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Privilege and Privacy When Dealing in an International Context

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Why should U.S. lawyers care?

- U.S. lawyers increasingly dealing with issues in or touching on non-U.S. forums due to:
  - Global nature of business today
  - Increased mobility and technology
  - Trend of globalization of law firms continues to grow
- Greater cooperation between U.S. and foreign government agencies in investigating and regulating companies.
- This is uncertain terrain—there are few clear guidelines governing international legal ethics.

Multifaceted Analytical Framework

- U.S. Model and State Rules of Professional Conduct.
- U.S. case law.
- Code of Conduct for European Lawyers ("CCBE Code") and UIA principles.
- E.U. case law and E.U. member countries' case law.
- The European Commission Directive on Data Protection and Article 29 Working Party on Data Protection
- E.U. member countries' respective data protection laws, privacy laws, and blocking statutes.
- Multinational treaties such as The Hague Evidence Convention, or similar bilateral agreements.

Hypothetical Part 1:
You Get the Call

Relevant Authority in the E.C.

- Case 155/79 *Australian Mining and Smelting (AM&S) v. Commission,* 1982 ECR 1575.
  - The European Court of Justice held that the attorney-client privilege ("legal professional privilege") applies only when:
  - the communication is made for the purpose of the client's defense
  - the lawyer is independent
  - the lawyer is licensed in the E.U.
  - In-house counsel are not "independent" and are not covered by legal professional privilege.

Relevant Authority in the E.C. (cont.)

- *John Deere & Co. v. N.V. Cofabel*, Commission Decision (85/79/EEC) 14 December 1984 O.J.L. 35
- In a dawn raid, the European Commission seized documents from a U.S. company's offices in Europe, including communications with in-house counsel.
- The European Commission relied upon the communications with in-house counsel to find that the company knew that its cross-border trading policies were illegal and in violation of E.U. competition laws.

Relevant Authority in the E.C. (cont.)

- *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of European Communities, (Joined Cases T-125/03 and T-253/03 (2007).*
- Confirmed the AM&S standard of legal professional privilege.
- Held that in-house counsel are not "independent" within the standard, even if they are members of a Bar or Law Society that requires independent legal advice.
- Legal professional privilege does cover internal documents drafted solely to seek advice from external lawyers.

Summary

- In dealing with the EC and possibly other national competition authorities for violations of EU competition law, internal communications between in-house counsel and European company are *not* privileged.
- Similarly, the EC does not regard communications between U.S. outside counsel and European company as privileged.
- Communication between outside E.U. counsel and European company *is* privileged – but must be for the purposes of legal defense.

Opinion of Advocate General Kokott, Akzo Nobel Chemical Ltd. and Akcros Chemicals Ltd. v. European Commission, Case C-550/07 P, (Apr. 29, 2010)

On appeal to the Court of Justice, the Advocate General:

- confirmed lower court's holding and recommended that the appeal be dismissed.
- opined that in-house lawyers, even if members of a Bar or Law Society requiring independence, are incapable of giving unbiased advice to their employers
- The Advocate General's opinions guide the Court of Justice in pending cases and while not binding, are followed in vast majority of cases.
- Decision is expected later this year.

Other Privilege Considerations

- Notwithstanding Akzo and EU law, internal communications between in-house counsel and the Company are deemed to be privileged in many countries. For example, nearly all Latin American countries share the U.S. practice; Scotland, Bangladesh and Bermuda do as well.
- Whether or not in-house counsel's communications are privileged can depend on whether the issue is a purely domestic one or if it crosses borders. Counsel must not rule out international considerations even if initially an issue seems purely domestic.
- In addition, the privilege issue is not resolved in a number of countries. For example, China does not have well established attorney client principles, When dealing in In these and similar countries, individual analysis of privilege issues must take place prior to an incident.

Interviewing Employees as Part of the Internal Investigation in the EC

- CCBE has a *non-waivable* conflicts rule that a "lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of conflict, between the interests of those clients." CCBE Code Rule 3.2.1
- Compare to ABA Model Rule 1.13 (a) which states that company counsel represents the organization (counsel is engaged to represent an organization "through its duly authorized constituents"); and
- Model Rule 1.7(a) which states that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client."

Other Ethical Considerations for the U.S. Lawyer

- ABA Model Rule requires "competent representation."
- Affirmative duty to know the foreign law if working in a foreign jurisdiction.
  - *See e.g. In re Roel*, 3 N.Y.2d 224 (1957) ("When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter and may not claim that they are not required to know the law of the foreign State.")

Hypothetical Part 2: The U.S. Case is Filed

Protecting Information Disclosed in EC Proceedings from Discovery In US Proceedings

- U.S. litigants may argue successfully that privilege is waived as to documents created in EC proceedings if those documents are:
  - Voluntarily submitted;
  - To third parties (such as the Competition Commission).
  - 8th Circuit recognizes a general exception to waiver rule for materials voluntarily submitted to government regulators. *See Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978).
- No waiver for compelled submissions.

Treatment of Foreign Privileges in U.S. Courts

- U.S. courts will look at the nature of the protection afforded by the foreign rule to determine whether the non-U.S. privilege rises to the level of a U.S. evidentiary privilege, and will also take comity into consideration when dealing with:
  - Professional secrecy laws
  - Data protection laws
  - Blocking statutes

Blocking Statutes – A "Paper Tiger"?

- French blocking statute, enacted in 1980, imposes fines and criminal penalties for requesting or providing information in answer to a U.S. discovery request. Prior to 2007 it had had never been enforced and was considered a hollow threat by US courts.
- In Dec. 2007, the French Supreme Court enforced the blocking statute for the first time, fining a French lawyer 10,000 euro for making a phone call seeking information in response to a U.S. discovery request.
- Regardless, U.S. courts thus far have not really changed their view. *See Global Power Equip. Group., Inc.*, No. 06-11045, 2009 WL 3464212 (Bkrtcy. D. Del., Oct. 28, 2009).

Treatment of U.S. Privileges in EC

- Note that U.S. courts will extend attorney-client privilege where U.S. attorney gives advice on US law to European company in U.S. proceedings, even if these conversations would not be privileged in the EC.

Hypothetical Part 3: The Discovery Phase in the U.S. Litigation

Document Discovery

- Which jurisdiction's discovery rules apply?
- Discovery of documents (paper and electronic) physically located in foreign jurisdictions.
- U.S. courts may require production even if non-U.S. privileges are raised.
- Counsel faced with two bad options—risk sanctions for non-compliance in US court or risk civil/criminal penalties in foreign jurisdiction for violating foreign law.

Document Discovery and Data Protection Laws

- Preservation of Data. Although sending a hold notice is not "processing" under the Directive, any action by "data controllers" to *comply* with a hold notice *is* processing, and violates the Directive unless it follows certain rules.
- Working Party opines that data controller should comply with established retention policy, and only suspend if the data is relevant and to be used in specific or imminent litigation. Culling and redacting to be done by the data controller or "trusted third party" in E.U.; requires notice to all the data subjects with opportunity to object or amend. Recommends using the Hague Convention.
- Sedona Conference response to Working Party wants "best practice" protocols and model forms. Hague and redacting are time-consuming and costly; but initial culling must be done in E.U.

Deposition Discovery

- Taking of depositions in foreign jurisdictions
  - Hague Convention procedures vs. FRCP
- Different considerations than with documents, because done on foreign soil, there is a greater infringement of sovereign rights.
- It is an ethical violation to engage in "under the table" depositions in countries where private depositions are not permitted.
  - ABA Model Rule 8.4(c) makes it "professional misconduct" for lawyers to engage in "conduct involving dishonesty, fraud, deceit or misrepresentation."

Takeaways

- Communications must flow through EU outside counsel.
- Limit what you commit to writing.
- Treat all materials you prepare as *potentially* discoverable in foreign proceeding.
- When in doubt, follow the most restrictive ethics rules.
- There are no easy answers.

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