and officers or attorney/client privileged information.

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In-House Counsel and the Attorney-Client Privilege

Norway

Prepared by Lex Mundi member firm Advokatfirmaet Thommessen AS

Counsel's general duty of confidentiality – professional secrecy – according to Section 144 of the Norwegian Penal Code extends also to in-house attorneys. Disclosure of secrets covered by this duty is punishable with fines or imprisonment of a maximum of 6 months. The duty extends also to the lawyer's associates and other assistants. The same will apply to in-house legal departments. The duty of confidentiality covers communication between counsel and the client, and also information received by counsel from third parties provided that such information is received in his capacity as attorney. However, company documents existing independent of the matter will not be protected by the sole fact that they are communicated to the attorney.

Professional secrecy is also protected by the fair trial guarantees in Article 6 of the European Convention on Human Rights. The Convention is incorporated into Norwegian law and takes as general rule precedence over other Norwegian legislation. Professional secrecy is also covered by the Bar association's ethical rules, which also applies to In-House Counsels.

The client may waive counsel's duty of confidentiality. The duty of secrecy does not apply to information that is publicly known. The Bar Association's ethical rules are, however, stricter.

The rules on professional secrecy protect the client's right not to disclose information covered by the counsel's duty of confidentiality. Thus, both in civil and criminal proceedings the client may refuse to give evidence about information and advice exchanged between counsel and the client. Further, documents covered by professional secrecy are not subject to disclosure by the client in civil proceedings and may not be seized from the client by the police in criminal cases. In criminal cases, the police may seize documents and other evidence otherwise covered by the duty of confidentiality if it relates to communication between accomplices in the criminal case. This applies if the In-House Counsel is suspected of being accessory to the crime under investigation.

It should be noted that the protection against disclosure and seizure may not apply in competition cases where the EFTA Surveillance Authority has competence and is investigating the case. This remains, however, an unresolved issue in Norwegian caselaw.

In order to be covered by the duty of professional secrecy, the information must be entrusted to the in-house counsel in his or her capacity as an attorney. Especially for in-house lawyers complicated issues of law and facts regarding the distinction between work as the clients attorney and other tasks will often arise. Thus, careful filing of correspondence and clear description of tasks that should be covered by professional secrecy is needed. The functions of an attorney serving as a member of a Board of Directors will not be covered, and the same applies for e.g. assistance in pure money transactions and other functions not related to – as expressed by the Supreme Court – the actual function of an attorney.

The attorney's nationality does not matter. In a case where an in-house counsel of an US-corporation had prepared certain strategy documents in connection with a dispute, the Norwegian Supreme Court in 2000 held that sections containing legal considerations and evaluations of the litigation risk were to be considered "attorney-client privileged."

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In-House Counsel and the Attorney-Client Privilege

Paraguay

Prepared by Lex Mundi member firm [Peroni Sosa Tellechea Burt & Narvaja](#)

As a rule, professional secrecy is expected of attorneys in their relationship with clients, and protected by law. There is not any distinction whether the attorney is part of an organization acting within or an independent professional giving advice to the corporation. The Attorney-client privilege protects from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve.

Documents and communications belonging to private persons and institutions are protected from disclosure, seizure or violation, under article 36 of the Paraguayan Constitution; provided that in specific cases, determined by law, a court may order the examination, reproduction, interception or seizure of documents if such are determined to be indispensable for the clarification of judicial matters.

The norm is applied by article 141, 142, 143, 144, 145 and 146 of the Paraguayan Penal Code. Specifically, in Article 147, the Code penalizes the attorney for revealing the secrets of a client that the attorney has learned in a professional capacity, defined as any event, data or information of restricted access that if divulged to third parties may affect legitimate interests of the client. Officers of a corporation may withhold documents pertaining to professional advice received from its attorneys. We believe that the court will exonerate such non-production. There are no cases in Paraguay where this issue has been adjudicated.

The Code of Civil Procedure exonerates that attorney from revelation of information and documents received or given in a professional capacity.

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In-House Counsel and the Attorney-Client Privilege

Peru

Prepared by Lex Mundi member firm Estudio Olaechea

"Under Peruvian law, attorney-client confidentiality is protected by the Code of Ethics issued by the Peruvian Bar Association. These rules are directed towards any attorney representing a client and no distinction is made as to whether he/she is acting as in-house counsel or not. By extension, any of these rules would also apply to any in-house counsel as well. Moreover, it is advisable that in-house counsel executes confidentiality agreements with the employer whereby the terms are expressly defined to avoid misunderstandings.

Article 10 of The Code of Ethics establishes that attorneys have as obligation and right to keep professional secret. The attorney has this obligation before his/her clients and will be in force even though he/she is no longer rendering legal services. The attorney also has the right to not reveal any confidentiality. Even if the attorney is called to serve as witness, he/she may attend the meeting with independent criteria and decide whether he/she answers any question that may violate the professional secret or expose him/her to do so.

Likewise, article 11 of The Code of Ethics provides that the attorney's obligation to keep professional secret also includes any confidences made to him/her by any third party, by means of his/her condition as attorney and the ones resulting from conversations to perform a transaction that did not succeed. The secret also covers any confidences made by his/her colleagues.

Article 12 of the Code of Ethics establishes that the attorney that is subject of accusation by his/her client or by other attorney may reveal the professional secret that the accused or third party has trusted to him/her, if this revelation favors his/her defense. Moreover, if the client informs his/her attorney of the intention to commit a crime, such confidence is not protected by the professional secret. Therefore, the attorney must make the necessary revelations to prevent an act of crime or to protect persons in danger.

Article 14 of the Code of Ethics rules that the attorney may not make public any pendant lawsuit, but only to rectify when justice and moral requires it.

The Criminal Code, in its article 165 has contemplated that any violation of the professional secret without the consent of the interested party is subject to prison for at most 2 years and 60-120 days-fine."

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In-House Counsel and the Attorney-Client Privilege

Philippines

Prepared by Lex Mundi member firm Romulo Mabanta Buenaventura Sayoc & de los Angeles

It is the duty of a lawyer to maintain inviolate the confidence and to preserve the secrets of his client.⁴² Rules on confidential communication between an attorney and his client apply to communications between in-house counsel and the officers, directors or employees of the companies they serve. An in-house counsel is employed as legal adviser for the purpose of obtaining from him legal advice and opinion concerning the corporation's rights and obligations relating to the subject matter of the communication.⁴³ Further, in the course of his work, an in-house counsel is engaged in the practice of law. He handles the legal affairs of a corporation and renders services requiring the knowledge and the application of legal principles and techniques to serve the interests of another. He gives advice on matters connected with the law and the legal implications involved in business issues.⁴⁴ Hence, communications between the officers, directors and employees of a corporation and its in-house counsel for the purpose of seeking legal advice or requiring the application of legal knowledge are privileged and confidential.

A lawyer (including in-house counsel) may reveal the confidence or secrets of his client in the following instances:

- When it is authorized by the client after acquainting him of the consequences of the disclosure.
- When it is required by law.
- When it is necessary to collect his fees or to defend himself, his employees or associates or by judicial action.⁴⁵
- When the communication by the client to his lawyer was made for the purpose of its communication to a third person.⁴⁶
- When the communication was made by a client to his lawyer in contemplation of a crime he intends to commit.⁴⁷
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⁴² Section 20(e), Rule 138 of the Rules of Court; Canon 21 of the Code of Professional Responsibility.

⁴³ Francisco, *The Revised Rules of Court in the Philippines, Evidence*, Vol. VII, Part I, 1997 ed., pp. 272-273.

⁴⁴ *Cayetano vs. Monsod*, 201 SCRA 210, 212-219.

⁴⁵ Rule 21.01 of the Code of Professional Responsibility.

⁴⁶ *Uy Chico vs. Union Life Assurance Society, Ltd.*, 29 Phil. 163, 165.

⁴⁷ *People vs. Sandiganbayan*, 275 SCRA 505, 519.

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In-House Counsel and the Attorney-Client Privilege

Poland

Prepared by Lex Mundi member firm Wardyński & Partners

Summary

In Poland, the concept of attorney-client privilege applies to three professions: advocate, legal adviser, and notary public. Their activities are regulated in three separate acts: the Bar Act, the Legal Advisers Act, and Notarial Services Act.

Each statute regulates the duty to keep privileged information confidential, the values covered by attorney-client privilege, the time during which an attorney is bound to maintain such information confidential, as well as the extent of confidentiality and the duties of certain parties entitled to gain access to privileged information, together with disciplinary liability.

The standards regulating these obligations are contained in statutes as well as in Ethical Codes and are not constitutional in nature, but are strongly supported by the Bar.

In – House Counsel

Although none of the said Acts specifically regulates an attorney's obligations acting as in-house counsel, general principles associated with attorney-client privilege apply in practice.

In particular, special attention must be paid to the situation when in-house counsel has an employment contract. According to the European Court of Justice case law (*AM & S Europe v. Commission and Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*)⁴⁸ under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks affecting the commercial policy of the company he works for. Attorneys covered by "European privilege"⁴⁹ must be "independent" in the sense that they are not bound to their clients by an employment relationship. The ECJ considers that the legal situation in European Union Member States has not evolved since these judgments and that there is no justification for a change in case-law and for in-house lawyers to benefit from attorney-client privilege.

Thereof the legal assistance provided by in-house counsels under the employment contract is not protected by the attorney-client privilege (according to Polish law legal advisers can act under an employment contract unlike advocates).

In practice, some attorneys who act as in-house counsel are law graduates, which means that they are not qualified lawyers and that the professional secrecy and the attorney-client privilege does not apply.

Scope of the Attorney-Client Privilege

A defendant's/suspect's defence counsel may not be questioned as to circumstances that he discovered when providing legal advice or conducting a case. Defence counsel privilege constitutes a qualified type of attorney-client privilege. Such privilege currently only applies to advocates who are permitted to act as defence counsel pursuant to Polish law. From 1 July 2015, legal advisers will be able to act as defence counsel.

⁴⁸ Judgement of the European Court of Justice dated 14 September 2010, C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*.

⁴⁹ According to the European Court of Justice Member States of the EU need to share the common understanding of the Attorney-Client Privilege, which is the European privilege.

Attorney-client privilege relates **to facts** that an advocate or legal adviser has discovered when providing legal advice, not only explicitly expressed by a client but also all confidential information obtained by an advocate or legal adviser while executing his professional duties.

Some information concerning money laundering and financing terrorism are excluded from attorney-client privilege.

It is only possible to question an advocate (not acting as defence counsel), a legal adviser or notary public about facts that are subject to attorney-client privilege with a Court's consent. In granting this consent the Court is guided by two prerequisites: 'the good' of the justice system and exhaustion of other possible sources of evidence.

A Court ruling waiving privilege is subject to appeal.

Supreme Court decisions stress that this kind of evidence should in fact be used as a final resort and in moderation.

Attorney-client privilege is not subject to the statute of limitations. The attorney cannot be released from this obligation by his client, who has revealed certain facts to his attorney (defence lawyer).

Recent court decisions emphasise that special caution must be exercised when passing privileged information via electronic and similar media.

The law stipulates serious sanctions for unlawfully disclosing privileged information: disciplinary liability, civil liability for breach of contract with the client and criminal liability based on Article 266 of the Criminal Code.

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In-House Counsel and the Attorney-Client Privilege

Portugal

Prepared by Lex Mundi member firm [Morais Leitão, Galvão Teles, Soares da Silva & Associados](#)

Pursuant to article 87^o of the *Estatuto da Ordem dos Advogados* (EAO, which establishes the professional ethics rules for lawyers), the Portuguese legal system binds lawyers to the attorney-client privilege. The attorney-client privilege has always been considered a sign of the dignity of the Portuguese legal profession and is one of the most delicate issues in the area of attorney professional ethics. The essential rule is that the lawyer is bound by the attorney-client privilege, which means absolute confidentiality.

Based on article 87 of the EOA, any lawyer exercising his professional duties is covered by the attorney-client privilege in everything relating to the facts concerned with professional matters that are disclosed by the client to him.

In this specific situation, the client is the Company itself. Its directors, officers or employees represent the company's will and are the company's mode of communication with the lawyer. As a consequence, all the facts that officers, directors or employees disclose to the company's in-house attorney during the exercise of his professional duties are under the protection of article 87.^o EOA.

It is important to analyze the expression "during the exercise of his professional duties", because it has special relevance in this case.

It is necessary to distinguish, on one hand, the company and the individuals that represent its will (officers, directors and employees) and, on the other hand, the attorneys within and outside the context of the exercise of their professional duties.

Thus, the client-attorney privilege covers:

- all the facts that the attorney has gained knowledge of through officers, directors or employees of the company (while representing the will of the company), for the purpose of professional matters and relative to carrying out legal proceedings;
- all the facts that the attorney has knowledge of, through the individuals that occupy the functions of officers, directors or employees of the company (even if it is not a clear situation of the professional exercise of an act in the performance of his duties), as long as they are connected with the legal services provided by the attorney to that company;
- all documents and other information connected with the protected information of which the attorney has knowledge.

There are limitations on the protection given by the article 87^o EOA. The attorneys of a company can request a waiver of the attorney-client privilege as long as all the following requirements are met:

- Previous authorization of the President of *the Conselho Distrital* with appeal to the *Bastonário* (President) of the Bar Association
- Allegation and proof that waiver of the attorney-client privilege is absolutely necessary for the defense of the personal dignity, rights and legal interests of the attorney, his client, or the clients' representatives (included the situation of requesting the lawyer to appear in court to make a statement about the protected facts without any discharge request on his part).

The Portuguese legal system is based on the principle of freedom of contract. Within the limits of the law the parties are free (i) to contract with no restrictions (freedom to contract), (ii) to select the type of business that best meets their interests (freedom of selection of the type of business), and (iii) to stipulate the clauses that they consider useful for their purposes (freedom of stipulation).

Therefore, based on these underlying principles of our system, nothing impedes the execution of a contract that guarantees the protection of information not covered by the client-attorney privilege.

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In-House Counsel and the Attorney-Client Privilege

Romania

Prepared by Lex Mundi member firm Nestor Nestor Diculescu Kingston Petersen

1. Generally applicable rules

Under Law no. 51/1995 regarding the organization and performance of lawyer's profession in Romania and the Statute of the profession, only a member of the Bar can perform lawyer's activities.

In the exercise of the profession, the Romanian lawyer is independent and shall only obey to the law, the statute and the ethics of the profession.

The scope of the legal profession is the defense of the rights, freedoms and legal interests of the clients. The attorney-client relationship is based, according to the law, on honesty, probity, correctness, sincerity, loyalty and confidentiality.

The attorney-client privilege is provided under Law no. 51/1995 and the Statute of the profession as a matter of public order. According thereto, a lawyer shall not reveal information relating to the assistance or representation of a client to any person and under any circumstance. No waiver of the attorney's obligation may be granted either by the client or by any other person or authority. The only exception provided by the law is the case when the attorney is under criminal or disciplinary investigation, or when there is a challenge with respect to the agreed fees, and only to the extent the disclosure is needed for the attorney's defense.

The attorney-client privilege does not forbid the attorney from using the information regarding a former client, to the extent this has already become public.

The confidentiality obligation of the lawyer is absolute and is not limited in time. Such obligation covers all the activities of the lawyer, his associates, agents, employees and other lawyers.

Any professional communication or correspondence between attorneys, between the attorney and the client, or between the attorney and the profession's management bodies, is confidential, irrespective of the mean of communication.

The correspondence and the information transmitted between the attorneys or between the attorney and the client, irrespective of the type of support / media, may not be used as evidence and may not be void of the confidential character.

With a view to protect the professional secrecy, the professional documents and works preserved by the lawyer or in his/her professional office are inviolable. The corporeal investigation or the research at the lawyer's domicile or professional place may be performed only by the prosecutor on the basis of the special mandate issued in accordance with the law. The professional communications of the lawyer as well as his professional correspondence may not be listened to or registered under any circumstances, except under the special conditions and with the special procedures provided by the law.

The contact between the lawyer and his client may not be interfered with or controlled either directly or indirectly by any state authority. If the client is detained, the prison administration is compelled to ensure the observance of the above rights.

2. Rules applicable to in-house counsels

The in-house counsel or juridical counselors' professional activity (whose profession is regulated by Law no. 514/2003 and the Statute enacted in March 2004), is protected to the same extent as the lawyers' profession as regards the attorney-client privilege.

3. Specific rules in the field of competition

Specific rules apply in relation to communications between lawyer and client in the field of competition. Under the Romanian Competition Law no. 21/1996, communications between a lawyer and his client are protected from disclosure by legal professional privilege and thus are confidential, provided that two cumulative conditions are met.

First, the communications must be made for the exclusive purpose and interest of the client's rights of defense in the proceedings. Second, the communications must emanate from an independent lawyer (i.e., external lawyers, not bound to the client by an employment relationship). As an exception to the Competition Council's power of investigation and examination of documents, such communication cannot be seized or used as evidence in its proceedings.

With regard to the first condition, the protection covers the following two categories of documents:

(a) communications between the undertaking and its lawyer, accomplished within and for the exclusive purpose of exercising the rights of defense (either before or after the initiation of the investigation)

and

(b) preparatory documents drafted by the undertaking for the exclusive purpose of exercising the rights of defense.

With regard to the second condition, the protection of legal professional privilege does not extend to advice from in-house lawyers (so that communications with in-house lawyers can be requested and seized by the Competition Council).

However, in cases where the advice from the external lawyer is reproduced in an internal document distributed within the company, this shall be protected by legal professional privilege, provided that this document merely summarizes the content of the external lawyer's advice

If prompt clarification of whether legal professional privilege applies is not possible during proceedings (e.g., such as a dawn raid), and the competition inspectors wish to take a copy of the respective document, there is a special procedure to be followed (finalized by the decision of the Competition Council's President, which can be challenged in court).

4. Exception from the attorney-client privilege rules

It should be noted however that under specific legislation regarding the money laundering and fight against terrorism, a lawyer may be required to disclose information about his/her clients identity and transactions, as the professional secrecy does not produce effects towards the State competent investigation authorities.

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In-House Counsel and the Attorney-Client Privilege

Slovak Republic

Prepared by Lex Mundi member firm **Čechová & Partners**

The express privilege of confidentiality is provided by the Slovak law only in respect to the attorney-client relationship. There is an exception to the privilege of confidentiality under Slovak Anti-Money Laundering Act, which recognizes attorneys as obliged persons imposing on them certain notification duties towards competent authorities in relation to certain unusual business transactions – an attorney is obliged to notify such a transaction subject to few exemptions with respect to information acquired from the client during or in relation to: (i) preparation of legal analysis; (ii) defense of the client in criminal proceedings; (iii) representation of the client at the court proceedings (iv) legal advice in relation to matters mentioned in (ii) and (iii). Any privilege in respect to the in-house counsel should be derived from the regulation of business secrets or employment relationships. Generally, the consequences of the disclosure of internal communication depend upon other aspects of the breach, in particular the nature of disclosed information, its importance, damages caused by the disclosure, etc.

Based on the Labor Code, the employee is obliged to follow the rules relating to the performance of his work (working order) and conduct his work in accordance with instructions of the employer. The employee shall be liable for damage caused to employer by the breach of the employee's obligation in performing the work tasks or in direct connections therewith, as well as for damage caused by the intentional actions contrary to the good manner. The employer is obliged to prove the employee's intention. Disclosure of internal communication might be a ground for termination of the employment contract by the employer (either by notice or by an immediate termination, depending on the intensity of the breach). It is recommended for the employer to specifically stipulate such confidentiality amongst the obligations of the employees in internal rules (work order), including determination of obligations, breach of which would be deemed a gross violation of work discipline (and thus a ground for immediate termination). In case of challenge of validity of the termination the court will consider intensity of such breach independently.

In respect to the external protection, such communication might be also protected by provisions of the Commercial Code regulating business secrets, defined as any information of business, production or technical nature related to the enterprise, having real or potential value, not being normally available at the respective commercial circles, provided that the entrepreneur intends to keep it protected and secures such protection by appropriate manner. Entrepreneur, whose business secrecy was impaired or endangered, may request the perpetrator to abstain from his conduct, to compensate damage and ask for an adequate satisfaction, which may be granted also in cash. Intentional disclosure of business secrets could be treated also as a criminal action, which could be punished by an imprisonment or ban of activity.

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In-House Counsel and the Attorney-Client Privilege

South Africa

Prepared by Lex Mundi member firm **Bowman Gilfillan**

Legal professional privilege can be claimed in respect of confidential communications between corporations and their salaried in-house legal advisers when they amount to the equivalent of an independent legal adviser's confidential advice. The requirements for claiming legal professional privilege are that (a) the legal adviser must be acting in a professional capacity; (b) the communication, whether written or oral, must be made in confidence; (c) the legal adviser must be approached for the purpose of delivering legal advice; and (d) the communication may not be used for the purpose of the commission of a crime or fraud.

To determine if a communication is confidential it will be decided whether or not it was intended to be disclosed to a third party. Confidentiality will be inferred but may be rebutted. The communication must be made with the intention of obtaining legal advice; there is no need for the legal advice to be concerned with actual or contemplated litigation.

No privilege will attach to a communication used in the commission of a crime or fraud even if the legal advisor had no knowledge of the purpose for which his/her advice was sought.

Our courts have not ruled on whether privilege may only be claimed where the in-house legal advisor holds the necessary qualifications for admission to private practice, and this remains an open question.

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In-House Counsel and the Attorney-Client Privilege

Spain

Prepared by Lex Mundi member firm Uría Menéndez

The attorney-client relationship and the documents and communications exchanged between the parties thereto are protected in Spain by the general rule of professional confidentiality, contained in article 542.3 of Basic Law 6/1985 of 1 July on the Judiciary (“the Judiciary Act”). This article implements the general rule of professional secrecy established in article 24.2 of the Spanish Constitution and is further developed by Royal Decree 658/2001 of 22 June on the Spanish Legal Profession Rules (articles 32, 34 and 42) and the Bar Code of Ethics (article 5). However, in the Spanish legal system there are no express regulations governing “privileged” or “without prejudice” documents or communications, as may be the case in common law or other jurisdictions.

The general rule is that any oral or written communications, documents or correspondence exchanged between a lawyer and his/her client, opposing parties and other attorneys within the context of an attorney-client relationship must be kept confidential. Any breach of this duty could lead to the attorney being held criminally liable (article 199 of the Spanish Criminal Code) and to sanctions being imposed by the Bar Association. However, in addition to this duty, the attorney is also afforded a privilege to maintain such confidentiality.

As regards internal or in-house counsels (i.e. lawyers under a labor relationship governed by the corresponding written labor contract), they enjoy the same rights and obligations as external counsels to carry out their professional duties according to the general principles of freedom and independence. Accordingly, although there are no specific provisions in this regard, it should be understood that in-house counsels have the same duty of confidentiality and secrecy. In fact, article 542.3 of the Judiciary Act establishes that all attorneys must keep confidential all information that they have knowledge of as a result of “carrying out their professional activity and thus cannot be required to testify in a court of law with regard to such information”.

Notwithstanding that under Spanish law in-house as well as external counsel are entitled to attorney-client privilege, it should be pointed out that under European Union law the attorney-client privilege is not extended to in-house counsels in situations such as “dawn raids” carried out by authorities seeking to obtain evidence of anti-trust violations.

In addition to that, there are some exceptions under Spanish law to the attorney-client privilege, applicable to all types of lawyers. As a consequence of Law 10/2010, of 28 April, on Prevention of Money Laundering and Financing of Terrorism, which implements Directive 2005/60/CEE of the European Parliament and of the Council, lawyers must examine any transaction that they suspect may involve money laundering or the financing of terrorist activities. They must also abstain from participating in any such transactions. To this end, law firms must implement an internal control procedure and adopt measures to ensure that all their employees are aware of and comply with the provisions of the Spanish legislation on the prevention of money laundering and the financing of terrorist activities. The Spanish regulations also establish the legal duty to report suspicious transactions to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (known by its Spanish abbreviation SEPBLAC). In-house counsels, as lawyers, must also abide by these obligations.

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In-House Counsel and the Attorney-Client Privilege

Sri Lanka

Prepared by Lex Mundi member firm

THE APPLICABLE LAW RELATING TO ATTORNEY-CLIENT PRIVILEGE IN SRI LANKA

Under the Sri Lankan jurisdiction, communications between Attorneys-at-Law and their clients (“professional communications”) are privileged, subject to certain limitations set out in the law.

In terms of the Supreme Court (Conduct and Etiquette for Attorneys-at-Law) Rules of Sri Lanka, an Attorney-at-Law has a duty to keep in strict confidence all information whether oral or documentary, acquired by him from or on behalf of his client, in any matter in respect of the business and affairs of his client, (“Confidential Information”).

This duty lies not only during the existence of his professional relationship with a client but indefinitely thereafter even after an Attorney-at-Law has ceased to act for his client and after the death of a client as well.

Further, the duty on the part of Attorneys-at-Law to refrain from disclosing Confidential Information extends to any partner or associate of the Attorney-at-Law in the profession and to any employee of the Attorney-at-Law. In fact, if an employee becomes aware of such information in the normal course of his, work, it would be the duty of the said Attorney-at-Law in such circumstance, to take all reasonable steps to prevent the disclosure of the information by such persons even after the termination of the employer-employee relationship with such persons.

The Evidence Ordinance of Sri Lanka also recognizes professional communications as privileged. In terms thereof, no Attorney-at-Law is permitted, unless with his client’s express consent, to disclose:

- a) any communication made to him in the course of and for the purpose of his employment as such attorney-at-law; or
- b) the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his professional employment; or
- c) any advice given by him to his client in the course of and for the purpose of his employment.

Such limitation shall also apply to interpreters and the clerks or servants of Attorneys-at-law and notaries. In respect of limitations to the aforesaid privilege on Confidential Information, the Supreme Court Rules specify that subject to any written law, an Attorney-at-Law may disclose Confidential Information:

- a) if it is expressly or impliedly authorized by his client in writing or in the event of the death of his client, by the legal representative of the client (provided however, he should be careful to disclose to disclose only Confidential Information as is necessary in the circumstances and no more);
- b) in order to defend himself, his associates or employees, against any allegation of misconduct or malpractice made by his client;
- c) to prevent the commission of a crime, fraud or illegal act;
- d) in the case of joint retainer or where the client has a joint retainer or others having a joint interest with the client, as the case may be.

Further, the Evidence Ordinance stipulates that the privilege relating to Confidential Information shall not be applicable for:

- a) any communication made in furtherance of any illegal purpose;
- b) any fact observed by such Attorney-at-Law in the course of his employment showing that any crime or fraud has been committed since the commencement of his employment.

In practice, it is recognized that there are exceptional circumstances in which professional communications may be disclosed by an Attorney-at-Law, such as:

- a) when disclosure is required by law or by order of a court of a competent jurisdiction, provided that only such information as is required is divulged;
- b) the Attorney's professional interests require it;
- c) the circumstances give rise to a public duty of disclosure; and / or
- d) where the information becomes public knowledge

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In-House Counsel and the Attorney-Client Privilege

Sweden

Prepared by Lex Mundi member firm Advokatfirman Vinge KB

Communications between in-house counsel and officers, directors, and employees of the company they serve are not protected from disclosure by attorney-client privilege according to Swedish law. However, communications might be protected under Swedish law if they contain information which concerns trade secrets or can be considered as personal notes (unless extraordinary reasons exist for their production). An alternative method of protecting the information might be to use outside counsel, provided they are members of the Swedish Bar Association, “advokat”, or regarding patent matters, authorized patent agents, “auktoriserat patentombud”.

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In-House Counsel and the Attorney-Client Privilege

Switzerland

Prepared by Lex Mundi member firm Pestalozzi

According to the traditional understanding in Switzerland, the attorney-client privilege is only available to external counsel, but not to in-house counsel admitted to the bar. The main argument for this differentiation is that in-house counsel is not independent from his or her employer. However, information of a confidential nature entrusted to in-house counsel may be protected by principles of general business secrecy or special business secrecy, such as bank and securities dealers' secret. Critics argue that the differentiation between external counsel and in-house counsel is not justified because the diligent in-house counsel must meet the same professional standards when representing his or her own employer. In addition, a company's director or employee confiding in the in-house counsel should also have the assurance that his or her communication be privileged. Therefore, many legal scholars have a more modern view of the attorney-client privilege and advocate that communications with in-house counsel should also be covered and protected by the privilege.

Despite these sound and reasonable arguments for a protection of the communication with in-house counsel, it is still the prevailing opinion in Switzerland that in-house counsel does not enjoy the attorney-client privilege. Therefore, Swiss State courts do not exclude from evidence the production of documents drafted by in-house counsel or the testimony of in-house counsel. It is worth noting that in May 2013, several procedural provisions on the lawyer's secrecy were amended. However, this recent amendment did not extend the attorney-client privilege to in-house counsel.

The question whether attorneys admitted to the bar working for MDPs can call upon the attorney-client privilege is unsettled. It is the prevailing view that, while the MDPs as such have a contractual confidentiality obligation, the attorneys employed by them cannot call upon the attorney-client privilege and cannot refuse to testify in court, unless the mandate was not entrusted to the MDP, but to an attorney ad personam.

Lastly, attorneys in private practice or employed by MDPs who act as directors in Swiss or foreign corporations cannot call upon the attorney-client privilege for their directorship activities.

Companies should think about alternative methods of protecting confidential and sensitive information. While there is no general recipe against the non-existence of the privilege for in-house counsel, some precautions may prove helpful:

- If a company, in preparation for litigation, has to gather sensitive information from its employees, an external lawyer should conduct the investigation and, in particular, the interviews with the company's directors and officers.
- An external lawyer should draft memoranda assessing the company's chances and risks related to a pending or threatening case.
- International contracts usually contain an arbitration clause. Very often, the arbitral tribunal follows the IBA Rules on the Taking of Evidence in International Arbitration (Adopted by the IBA Council on May 29, 2010, hereinafter referred to as "the Rules on Taking Evidence") or takes these rules as a general guideline. Article 9 of the Rules on Taking Evidence excludes from evidence or production any document, statement, oral testimony or inspection for reasons of legal impediment or privilege under legal or ethical rules determined by the arbitral tribunal to be applicable. If the parties stipulated in the arbitration clause that the arbitral tribunal should

provide the full protection of the attorney-client privilege to in-house counsel, the arbitral tribunal is likely to respect the parties' agreement on the scope and the availability of the privilege.

At first sight, some of the suggested steps may seem to be complicated and overly precautionary. However, as long as the protection of the attorney-client privilege is not enlarged by Swiss legislation and case law, and as long as the privilege is not available to in-house counsel, it is wise for a company to take the adequate precautionary measures. In this context, it is noteworthy that in 2010, the Federal Council abandoned a project to work out a new law which would have granted the attorney-client privilege also to in-house counsel. As a consequence, it seems unlikely that the legislation will change in this respect in the near future.

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In-House Counsel and the Attorney-Client Privilege

Thailand

Prepared by Lex Mundi member firm Tilleke & Gibbins

Under the Lawyers Act B.E. 2528 (A.D. 1985), the Lawyers Council of Thailand ("LCT") is authorized to issue Regulations regarding attorney ethics. Under Clause 11 of the Regulations on Attorney Ethics B.E. 2529 (A.D. 1986) ("Code of Ethics"), it is a breach of attorney ethics to reveal a client's confidential information obtained while representing the client, unless the client grants permission or it is compelled by a court order. Under Section 323 of the Penal Code, it is also a criminal offence (punishable by a small fine and/or up to six months imprisonment) for legal professionals and their staff to disclose client information which could cause injury to the client.

Any licensed, in-house counsel must also comply with the above Regulations and statute. Communications regarding a company between its licensed in-house counsel and its directors, officers or employees, must be kept confidential by the attorney unless the company or the Court grants permission.

There are some law school graduates providing legal advice in Thailand without an attorney license. Strictly speaking, these persons are not governed by the Lawyers Act or the Law Society regulations. Since these legal advisers do not need to register with the Lawyers Council of Thailand, they are not required to follow the Code of Ethics. However, they are still prohibited from disclosing clients' confidential information by virtue of Section 323 of the Penal Code.

The Thai legal system does not generally provide for court-supervised pre-trial discovery, and for the most part, the parties to Thai litigation are expected to investigate and uncover supporting evidence without judicial assistance. However, once proceedings commence, a party may petition the Court to issue a subpoena for documents or a witness.

Any person who is subpoenaed to disclose attorney-client confidential information or documents may object and refuse under the attorney-client privilege. In that event, the Court is empowered to delve further into the matter to determine whether the objection is well grounded. If the Court concludes that the privilege is not applicable, it may issue an order to compel disclosure.

The Thai Courts will not abide "fishing expeditions." A party requesting the Court to subpoena documents or information usually must identify those items with some specificity. Consequently, if the attorney and his client have properly maintained confidentiality, it is unlikely that the requesting party will be able to meet this burden.

In summary, Thai law protects the confidentiality of attorney-client communications, including communications involving licensed in-house counsel. However, since the Courts are reluctant to subpoena unspecified documents or other unspecified evidence, the concept of protecting documents and information by declaring them attorney-client privileged is probably not as pertinent at present in Thai litigation as it might be elsewhere.

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In-House Counsel and the Attorney-Client Privilege

Trinidad & Tobago

Prepared by Lex Mundi member firm Hamel-Smith

Under the law of Trinidad & Tobago, an in-house counsel is treated in the same way as an external counsel. Communications between an in-house Attorney and his client will qualify for privilege whether these are written or oral.

The general rule is that a client cannot be compelled (either by disclosure, at a trial or otherwise) to disclose any privileged communications. However, the privilege is that of the client who may, either expressly or by its conduct waive any claim for privilege.

Communications are privileged where the information is confidential and it must remain confidential in order attract privilege. Typically, communications which concern the rights, liabilities, obligations and remedies of the client are preferable to the attorney-client relationship. Additionally, communications between an attorney and a third party will be protected from disclosure as privileged communications (litigation privilege) where:

- a) such communications were made in the contemplation of litigation; and
- b) the sole purpose or predominant purpose of such communication was for use by an Attorney in order to advise or represent his client in relation to litigation that is contemplated.

Although there are exceptions which protect these categories of communications as being privileged, these exceptions are fairly narrow such as where the (otherwise privileged) communications were made in furtherance of a fraud or crime.

In relation to the principle of privilege, there are important differences for in-house counsel which arise primarily from the fact that in-house attorneys usually operate, and relate to their clients, in ways that are different to how external counsel operate and relate to their clients.

Typically, an in-house attorney has two roles, acting as a legal advisor and also providing and commercial advice to the Board of Directors. Where in relation to any particular matter, an in-house attorney acting purely as a member of the management team, advises on commercial matters, which have little (if anything) to do with the practice of law, his advice will not be privileged.

In many situations, the lines between an-house counsel acting as a legal advisor as compared to operating in a broader capacity as business advisor, can become blurred. Since communications involving an in-house attorney will not attract the protection unless they are preferable to the attorney-client relationship or litigation privilege, it can frequently become difficult to know which, if any, of those communications are privileged. These uncertainties can:

- Encourage other parties to mount a challenge to a privilege claim in circumstances where they would not do so if external counsel were involved;
- Lead the Court to be more stringent in its scrutiny of a privilege claim than it would be if external counsel are involved; and
- Increase the risk that the privilege might be inadvertently waived.

To maximize the chances that communications involving an in-house attorney will attract and retain the protection of privilege, it is important to keep clear lines between communications with an in-house

attorney in his capacity as a legal advisor and those in which he or she is involved because of his or her broader role.

For example, care should be taken to properly define the internal client within the company, to ensure that legal privilege applies to those communications with persons who comprise the client. Secondly, documents which deal with matters related to the rights, liabilities, obligations and remedies of the company should be kept separately from documents which reflect matters where the in-house attorney is playing a broader role as a member of the management team. Even where this is done, it is useful to have a document which carries legal privilege to clearly reflect the basis on which it does so, and have it appropriately labeled as a privileged document, and restrict its circulation as far as possible. It is also worth taking into account, that advice from non-legal professionals (such as tax advisors) may not attract privilege and merits and demerits of obtaining this third party advice should be considered, especially in a litigious context.

In addition to taking these practical precautions, in circumstances where it may be very important to maintain the privilege (such as where the matter is sensitive or important) it is usually best to involve external Counsel at an early stage. By doing so, one can mitigate the risks associated with the blurring of the lines between the different roles that the in-house attorney may be called upon to play and thus:

- Maximize the scope of the privilege available;
- Reduce the chances of a successful challenge to any claim of privilege which is asserted; and
- Help avoid any inadvertent waiver of the privilege.

In Trinidad & Tobago, attorneys are required to annually obtain a practicing certificate, by paying the requisite subscription. If an in-house attorney does not obtain a current practicing certificate, it is arguable that he or she cannot lawfully practice as an attorney and that those attorney-client communications may be incapable of attracting the protection of privilege. Each in-house attorney simply needs to ensure that he or she maintains a current practicing certificate.

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In-House Counsel and the Attorney-Client Privilege

Turkey

Prepared by Lex Mundi member firm Pekin & Pekin

Under the laws of the Republic of Turkey, communications between an in-house counsel and the officers, directors, or employees of the company they serve are not treated any differently than communications between an attorney and his or her client. Communications between an attorney and his or her clients are privileged to the extent that they cannot be disclosed by the attorney, but are not privileged to the extent that such communications are deemed not to be privileged evidence before a court of law.

Article 36 of the Law Governing the Legal Profession (Law No. 1136) indicates that information an attorney obtains from a client in the course of the attorney's practice is deemed confidential and enjoys a privilege of non-disclosure by the attorney.

Confidential information within the scope of the attorney-client privilege may be disclosed by an attorney only if the client revokes such privilege or if a law requires such information to be disclosed to government bodies and offices specifically identified in such law. As such communications include legal opinions of the attorney; such information is deemed secondary evidence before a court of law in the event its disclosure by the attorney is permissible. Furthermore, Article 36 of the said Law provides to attorneys a right to refuse to testify with regard to such information before a court of law even if the client has revoked the confidentiality privilege otherwise granted to attorney-client communications and such refusal to testify does not subject the attorney to any legal or penal repercussions.

The attorney-client privilege with respect to the practice of in-house counsel of banks are additionally governed by the relevant provisions of the Banking Law (Law No. 5411) (*published in the Official Gazette dated November 01, 2005 and numbered 25983*) (the "**BL**") which provides confidentiality obligation for the Bank's personnel. Accordingly, the sub-section 3 of Article 73 of the BL sets forth that those who has obtained confidential information with respect to the banks and their clients due to their capacity and their duty cannot disclose such confidential information to any third parties other than the authorities expressly stipulated under the BL and that such confidentiality obligation shall continue after the termination of the office of the relevant individual. Pursuant to Article 159 of the BL, those who violates the confidentiality obligation under Article 73, shall be sanctioned with imprisonment for one to three years and judicial fine not to more than two thousand days. In addition, Article 159 also stipulates that in the event such persons reveal confidential information about the relevant bank in order to gain any advantage for either themselves or for third persons, the sanction shall be increased at the ratio of 1/6 and depending on the severity of their actions in this respect, such persons may be temporarily or permanently exempted from working with entities within the scope of the BL.

On the other hand, and the attorney-client privilege with respect to the practice of in-house counsel of corporations are also governed by the relevant provisions of the Turkish Criminal Code (Law No. 5237) (*published in the Official Gazette dated October 12, 2004 and numbered 25611*) (the "**TCC**"). Pursuant to Article 239 of the TCC which regulates the violation of the confidentiality obligation as a crime, in case those, who has acquainted of information and documents which may be considered as commercial, banking or client secrets due to their capacity, duty, profession or art, discloses such information or documents to any unauthorized third party, those individuals shall be sanctioned with imprisonment for 1 to 3 years and judicial fine for not more than five thousand days upon a complaint.

In the event the violation of the confidentiality obligation under the BL is also punishable under other laws pursuant to Article 161 of the BL, the severest punishment under the relevant laws shall be applied.

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In-House Counsel and the Attorney-Client Privilege

Uruguay

Prepared by Lex Mundi member firm Guyer & Regules

In Uruguay, all the information received by an attorney from his/her clients is protected from disclosure by means of section 302 of our Criminal Code, which punishes with fines such disclosure when it occurs without just cause.

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In-House Counsel and the Attorney-Client Privilege

USA, Arizona

Prepared by Lex Mundi member firm Snell & Wilmer L.L.P.

Arizona expressly recognizes corporations as clients for purposes of the attorney-client privilege protection.⁵⁰ Communications made by or to in-house counsel are privileged if those communications are made for the purpose of either providing legal advice to the corporation or obtaining information in order to provide legal advice to the corporation.⁵¹ Arizona uses a functional approach to determine whether communications are protected between in-house counsel and other corporate employees.⁵² This approach focuses on the nature of the communication rather than the status of the communicator.⁵³ Therefore, all communications initiated by the employee, made in confidence to in-house counsel, and which directly seek legal advice are protected, regardless of the employee's position in the corporate hierarchy.⁵⁴

But where an investigation is initiated by the corporation and factual communications are made between in-house counsel and other corporate employees, the privilege does not apply to the communications unless they concern the employee's own conduct within the scope of his or her employment and the inquiry is made to assist in-house counsel in assessing or responding to the legal consequences of the employee's conduct for the corporation.⁵⁵ If the employee's conduct does not subject the corporation to potential liability, then the attorney-client privilege does not apply to communications initiated by in-house counsel because the employee can be characterized more as a witness than a client.⁵⁶

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⁵⁰ A.R.S. 12-2234(B).

⁵¹ *Id.*

⁵² *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993).

⁵³ *Id.*

⁵⁴ *Id.* at 503, 862 P.2d at 876.

⁵⁵ *Id.* at 506, 862 P.2d at 879.

⁵⁶ *Id.* at 507, 862 P.2d at 880.

In-House Counsel and the Attorney-Client Privilege

USA, California

Prepared by Lex Mundi member firm Morrison & Foerster LLP

In California state courts, the attorney-client privilege applies to communications between a client and in-house counsel in the same way that the privilege applies to such communications between a client and outside counsel. See *Bank of Am., N.A. v. Superior Court*, 212 Cal. App. 4th 1076, 1099 (2013). Similarly, the United States Court of Appeals for the Ninth Circuit (the federal appellate court with jurisdiction over California) has stated that federal law recognizes that the “attorney-client privilege will apply to confidential communications concerning legal matters made between a corporation and its house counsel. This principle has been followed with virtual unanimity by American courts.” See *U.S. v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996).

Notwithstanding the above principles, in-house counsel, unlike outside counsel are often asked to provide advice that is more business-oriented, rather than legal, in nature. Accordingly, while California recognizes that in-house counsel may serve as an attorney for purposes of the attorney-client privilege, the existence of the privilege depends on the nature and substance of the communication. The privilege applies to confidential communications seeking or providing legal advice. By contrast, in circumstances where a communication is for business purposes or where the business and legal portions of a communication are not clearly separable, the attorney-client privilege is inapplicable. See, e.g., *Chicago Title Ins. Co. v. Superior Court*, 174 Cal. App. 3d 1142, 1151 (1985) (“It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent”).

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In-House Counsel and the Attorney-Client Privilege

USA, Hawaii

Prepared by Lex Mundi member firm Case Lombardi & Petit

Rule 503 of the Hawaii Rules of Evidence establishes the attorney-client privilege under Hawaii law. However, Hawaii is one of eight states that enacted an evidence code rejecting the *Upjohn Co v. United States* standard for corporate attorney-client privilege. 449 U.S. 383, 389 (1981). Rule 503(a)(2) of the Hawaii Rules of Evidence limits the scope of this privilege in the corporate context. The limitation imposed by Rule 503(a)(2) echoes the control group test established by the court in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). In order to satisfy the more stringent control group test, in-house counsel should communicate with top-level management or those whose responsibilities clearly include making substantial decisions within the corporation. The attorney-client privilege likely will not attach to lower level employees with knowledge of relevant events. These employees will likely be viewed as witnesses rather than as corporate embodiments, and their communications with in-house counsel will not be safeguarded by the attorney-client privilege.

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In-House Counsel and the Attorney-Client Privilege

USA, Minnesota

Prepared by Lex Mundi member firm Briggs and Morgan, P.A.

Generally, the attorney-client privilege can be invoked when a professional attorney-client relationship exists and a confidential communication seeking or providing legal advice is made pursuant to the relationship.⁵⁷ Minnesota courts strictly construe the privilege since “[t]he attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts....”⁵⁸

In Minnesota, corporations and in-house counsel may assert the attorney-client privilege. The difficulty, however, is ascertaining what communications are protected by the attorney-client privilege because the Minnesota Supreme Court has neither embraced nor rejected the “control group” or “subject matter” test.⁵⁹ Rather, and due to courts’ strictly construing the privilege, communications to in-house counsel are analyzed on a case-by-case, document-by-document basis to determine if a communication is protected or privileged.⁶⁰

Because applicability of the attorney-client privilege to in-house counsel is highly dependent on the specific facts and circumstances involved and because Minnesota does not have a well-developed body of case law on the issue, assistance should be sought from Minnesota counsel in analyzing whether a communication between in-house counsel and an employee is privileged.

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⁵⁷ Minn. Stat. Ann. § 595.02 subd. 1(b).

⁵⁸ *Leer v. Chicago, Milwaukee, St. Paul Cty. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981), cert denied 455 U.S. 939 (1982).

⁵⁹ *Leer*, 62 N.W.2d at 309.

⁶⁰ *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 n.6 (Minn. 1979)

In-House Counsel and the Attorney-Client Privilege

USA, Montana

Prepared by Lex Mundi member firm Crowley Fleck PLLP

The attorney-client privilege in Montana is codified in Montana Code Annotated Section 26-1-803 which provides a privilege to communications between an attorney and client in the course of the attorney's professional employment. This statute has been found by the Montana Supreme Court on several occasions to protect communications between in-house counsel and the corporation.

In *Union Oil Co. of California v. District Court*, 160 Mont. 229, 503 P.2d 1008 (1972), the Montana Supreme Court held that the attorney-client privilege applies to legal memoranda between in-house counsel and members of the corporation's management where in-house counsel were acting solely in their capacity as attorneys, the memoranda were addressed only to members of the corporation's management, and the memoranda were intended to be confidential. The court cited with approval a ~~three~~ three-part test contained in *United States v. United Shoe Machinery Corporation*, 89 F.Supp. 357(D. Mass., 1950), which provided the privilege to documents meeting the following criteria:

- a) The exhibit was prepared by or for either independent counsel or the corporation's general counsel or one of his immediate subordinates; and
- b) As appears upon the face of the exhibit, the principal purpose for which the exhibit was prepared was to solicit or give an opinion on law or legal services or assistance in a legal proceeding; and
- c) The part of the exhibit sought to be protected consists of either (1) information which was secured from an officer or employee of the corporation and which was not disclosed in a public document or before a third person, or (2) an opinion based upon such information and not intended for disclosure to third persons.

In *Kuiper v. District Court of Eighth Judicial District*, 193 Mont. 452, 632 P.2d 694 (1981), the Montana Supreme Court confirmed that the attorney-client privilege relates to legal advice given by in-house counsel to the corporate employer, but held that communications not relating to the provision of legal advice were not privileged.

[The Montana Supreme Court has held that a former director of a closely held corporation who has brought claims against the corporation is allowed to discover communications between corporate counsel and other directors that occurred during the former director's tenure as a director. *Inter-Fluve v. District Court*, 2005 MT 103, § 37, 327 Mont. 14, 112 P.3d 258.](#)

In addition to the attorney-client privilege, the work product doctrine, contained in Montana Rules of Civil Procedure 26(b)(~~3~~)-(3), may protect the work product of in-house counsel prepared in anticipation of litigation.

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In-House Counsel and the Attorney-Client Privilege

USA, Missouri

Prepared by Lex Mundi member firm Armstrong Teasdale

Under Missouri law, the attorney-client privilege is to be construed broadly to promote its fundamental policy of encouraging uninhibited communication between the client and his or her attorney.⁶¹ Generally, communications will be held to be privileged if the following elements are present:

1. The information is transmitted by a voluntary act of disclosure,
2. between a client and his lawyer,
3. in confidence,
4. by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted.⁶²

All four of the above elements must be present for the privilege to apply.⁶³ If a question exists as to whether one of the four elements has been satisfied, the court will look to the surrounding circumstances to assist it in its determination.⁶⁴

Additionally, it is by now well established that the attorney-client privilege applies to corporations as well as to individuals.⁶⁵ Because a corporation can speak only through its agents, two tests have developed in the U.S. Federal Courts to determine whether a corporate employee's communications with the corporation's legal counsel are privileged.⁶⁶ The first test, formulated in *Philadelphia v. Westinghouse Elec. Corp.*, is referred to as the "control group" test and focuses upon the employee's position and his or her ability to take action upon the advice of the attorney on behalf of the corporation.⁶⁷ The second test, formulated in *Harper & Row Publishers, Inc. v. Decker*, focuses upon why an attorney was consulted, rather than with whom the attorney communicated.⁶⁸ The test extends the privilege to communications made by an employee if a communication is made at the direction of the employee's superior and concerns the performance of his or her duties.⁶⁹

Missouri law applies a modified version of the second, or *Harper & Row* test, to determine whether an employee's communications are privileged.⁷⁰ Under Missouri law, communications between a corporation's in-house counsel and its directors, officers and employees will be privileged if the following elements are present:

⁶¹ *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. 1978) (en banc).

⁶² *State v. Longo*, 789 S.W.2d 812, 815 (Mo. Ct. App. 1990).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. 1995) (en banc), *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 531 (Mo. Ct. App. 1991).

⁶⁶ *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1977).

⁶⁷ *Id.* (citing *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962)).

⁶⁸ *Id.* (citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971)).

⁶⁹ *Id.* at 609.

⁷⁰ *DeLaporte*, 812 S.W.2d at 531.

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.⁷¹

Under this modified *Harper & Row* test, the corporation has the burden of showing that the communication in issue meets all of the above requirements.⁷²

Finally, in Missouri, the attorney-client privilege is not without limitation.⁷³ While the purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients so that clients may obtain complete and accurate legal advice, the privilege protecting attorney-client communications does not outweigh society's interest in full disclosure when legal advice is sought for the purpose of furthering the client's on-going or future wrongdoing.⁷⁴ Thus, it is well established that the attorney-client privilege does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.⁷⁵ This limitation is commonly referred to as the "crime-fraud exception" to the attorney-client privilege.⁷⁶ In addition, the attorney-client privilege is waived when the client places the subject matter of the privileged communication in issue.⁷⁷

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⁷¹ *Id.* (quoting *Meredith*, 572 F.2d at 608).

⁷² *Meredith*, 572 F.2d at 609.

⁷³ *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo. 1993).

⁷⁴ *Id.*

⁷⁵ *Crow v. Crawford & Co.*, 259 S.W.3d 104, 122 (Mo. Ct. App. 2008).

⁷⁶ *Id.*

⁷⁷ *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 729 (Mo. Ct. App. 2011) (quoting *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 837 (Mo. Ct. App. 1995)).

In-House Counsel and the Attorney-Client Privilege

USA, Nebraska

Prepared by Lex Mundi member firm Baird Holm LLP

There is little Nebraska case law which deals with the attorney-client privilege in the context of the corporate setting. Although the Nebraska Supreme Court has held that it is vested with the inherent power and authority under the Nebraska Constitution to admit lawyers to the practice of law and to discipline and regulate them, *State ex rel. Counsel for Discipline of the Neb. Supreme Court v. Wilson*, 283 Neb. 616, 620-21, 811 N.W.2d 673, 676 (2012), *State ex rel. Nebraska State Bar Ass'n v. Krepela*, 259 Neb. 395, 398, 610 N.W.2d 1, 3 (2000), and *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937), a variety of Nebraska statutes nonetheless define certain duties of a lawyer. Principal among them are Neb. Rev. Stat. § 7-105 (Reissue 2012) and Neb. Rev. Stat. § 27-503 (Reissue 2008). The first imposes upon lawyers the duty to, among other things, “maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients.” The second grants a client the privilege to refuse to disclose, and to prevent others from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. However, the statute exempts a number of communications from the privilege, including those sought or obtained to enable or aid anyone to “commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud,” those “relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer,” those relevant to an issue concerning a document which the lawyer attested as a witness, and those “relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.” Neb. Rev. Stat. § 27-503 (Reissue 2008).

Doyle v. Union Insurance Co., 202 Neb. 599, 277 N.W.2d 36 (1979), presented a class action filed on behalf of the policyholders of a mutual insurance company which had been sold to a stock insurance company. The plaintiff alleged that the defendant directors of the mutual company had acted in their own interests, breached their fiduciary duties to the policyholders, and failed to make proper disclosures in the proxy statements soliciting the policyholders’ approval of the sale. A money judgment was entered against certain of the defendants, who appealed to the Nebraska Supreme Court. One of the claims of error assigned to the trial court was the admission into evidence of certain communications between the director-president of the mutual company and its counsel. Both the mutual company and the president claimed that the communications came within the attorney-client privilege. In rejecting that claim, the Supreme Court concluded that because the facts clearly demonstrated the president’s conduct was fraudulent and violated his fiduciary duties, the communications were not privileged. The Court wrote: We hold, under the provisions of section 27-503 . . . a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud.

202 Neb. at 607, 277 N.W.2d at 44. Two of the seven judges⁷⁸ concurred in the result, writing that they would restrict the holding to the particular corporate context of this case. Accordingly, they would:

hold that where a corporation and its officers are charged with actions inimical to the interests of shareholders, the fiduciary obligations owed to shareholders are stronger than the policy favoring privileged communications, and that the facts in this case established good cause for holding that the attorney-client privilege was not available here.

⁷⁸ The Nebraska Supreme Court consists of seven members; of the seven judges who sat and decided this case, two—including one of the dissenters—were trial court judges sitting by invitation.

202 Neb. at 624, 277 N.W.2d at 49. In their view, the holding that the lawyer-client privilege is not available in any case where the attorney's services are obtained in order to commit or plan to commit what the client knew to be a fraud, was "far too broad," notwithstanding the specific language of § 27-503. No other published Nebraska appellate case dealing with the crime-fraud exception was found.⁷⁹

In *League v. Vanice*, 221 Neb. 34, 44-45, 374 N.W.2d 849, 855-856 (1985), the Nebraska Supreme Court explained that fairness is an important and fundamental consideration in assessing the issue of whether there has been a waiver of the attorney-client privilege, noting that it exists only as an aid to the administration of justice. When it is shown that the privilege frustrates the administration of justice, a communication may be disclosed. Accordingly, it ruled that a minority shareholder who sued a corporate president asserting breach of duty in connection with a variety of transactions had waived the attorney-client privilege by alleging, in order to overcome the periods of limitations, that the president had concealed relevant facts. The Court reasoned that the shareholder could not rely on his claimed lack of knowledge of the relevant facts and at the same time use the attorney-client privilege to frustrate proof that he did have knowledge.

On a related matter, the Nebraska Supreme Court affirmed in *Detter v. Schreiber*, 259 Neb. 381, 388-389, 610 N.W.2d 13, 18 (2000), the trial court's ruling that an attorney who had rendered legal services to a closely held corporation in connection with a lease and shareholder agreement was disqualified from defending one shareholder in an action brought by the only other shareholder over promissory notes executed in connection with the formation of the corporation. The Court rested its decision on the fact that in preparing the shareholder agreement, which governed the evaluation of the corporation and the acquisition and disposition of stock, the attorney was required to work with both shareholders and ascertain their financial and personal interests. As it could be inferred that the attorney had knowledge of the notes and of the management duties which were at issue in the litigation, it could not be said that the trial court's ruling was clearly erroneous. The Supreme Court rested its decision on former Canon 5 of the then Nebraska Code of Professional Responsibility (Rev. 1996), which required that an attorney "exercise independent professional judgment on behalf of a client," then Ethical Consideration 5-18, which provided that an attorney employed by a corporation owed allegiance to the corporation and required that professional judgment be exercised uninfluenced by the desires of others, and then Ethical Consideration 5-14, which prohibited the acceptance of employment where two or more clients had differing interests.

The former Code has been replaced by the Nebraska Rules of Professional Conduct (West 2013) which, insofar as is relevant to the *Detter* decision, imposes obligations which are essentially the same as those imposed by the earlier Code. More specifically, Rule 2.1 requires that a lawyer exercise independent professional judgment in representing a client. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents (that is, the corporation's officers, directors, employees and shareholders). Comment [10] thereto makes clear that the lawyer's allegiance is owed to the organization by noting that when an organization's interest becomes adverse to those of a constituent, the lawyer should advise such constituent of the conflict, that the lawyer cannot represent the constituent, and that discussions between the lawyer and constituent may not be privileged. Rule 1.7 prohibits a lawyer from representing a client if there exists a concurrent conflict of interest and Rule 1.9 protects the interests information of former clients unless the current or former client consents to the representation. Thus, at least in the absence of valid waivers by all parties, the result in *Detter* would likely be the same under the current Rules as it was under the former Code.

⁷⁹ In an unpublished opinion, and thus an opinion which cannot be cited as precedent, Neb. Ct. of Prac. 2E(4) (West 2013), the Nebraska Court of Appeals noted in a non-corporate setting that the trial court relied upon the crime-fraud exception in determining the privilege to be inapplicable to a lawyer's testimony about the inaccurate contents of an affidavit his client had signed and the circumstances surrounding its execution. The appellate court, however, rested its affirmance on the attestation exception. *Smith v. Smith*, 2000 WL 228651, 2000 Neb. App. LEXIS 55 (Neb. App. Feb. 29, 2000).

In *Centra Inc. v. Chandler Insurance Co. Ltd.*, 248 Neb. 844, 540 N.W.2d 318 (1995), the Nebraska's Department of Insurance restricted the ability of the applicant foreign entities to acquire control of a domestic insurance company. That ruling was affirmed on appeal to the district court. Both the department and the district court had overruled the applicants' motion to disqualify the insurance company's counsel on the grounds counsel had a variety of conflicts. On further appeal, the Nebraska Supreme Court affirmed, in part on the basis that no contention was made that the evidence did not support the decision of the department and district court on the merits, and in part on the basis that the applicants had not sought timely review of the adverse ruling on the disqualification motion. The Court noted that the proper means of addressing perceived attorney conflicts of interest is by mandamus. In reaching its decision, the Court observed that while courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship, they also must recognize that disqualification can disrupt a party's efforts to resolve a dispute and thus the courts cannot permit motions to disqualify counsel to become a tool to frustrate adjudication.

While the Nebraska Supreme Court's pronouncements on the matter of attorney disqualification may give further insight as to the application of the attorney-client privilege in the corporate setting, such as the need to assert the privilege in a timely manner, the case law of Nebraska does not address questions such as which communications are privileged, who in the corporate hierarchy may invoke the privilege, who may waive it, or to whose benefit it operates in the event of a dispute as to its application between the shareholders and the corporation's present and former directors, officers, employees, or representatives. However, the Federal District Court for the District of Nebraska on appeal from a ruling by the magistrate judge concluded in *Milroy v. Hanson*, 875 F. Supp. 646 (D. Neb. 1995), *on appeal after remand*, 902 F. Supp. 646 (D. Neb. 1995), that under Nebraska law, a minority shareholder and director of a closely held corporation who brought a derivative suit largely to benefit himself could not pierce the assumed attorney-client privilege asserted on behalf of the corporation by a majority of the directors. On appeal after remand to the magistrate judge, the court ruled that oppression of the minority shareholder did not constitute fraud for purposes of the crime-fraud exception to the privilege. Additionally, Comment [2] to Rule 1.13 provides that when a constituent communicates in a corporate capacity with corporate counsel, the communication is privileged as set forth in Rule 1.6.

In *Williams v. Herron*, the Federal District Court for the District of Nebraska explained that communications from outside counsel, as part of an internal investigation, were protected by both the attorney-client privilege and the work product privilege. *Williams v. Herron*, Case No. 8:09-cv-201, 2011 U.S. Dist. LEXIS 17791, at *21-22 (D. Neb. Feb. 8, 2011). This protection was extended to interviews conducted of the client's employees, even though those employees were not within the "control group." *Id.* at *24. The work-product doctrine protected the documents that were the result of the internal investigation because they were prepared in anticipation of litigation. *Id.* at *21-22. The court also found that the defendant had not waived any protections because it did not rely on the adequacy of the investigation as an affirmative defense. *Id.* at *30-31.

Federal law does not control aspects of Nebraska privilege law, though, when those federal legal principles have not been adopted by a Nebraska state court. *Woodmen of the World Life Ins. Soc. v. U.S. Bank Nat'l Ass'n*, Case No. 8:09-cv-407, 2012 U.S. Dist. LEXIS 12462, at *17 (D. Neb. Feb. 2, 2012). In *Woodmen*, the Federal District Court for the District of Nebraska refused to apply an 8th Circuit case that held that the party seeking the documents has the burden to show that there is no privilege because Nebraska had not adopted that case and because Nebraska case law "clearly places the burden of proof on the party asserting the privilege." *Id.* at *18 (citing *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 39, 567 N.W.2d 560, 566 (1997) ("[T]he party asserting the attorney-client privilege or work product doctrine has the burden of proving that the documents sought are protected."))

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In-House Counsel and the Attorney-Client Privilege

USA, New Hampshire

Prepared by Lex Mundi member firm Sheehan Phinney Bass + Green PA

In New Hampshire, the attorney-client privilege protects communications between in-house counsel and the company for which such counsel is employed. These privileged communications cannot be waived either by error (i.e. information disclosed by court order later found improper) or by inadvertent disclosure (i.e. a mistake in the course of discovery).

New Hampshire codified all of its statutory and common law privileges in the New Hampshire Rules of Evidence, (“Rules”). The rule at issue here is Rule 502. LAWYER-CLIENT PRIVILEGE (“the rule”). By its terms, the rule protects confidential communications between client and lawyer that facilitate the rendition of professional legal services. All such communications are deemed privileged, except in the limited circumstances enumerated in Rule 502(d) (i.e., further of a crime or fraud, claimants through the same deceased client, breach of duty by a lawyer or client, document attested by a lawyer, and joint clients.) Importantly, a corresponding federal privilege does not exist; so when practicing at the United States District Court for the District of New Hampshire, practitioners should look to state law and rules.

When looking at Rule 502, practitioners should note that the rule defines many essential terms but leaves others open. For example, the rule defines what a client is but provides no such definition for the term communication. The rule itself; however, taken as a whole, provides guidance that should give in-house counsel assurance when certain communications are privileged.

What follows are some guidelines for these types of communications. In New Hampshire, the privilege extends to certain representatives of the client. Representatives may be employed by the same entity, corporation, business, or organization. Rule 502 defines representative as “one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” Those who are receiving legal services are generally known as “privileged persons.” In a corporate setting, in-house counsel can share privileged communications with such “privileged persons” and other such individuals who are presumed to need to know of the communication in order to act for the organization.⁸⁰

The Reporter's notes to Rule 502 state that the definition “representative of a client” is an adoption of the so-called “control group” test. Principally, the control group test is the narrowest test for determining whether an entity's communications with counsel are privileged. In effect, only those communications from persons with authority to act are privileged. But see, Upjohn v. United States, 449 U.S. 383 (1981) (rejecting the control group test in federal matters). Importantly, the New Hampshire Supreme Court has yet to comment on or apply the control group test. Nevertheless, the Reporter's notes to Rule 502 favor the test—as opposed to the broader subject-matter test—because it encourages communication without unduly inhibiting trial preparation or overextending the attorney-client privilege to encompass all corporate activity. Otherwise, an entity could insulate itself from all normal fact gathering efforts by using a medium of communication that involves counsel. The control group test prevents such an abuse of the attorney-client privilege.

New Hampshire also adopted the universal standard that communications must be intended as “confidential” in order to be privileged. In other words, a communication must not be intended to be disclosed to third persons unless doing so would further the stated purpose of rendering legal services.

⁸⁰ (See Restatement of the Law Governing Lawyers, 3d Edition, 1998, Section 73).

New Hampshire mostly follows the revised Uniform Rules of Evidence (1974) and in so far as common law privileges are concerned has adopted these rules essentially verbatim. Outside of the Rules there is little guidance for in-house counsel in New Hampshire on the issue of attorney-client privilege. The leading case in New Hampshire is Riddle Spring Realty v. State, 107 NH 271 (1966) which recognized the privilege between lawyer and client and held that privileged matters are governed by the rules of evidence. See also Stevens v. Thurston, 112 N.H. 118, 118 (1972) (“We recognize and enforce the common-law rule that confidential communications between a client and attorney are privileged and protected from inquiry in the absence of a waiver by the client.”). It is clear, however, that a client may waive the privilege either expressly or impliedly, by “injecting” an otherwise privileged communication into a case – a so-called “at issue” waiver. Petition of Dean, 142 N.H. 889, 890 (1998).

In Riddle Spring, the Supreme Court also recognized that even if the privilege did not apply in a particular case, information may still be exempt from discovery under the work product doctrine. The work product doctrine protects the conclusions, opinions and mental impressions of an attorney, such as in-house counsel. Formerly, the work-product doctrine’s applicability to in-house counsel had been called into question by Superior Court Rule 35. In pertinent part, this rule allowed the discovery of documents and other tangible items prepared in anticipation of litigation if “the party seeking discovery ha[d] substantial need of the materials.” New Superior Court Rules, however, became effective October 1, 2013. Now codified at Superior Court Rule 21 (formerly Superior Court Rule 35), New Hampshire’s rule on the scope of discovery provides that “parties may obtain discovery regarding any matters, not privileged, that is relevant to the subject matter involved in the pending action.” The key to this rule is the term “not privileged.” With the attorney-client privilege expressly provided for in Rule 502, in-house counsel should take comfort that so long as the requirements of this rule are satisfied, documents and other tangible items will be protected. Moreover, whether a document is produced during discovery bears no connection to its admissibility at trial. See Super. Ct. R. 21(b).

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In-House Counsel and the Attorney-Client Privilege

USA, New Jersey

Prepared by Lex Mundi member firm Day Pitney LLP

The attorney-client privilege extends to confidential communications between in-house counsel and officers, directors or employees of the companies they serve who are deemed members of its so-called "litigation control group." Members of the "litigation control group...include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that 'significant involvement' requires involvement greater, and other than, the supplying of factual information or data respecting the matter."⁸¹

Although the attorney-client privilege exists between a company and its in-house counsel, this privilege has limitations. Communications to an attorney are privileged when made to the attorney in his or her professional capacity.⁸² Communications are protected only to the extent that they are 'legal' in nature and are not merely 'business' in nature, such as where a non-lawyer could have acted.⁸³ Therefore, the nature of the relationship and the communication involved are relevant in determining whether a protectable relationship of attorney and client exists.⁸⁴

The attorney-client privilege does *not* extend

- a) "to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or
- b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or
- c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer."⁸⁵

A communication also will not receive the protection of the attorney-client privilege where such "grave circumstances" exist that public policy concerns compel disclosure.⁸⁶ A three-part test has been adopted in order to determine whether a privilege must yield to other significant societal concerns:

- 1) there must be a legitimate need to reach the evidence sought;
- 2) there must be a showing of relevance and materiality of that evidence to the issue before the court; and
- 3) the party seeking to bar assertion of the privilege must show by a fair preponderance of the evidence including all reasonable inferences that the information cannot be secured from any less intrusive source.⁸⁷

⁸¹ New Jersey Rules of Professional Conduct 1.13.

⁸² See, e.g., *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 562 (App. Div. 1984).

⁸³ See *Hedden v. Kean Univ.*, 2013 N.J. Super.. LEXIS 156, at *11 (App. Div. Oct. 24, 2013).

⁸⁴ *Wolosoff*, 196 N.J. at 562.

⁸⁵ N.J.S.A. 2A:84A-20.

⁸⁶ See *Dontzin v. Myer*, 301 N.J. Super. 501, 508 (App. Div. 1997).

⁸⁷ See *In re Kozlov*, 79 N.J. 232, 243-44 (1979).

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In-House Counsel and the Attorney-Client Privilege

USA, New Mexico

Prepared by Lex Mundi member firm Rodey, Dickason, Sloan, Akin & Robb, P.A.

In New Mexico, attorney-client privilege exists by virtue of a rule of evidence promulgated by the New Mexico Supreme Court. Rule 11-503 is a largely verbatim replica of Standard 503, one of the federal rules of evidentiary privilege that the United States Supreme Court proposed – but that Congress declined to adopt – in the mid-1970s. The rule provides, in pertinent part, that

[a] client [including a corporation, association, or other organization or entity] has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications [i.e., communications not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication] made for the purpose of facilitating the rendition of professional legal services to the client,

(1) between the client and the client's lawyer or [the] lawyer's representative, or ...

(4) between representatives of the client or between the client and a representative of the client

N.M. R. Evid. 11-503(B). Although the rejected federal standard, unlike the New Mexico rule, explicitly shields communications between the client or the client's representative and the lawyer or the lawyer's representative, it seems highly doubtful that the omission of this phrase from the New Mexico rule signals any intent to deny protection to communications between in-house counsel and corporate officers, directors, or employees. Thus, in Public Service Co. v. Lyons, 2000-NMCA-077, 129 N.M. 487, 10 P.3d 166 – in the course of adopting a “restrictive approach” to assertions that attorney-client privilege has been waived – the New Mexico Court of Appeals approvingly quoted Upjohn Co. v. United States, 449 U.S. 383 (1981), in which the United States Supreme Court confirmed that communications between corporate counsel and corporate employees for the purpose of facilitating the provision of legal services are privileged. 2000-NMCA-077, ¶¶ 24-25. On the other hand, New Mexico case law does not expressly address the extent to which the privilege attaches to such communications.

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In-House Counsel and the Attorney-Client Privilege

USA, New York

Prepared by Lex Mundi member firm Day Pitney LLP (member firm for New Jersey)

Corporations, as clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys that relate to their legal matters.⁸⁸ The attorney-client privilege applies to communications with attorneys, whether those attorneys are corporate staff counsel or outside counsel.⁸⁹

The inquiry as to whether a communication between staff counsel and a corporation's employees is privileged is fact-specific.⁹⁰ The test to determine if the attorney-client privilege applies to such a communication is whether the communication was "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship."⁹¹

Communications between an attorney and a client about the "substance of imminent litigation generally will fall into the area of legal rather than business or personal matters" and, therefore, will usually be considered privileged communications.⁹² As long as a communication between a company and its staff counsel is "predominantly of a legal character" the fact that the legal advice may refer to non-legal matters does not mean that the communication is not privileged.⁹³

Although a "confidence" or "secret" between a company and its staff counsel is generally privileged, a "lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- 1) The client gives informed consent, as defined in [New York Rule of Professional Conduct] 1.0(j); [or]
- 2) The disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community"⁹⁴

In addition, a "lawyer may reveal or use confidential information to the extent the lawyer reasonably believes necessary:

- 1) to prevent reasonably certain death or substantial bodily harm;
- 2) to prevent the client from committing a crime;
- 3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- 4) to secure legal advice about compliance with [the New York Rules of Professional Conduct] or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
- 5) (i) to defend the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
- 6) when permitted or required under [the New York Rules of Professional Conduct] or to comply with other law or court order."⁹⁵

⁸⁸ See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 542 N.Y.S.2d 508, 509 (N.Y. 1989).

⁸⁹ *Id.*; C.P.L.R. 4503.

⁹⁰ *Rossi*, 542 N.Y.S.2d at 510.

⁹¹ *Id.* at 511.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ New York Rule of Professional Conduct 1.6(a)-(b).

Lastly, the attorney-client privilege “may give way to strong public policy considerations.”⁹⁶

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⁹⁵ *Id.* at 1.6(b).

⁹⁶ See *Spectrum Sys. Int'l corp. v. Chem. Bank*, 78 N.Y.2d 371, 381 (N.Y. 1991).

In-House Counsel and the Attorney-Client Privilege

USA, Ohio

Prepared by Lex Mundi member firm Calfee, Halter & Griswold LLP

Ohio law generally recognizes the availability of the attorney-client privilege to communications between corporate counsel and its employees. The attorney-client protections recognized under Ohio law arise from two sources: one arises from the common law, and the other is statutorily created. The statutory attorney-client privilege affords greater protections than the common law privilege, but to a smaller scope of protected communications. While there is some overlap between the statutory and common law attorney-client privilege, this memorandum will discuss them as separate and independent protections.

The statutory attorney-client privilege in Ohio is set forth in Ohio Revised Code Section 2317.02, which defines privileged communications. Section 2317.02 states, in pertinent part, that:

The following persons shall not testify in certain respects: An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the expressed consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421⁹⁷ of the Revised Code to have waived testimonial privilege under this division, the attorney may be compelled to testify on the same subject...

Ohio Rev. Code § 2317.02(A). The term "client" used in Section 2317.02(A) is defined in Ohio Revised Code Section 2317.021 as follows:

"Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him in his professional capacity, *or consults an attorney employee for legal service or advice*, and who communicates, either directly or through an agent, employee, or other representative, with such attorney; and includes an incompetent whose guardian so consults the attorney in behalf of the incompetent.

Where a corporation or association is a client having the privilege and it has been dissolved, the privilege shall extend to the last board of directors, their successors or assigns, or to the trustees, their successors or assigns.

Ohio Rev. Code. § 2317.021 (emphasis added). Accordingly, the statute itself provides that the definition of client includes any person who "consults an attorney employee for legal service or advice."⁹⁸ As such, communications between an in-house counsel and an employee fall within the statutory attorney-client privilege.⁹⁹

⁹⁷ Ohio Revised Code § 2151.421 deals with duties to report child abuse or neglect.

⁹⁸ See id.

⁹⁹ See Shaffer v. OhioHealth Corp., 10th Dist. No. 03AP-102, 2004 Ohio 63, ¶ 10 (noting that § 2317.021 extends the attorney client relationship to firms, partnerships or corporations as clients and the statute acknowledges that corporations can only communicate with counsel through their employees or agents; positing that in cases where the "corporation, partnership, or other collective entity is the client, the attorney-client privilege belongs to the company and not to its employees outside of their employment capacity.") See also State v. Today's Bookstore, Inc., 86 Ohio App. 3d 810, 817 (2d Dist. 1993) (finding that the

In addition to the attorney-client privilege created by statute, Ohio courts also recognize the common law privilege. The common law attorney-client privilege encompasses a broader class of communications than the statutory privilege, including, for example, communications between a client and an attorney's agents.¹⁰⁰

Ohio courts follow the United States Supreme Court's decision in Upjohn Co. v. United States, 449 U.S. 383 (1981), recognizing that the common-law attorney-client privilege extends to communications between a corporate counsel and its employees under certain circumstances.¹⁰¹ The Bennett court emphasized that protected communications under Upjohn are:

[C]ommunications . . . made by the employees to corporate counsel who was acting as such at the direction of corporate supervisors in order to secure legal advice [which] concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

Id. at *42 (finding communications between a corporation's general counsel and a secretary were protected); see also Graff v. Haverhill North Coke Co., No. 1:09-cv-670, 2012 U.S. Dist. LEXIS 162013, *58-59 (S.D. Ohio Nov. 13, 2012) (upholding privilege on documents created based on information provided by an employee to company's in-house counsel at the direction of her superior for the purpose of obtaining legal advice); Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410, 414 (S.D. Ohio 1981) (extending the attorney-client privilege under Upjohn to communications between a corporate counsel and an employee which were obtained before the communicator became an employee because the communications were in order to secure legal advice).

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communications between the City of Dayton and its chief prosecutor fell within the statutory definition of attorney-client communications under Ohio Rev. Code. § 2317.02 and § 2317.021).

¹⁰⁰ State v. Post, 32 Ohio St. 3d 380, 385 (1987) (modified by State v. McDermott, 72 Ohio St. 3d 570, 574 (1995), which states that while the court in Post could properly determine how common-law privilege (created between a client and an attorney's agent) may be waived, waiver of privileged communications between an attorney and a client is governed exclusively by § 2317.02(A)); see also State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth., 121 Ohio St.3d 537, 542 (2009) ("The [attorney-client] privilege applies when legal advice of any kind is sought from the legal advisor in that capacity and the client's confidential communication relates to that purpose.") (internal citations omitted).

¹⁰¹ See Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410, 413 (S. D. Ohio 1981); Bennett v. Roadway Express, Inc., No. 20317, 2001 Ohio App. LEXIS 3394 (9th Dist. Aug. 1, 2001).

In-House Counsel and the Attorney-Client Privilege

USA, South Carolina

Prepared by Lex Mundi member firm Wyche, P.A.

Communications with in-house counsel who are either full members of the South Carolina Bar or who hold Limited Certificates of Admission under Rule 405, are generally within the attorney client privilege to the same extent as communications with outside counsel. However, the privilege would only attach to confidential communications made for the purpose of giving or obtaining advice that is predominantly legal in nature, as opposed to business advice such as financial advice or discussions concerning business negotiations.

There are no reported South Carolina cases specifically addressing this issue. The above statement is based on our understanding of general law.

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In-House Counsel and the Attorney-Client Privilege

USA, Tennessee

Prepared by Lex Mundi member firm Bass, Berry & Sims PLC

The attorney-client privilege in Tennessee has been codified in Section 23-3-105 of the Tennessee Code Annotated which provides:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

Under Tennessee law, the attorney-client privilege generally applies if the communication: (a) involves the subject matter of the representation, and (b) is made with the intent that the communication will be kept confidential.¹⁰² The party asserting the privilege bears the burden of proving these two elements.¹⁰³

Although the statute only address a client's communications to an attorney, the privilege also applies to communications from the attorney to the client "when the attorney's communications are specifically based on the client's confidential communications or when disclosing the attorney's communications would, directly or indirectly, reveal the substance of the client's confidential communications."¹⁰⁴

In the in-house context, communications between a corporate employee and an attorney are privileged 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.¹⁰⁵

When reviewing claims of privilege involving in-house attorneys, courts will pay particular attention to the requirement that the communication be for the purpose of securing legal advice.¹⁰⁶ In this regard, such communications will be scrutinized to ensure that the communications were related to a legal purpose, as opposed to a business or administrative purpose.¹⁰⁷

¹⁰² *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002).

¹⁰³ *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006).

¹⁰⁴ *Tennessean v. Tenn. Dept. of Pers.*, 2007 Tenn. App. LEXIS 267, *18 (Tenn. Ct. App. April 27, 2007).

¹⁰⁵ *In re Southern Indus. Banking Corp.*, 35 B.R. 643, 647 (Bankr. E.D. Tenn. 1983) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978); *Union Planters Nat'l Bank v. ABC Records, Inc.*, 82 F.R.D. 472 (W.D. Tenn. 1979).

¹⁰⁶ *Leazure v. Apria Healthcare, Inc.*, 2010 U.S. Dist. LEXIS 88612, *7-8 (E.D. Tenn. Aug. 26, 2010).

¹⁰⁷ *Id.* at *7.

The Tennessee Supreme Court has also found that a former in-house counsel may reveal confidential information received during the course of his employment to the extent necessary to establish a retaliatory discharge claim.¹⁰⁸

If the communication is not privileged in and of itself, however, it may be possible to argue that the communications are “confidential.”¹⁰⁹ By classifying the communicated information as “confidential” and taking steps to limit internal access to the information, it may be possible to prevent disclosure by seeking a protective order or injunction.

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¹⁰⁸ *Crews v. Buckman Labs. Int'l*, 78 S.W.3d 852, 863 (Tenn. 2002).

¹⁰⁹ *See, e.g., Newson v. Breon Labs, Inc.*, 1985 Tenn. App. LEXIS 3410, *10-13 (Tenn. Ct. App. July 18, 1985).

In-House Counsel and the Attorney-Client Privilege

USA, Utah

Prepared by Lex Mundi member firm Van Cott, Bagley, Cornwall & McCarthy

The attorney-client privilege in Utah is codified in Rule 504 of the Utah Rules of Evidence, and protects confidential communications “made for the purpose of facilitating the rendition of professional legal services to the client,” that are between “the client and the client’s representatives, lawyers, lawyer’s representatives, and lawyers representing others in matters of common interest.” The party claiming the privilege bears the burden of demonstrating it applies. The elements of the privilege are: “(1) an attorney client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice.” Southern Utah Wilderness Alliance v. Automated Geographic Reference Ctr., Div. of Info. Tech., 2008 UT 88, 200 P.3d 643, 655.

Rule 504 privileges communications made by representatives of the client, meaning not only those who have the authority to obtain or act on legal advice, but also people “specifically authorized [by the client] to communicate with the lawyer concerning a legal matter.” Thus, a corporate client may control and significantly extend the privilege through careful and deliberate grants of specific authorization. This rule is broader than the “control group” test from Upjohn Co. v. United States, 449 U.S. 383 (1981).

The rule privileges communications with in-house counsel, so long as the communication meets the Rule’s other elements, though communications that do not reflect any advice given by the in-house counsel might not be protected. See Christensen v. Am. Family Mut. Ins. Co., No. 1:09-cv-94, 2011 U.S. Dist. LEXIS 96620 (D. Utah Aug. 29, 2011) (unpublished) (applying Rule 504 in a diversity case). Communications with a lawyer’s representatives, like paralegals, are also privileged.

For clients that are not natural persons, not only the client but also successors, trustees, or similar representatives may claim the privilege. Though ordinarily straightforward, the continuity analysis can become complex for unique organizations. See Snow, Christensen & Marteneau v. Lindberg, 2013 UT 15, 299 P.3d 1058 (holding there was no continuity where a trust was reformed under the cy pres doctrine and the reformed trust could not accomplish essential purposes of the prior trust).

There are five exceptions to the privilege. First, the privilege is not applicable where the lawyer’s services were sought or obtained in furtherance of a crime or fraud. Second, communications relevant to issues between parties who claim inheritance through the same deceased client are not privileged. See In Re Young’s Estate, 94 P. 731 (Utah 1908). Third, the privilege does not apply when the lawyer breached a duty to the client. Fourth, where a lawyer is an attesting witness to a document, the privilege does not extend to relevant communications. Fifth, the privilege does not extend to communications relevant to an action between joint clients, where the communication was made to a lawyer retained or consulted in common.

Rule 504 establishes whether a communication is privileged at the time it was made. Whether the privilege is subsequently waived is answered under Rule 510. Doe v. Maret, 1999 UT 24, 984 P.2d 980. The attorney-client privilege is only waived if the holder of the privilege voluntarily discloses or consents to disclosure, or fails to take reasonable precaution against inadvertent disclosure.

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In-House Counsel and the Attorney-Client Privilege

USA, Virgin Islands

Prepared by Lex Mundi member firm Dudley, Topper and Feuerzeig, LLP

In the absence of the local laws to the contrary, the Restatements of Law approved by the American Law Institute are the rules of decision in the U.S. Virgin Islands. V.I. Code Ann. tit. 1, § 4 (1995). Since the U.S. Virgin Islands has no statutory or case law specifically addressing the applicability of the attorney-client privilege to communications with inside counsel, a Virgin Islands court would look to the *Restatement (Third) of the Law Governing Lawyers* (1998) to determine the extent to which the privilege applies to such communications.

The *Restatement (Third) of the Law Governing Lawyers* § 72 cmt. c, § 73 cmt. i (1998) provides that the attorney-client privilege extends to communications between organizations and their inside counsel. The privilege is subject to the same restrictions as are communications between a client and its outside counsel: the communication must be made in confidence and for the purpose of obtaining or providing legal assistance. The mere fact that the communication is made to or from a person who is a lawyer is not sufficient. For example, if a corporate officer asks inside counsel to assess an employee's performance, this communication is not privileged. If the officer asks her inside counsel about the corporation's potential liability if the employee is terminated, that communication is privileged, provided it is made in confidence.

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In-House Counsel and the Attorney-Client Privilege

USA, Virginia

Prepared by Lex Mundi member firm McGuireWoods LLP

The Virginia Supreme Court recognizes that the attorney-client privilege can protect in-house lawyers' communications with their corporate employer/clients' employees.¹¹⁰ Virginia Circuit Courts have also confirmed this principle.¹¹¹ Both Federal District Courts in Virginia have similarly recognized that in-house lawyers may have such privileged communications.¹¹²

Like other states, Virginia places a heavier burden on in-house lawyers than outside lawyers to prove that their communications related to legal advice, rather than business or other non-legal advice.¹¹³

Virginia law contains an unusual definition of the "practice of law," which by its terms seems to exclude from the definition of the practice of law a "regular employee" acting for his or her employer.¹¹⁴ One Virginia Circuit Court cited this strange definition in holding that the attorney-client privilege did not protect communications between in-house lawyers and their clients' employees.¹¹⁵ However, that decision seems to have been an aberration, and no other courts have taken the same approach.

In-house lawyers practicing law in Virginia without a full Virginia license must obtain either a registration or a certification from the Virginia State Bar.¹¹⁶ Although this new approach did not explicitly change the definition of the "practice of law," the fact that all Virginia in-house lawyers must be licensed somewhere,

¹¹⁰ Va. Elec. & Power Co. v. Westmoreland-LG & E Partners, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer; explaining that "Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to attorney-client privilege.") (citing Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 638 (Va. 1992)).

¹¹¹ Gordon v. Newspaper Ass'n of Am., 51 Va. Cir. 183, 186 (Richmond 2000) ("[T]he privilege exists between a corporation and its in-house attorney. . . . The communications protected are those between employees and in-house counsel which aid counsel in providing legal services to the corporation."); Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("That such [attorney-client] privilege does apply to in-house counsel is clear.").

¹¹² Sayre Enters., Inc. v. Allstate Ins. Co., Civ. No. 5:06cv00036, 2006 U.S. Dist. LEXIS 89097, at *9 (W.D. Va. Dec. 8, 2006) ("The protection applies equally to communications between a corporate party and its in-house counsel and to its communications with any retained outside counsel."); Lewis v. Capital One Servs., Inc., Civ. A. No. 3:04CV186, 2004 U.S. Dist. LEXIS 26978, at *22 (E.D. Va. June 10, 2004) ("The attorney-client privilege 'applies to individuals and corporations, and to in-house and outside counsel.'" (citation omitted)); Deel v. Bank of Am., N.A., 227 F.R.D. 456, 458 (W.D. Va. 2005) ("It applies to individuals and corporations, and to in-house and outside counsel.").

¹¹³ Adair v. EQT Prod. Co., 285 F.R.D. 376, 380 (W.D. Va. 2012) ("[A]ttorneys employed by corporations serve in many roles, some of which have little to do with being an attorney. Because of this, 'courts and commentators alike have frequently expressed concern that the privilege may be used by corporations to create a large 'zone of secrecy' for communications whose probative value could be important to a fair resolution of disputes.'" Rush v. Sunrise Sr. Living, Inc., 2008 Va. Cir. LEXIS 12, 2008 WL 1926766 (Va. Cir. Ct. Feb. 12, 2008) (citations omitted). To prevent this, the privilege should not be applied to protect any and all documents routinely routed through corporate counsel for little, if any, legal purpose. In such situations, "the privilege should be strictly construed to apply only where necessary to protect its underlying policy aims." Rush, 2008 Va. Cir. LEXIS 12, 2008 WL 1926766 (quoting Edwards, 370 S.E.2d at 301). Courts should "cautiously and narrowly" apply the privilege in cases involving corporate staff counsel 'lest the mere participation of an attorney be used to seal off disclosure.'" (citation omitted)); Scott & Stringfellow, LLC v. AIG Commercial Equip. Fin., Inc., Civ. No. 3:10cv825-HEH-DWD, 2011 U.S. Dist. LEXIS 51028, at *12-13 (E.D. Va. May 12, 2011) ("Document 7 is written by an employee of AIG whom defendant AIGCEF also claims is in-house counsel. On the face of the document, the author does not appear to be acting in his capacity as counsel. His title in the signature line refers to his AIG employee title, rather than legal counsel alone, indicating that this employee has a dual role at the company -- one business, one legal. Indeed, the subject matter of the communication is limited to a summary of a business meeting and asking a fellow AIG employee about future action to be taken. Although the communication contains a confidentiality notice at the bottom of the email alerting readers that the communication is forwarded by an attorney, the apparent purpose of the communication is neither the solicitation nor the offer of legal advice from a person acting in his capacity as legal counsel. Therefore, Document 7 is not protected by attorney-client privilege.").

¹¹⁴ Va. R. pt. 6, § I(B).

¹¹⁵ Belvin v. H.K. Porter Co., 17 Va. Cir. 303, 308 (Norfolk 1989).

¹¹⁶ Va. R. pt. 1A:5.

and must have some connection to the Virginia Bar, makes it even less likely that a court communication would ever point to Virginia's unique definition in denying privilege protection for in-house lawyers' communications.

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