502 Going International From a One Lawyer Shop

Hazel L. Johnson
Librarian
McGuireWoods LLP

Frederick J. Salek
Former Vice President and General Counsel
Agfa Corporation

Milton R. Stewart
Partner
Davis Wright Tremain, LLP

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).
Materials may not be reproduced without the consent of ACCA.
Reprint permission requests should be directed to James Merklinger at ACCA: 202/293-4103, ext. 326; merklinger@acca.com

Faculty Biographies

Hazel L. Johnson

Hazel L. Johnson is supervising librarian for the Richmond office of McGuireWoods LLP. She manages library operations for the Richmond office, including legal and nonlegal research, collection development and maintenance, acquisitions of print, and electronic resources, and organizes and provides training in research techniques and library computer applications.

She possesses more than 20 years experience as a librarian and has worked in academic and law firm libraries and as a consultant to law firms on information and library issues. Previous employers include the University of Alabama Law Library, the University of Georgia Law Library, North Carolina State University Libraries, Smith Hulsey & Busey, Long Aldrige & Norman, and Sutherland Asbill & Brennan.

A member of the American Association of Law Libraries (AALL) and the ABA, she has served as liaison from AALL to the ABA Law Practice Management Section and is a past president of AALL's Southeastern Chapter.

Ms. Johnson received a BA from Mississippi University for Women and a MLS from the University of Alabama.

Frederick J. Salek

Frederick J. Salek has served as general counsel for domestic and international public companies, and smaller entrepreneurial companies at the IPO stage, in the healthcare, energy, and digital technology arenas. Mr. Salek concentrates in mergers and acquisitions, intellectual property, antitrust law and dispute resolution.

He is a member of the European-American General Counsel's Association in New York City and the Board of Directors of the Alumni Association of New York University.

Mr. Salek is a graduate of New York University and the University of Michigan Law School.

Milton R. Stewart

Milton R. Stewart is a partner in the Portland office of Davis Wright Tremain, LLP. In this position he acts as general counsel to a number of companies, both in the Northwest and throughout the country, and also has extensive experience in merger and acquisition transactions including leveraged and management buy-outs and reorganizations. He also has extensive experience in international merger and acquisition and joint venture transactions.

Mr. Stewart is active in the administration of the firm, serving as the Business Development Partner and on the Client Relations Team. His entrepreneurial experience in the areas of leveraged buy-outs, manufacturing, distribution and retailing have given Mr. Stewart a practical understanding of the needs of his business clients.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Mr. Stewart is a member of the Board of Directors of the National Multiple Sclerosis Society. He is also the immediate past chairman and a member of the Board of Visitors of the Indiana University School of Law.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Going International From a One-Lawyer Shop

Presented by:

LEX MUNDI

The World's Leading Association
Of Independent Law Firms

Presenters:

Hazel Johnson, Librarian McGuireWoods LLP

Fred J. Salek, General Counsel

Milt Stewart, Davis Wright Tremaine, LLP

Presentation Overview

- Employment/Personnel Issues
- International Joint Ventures
- Distribution Issues
- Currency Issues
- Attorney Client Privilege

✓ Suggested resources available to the one-lawyer shop

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Case Study #1

Employment/Personnel

Your CEO wants to transfer a US citizen from Asia to become CEO of your company's European subsidiary.

It is planned to fill the Asia post with a "fast-track" Canadian who has served for three years in the US.

The Canadian's role in the US would be filled by a Hong Kong national, currently a professor at a major university, whom the Company has been trying to hire for some time.

Case Study #1

Employment/Personnel

Your CEO stops by to ask whether you see any major problems with these plans, and in any case to coordinate with HR in getting it done.

There are questions of compensation policy, personal tax planning, immigration law, and relocation reimbursement.

How do we get everyone to work together?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Employment/Personnel Issues

International Relocation Case

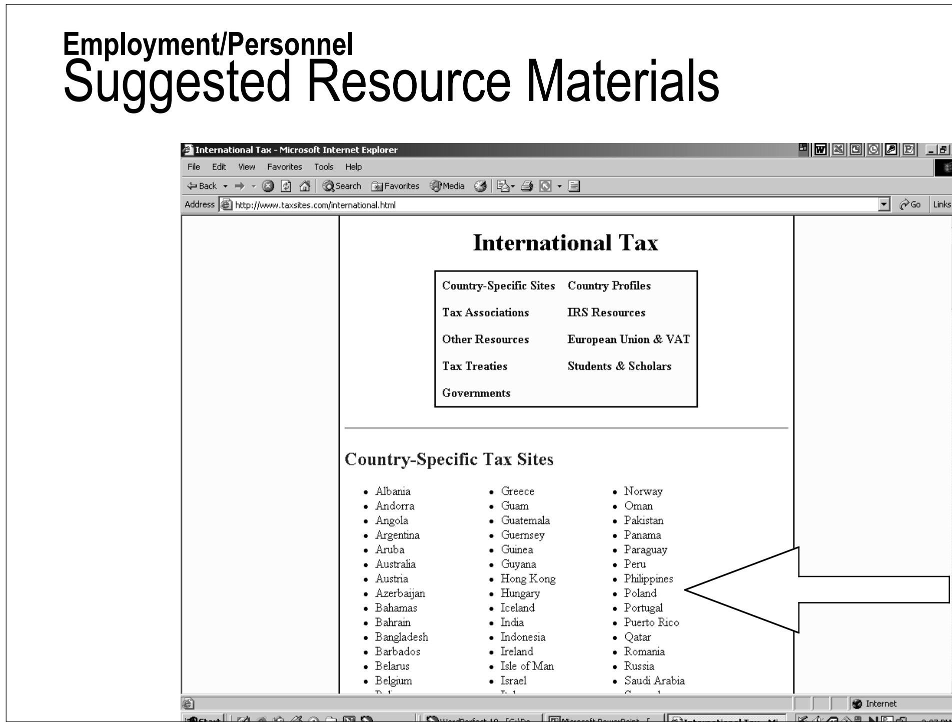
- Who is the client: CEO, Division Head, HR?
- Personal tax planning involves country of origin, residence and employment.
- Immigration is only a quasi-legal process, so favor local counsel. Compare applicant's statements on prior applications.

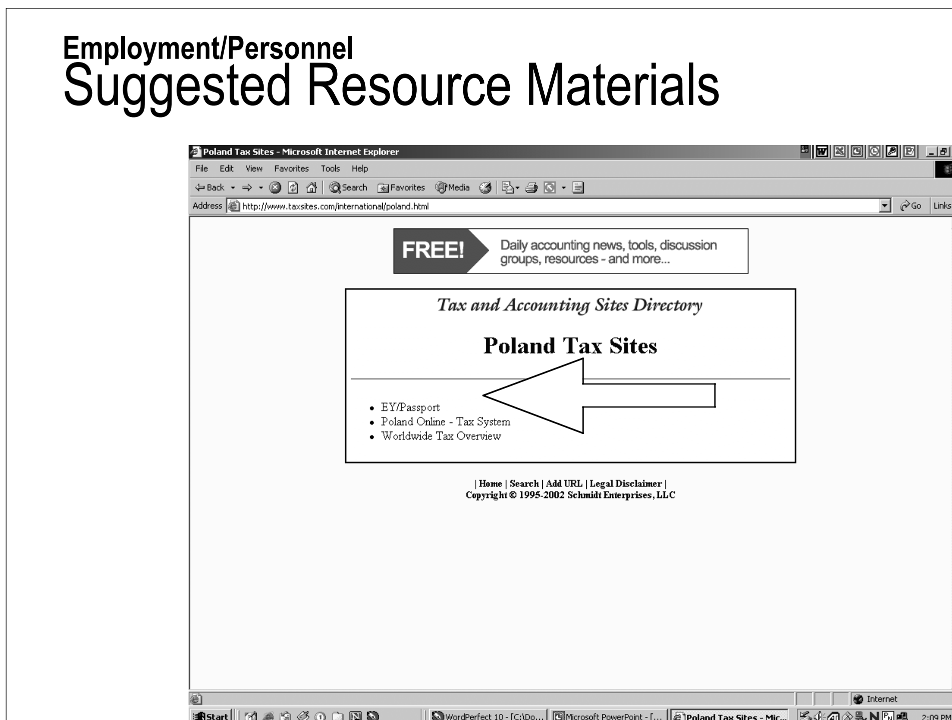
Employment/Personnel Issues

International Relocation Case

- Insist on a written agreement, on the Company's form if possible, based on a uniform international transfer policy. Ad hoc negotiations create policy by default.
- U.S. law allows certain kinds of discrimination in favor of executives from a foreign Company's home country and possibly those on a "headquarters" contract.
- International relocation is a most stressful situation for the employee and the family.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).





This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Employment/Personnel
Suggested Resource Materials

TAX SYSTEM IN POLAND - Microsoft Internet Explorer

http://www.polandonline.com/tax.html

POLAND ONLINE

www.PolandOnline.com

TAX SYSTEM

CORPORATE INCOME TAX	VAT (SALES TAX)	PERSONAL INCOME TAX
DUTY AND IMPORT TAX	PROPERTY TAX	ABOUT DOUBLE TAXATION

CORPORATE INCOME TAX

In 1994, the nominal rate of income tax was kept at 40%. Legal entities whose seat or management is to be found on Polish territory are liable to have their entire earnings taxed at this rate, However, should the taxpayer be based abroad, only that income generated in Poland is liable to taxation. Income tax on dividends or from other earnings derived from profits earned by legal entities based in Poland amount to 20% of that income.

INVESTMENT TAX RELIEF

A new investment tax relief system was introduced across the board in 1994. Economic entities whose pre-tax profits in 1993 were equal to at least 8% of their takings and which have no tax arrears or other liabilities such as contributions to the Social Insurance Fund will be able to subtract from the tax base any sum invested up to 25% of profits earned. Should at least 60% of receipts come from exports, the tax relief will rise to 50% of earnings.

This tax relief will not be applicable to tax-payers availing themselves of tax relief, allowances and exemptions under the provisions of other regulations. Associated with the relaxation in income tax rates is the change in the law regarding joint venture companies. Previously, according to the law of 23rd December 1988, concerning joint venture firms, a three year moratorium on income tax was in force. The beginning of this period was calculated as starting from the first invoice. With the aim of activating companies which had hitherto not undertaken economic activity, this relief was limited to joint venture companies which started trading and presented their first invoice before

Case Study #2
International Joint Ventures

A U.S. bank holding company owns a subsidiary providing services and products related to the data processing needs of its parent. The holding company determines that the subsidiary should offer these services to other banks and bank holding companies throughout Europe, Asia and Latin America. They suspect, but do not know, that a joint venture may be the best structure for the provision of those services and the sale of the products.

- What issues should be considered?
- What structure should be adopted?
- What are the parameters of international joint ventures?
- Are they different for inbound versus outbound joint ventures?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Joint Ventures

Joint Venture:

A form of partnership between business entities

International Joint Ventures

Attributes:

- May be with a major customer, a source of distribution, a supplier or even a competitor.
- Relationship defined by contract.
- Often temporary.
- Very common in multi-national context.
- Contributions often differ.
- In US, special tax allocations allowed.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Joint Ventures

Advantages of Partnerings and Alliances:

- Reduced overhead
- Credibility
- Quick access to facilities and technology.
- Ability to keep the company small.
- More and more innovative products to sell.
- Ability to hedge your own R&D effort.
- Less costly than buying a company.

International Joint Ventures

Advantages of Partnerings and Alliances (Cont'd):

- Better product distribution.
- Diversification and quicker entry into new markets.
- Access to knowledge and know-how – common incentive for joint venture solution.
- Strengthened relationships with key suppliers or customers.
- Ability to move quickly.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Joint Ventures

Disadvantages of Partnerings and Alliances:

- Sharing of future profits
- Foreclosure of other opportunities
- Some barriers to future financing opportunities.
- Creating a competitor or a potential competitor.
- Unexpected disappointments and headaches from your partner.
- Lack of shared expectations and contributions

International Joint Ventures

Agreement Provisions

- Management
- Relative and respective contributions of partners
- Allocation of risks
- Allocation of rewards
- Alternative Dispute Resolution provisions
- Often has separate IP, technology and software or licensing agreement

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Joint Ventures

Joint Venture Facts of Life:
The Really Important Stuff

- Joint ventures are increasingly important
- The rate of return on joint venture activity is very high
- Approximately 50% of all joint ventures succeed
- The likelihood of early problems is high
- Flexibility and evolution are key
- Management autonomy is very important

International Joint Ventures

Joint Venture Facts of Life:
The Really Important Stuff (Cont'd)

- The life of a joint venture is often relatively short
- Joint ventures most often terminate by acquisition
- 50/50 joint ventures work better than others
- Joint ventures between equally strong partners work better
- Ventures between partners with complementary strengths work better

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Joint Ventures

Common Joint Venture Mistakes

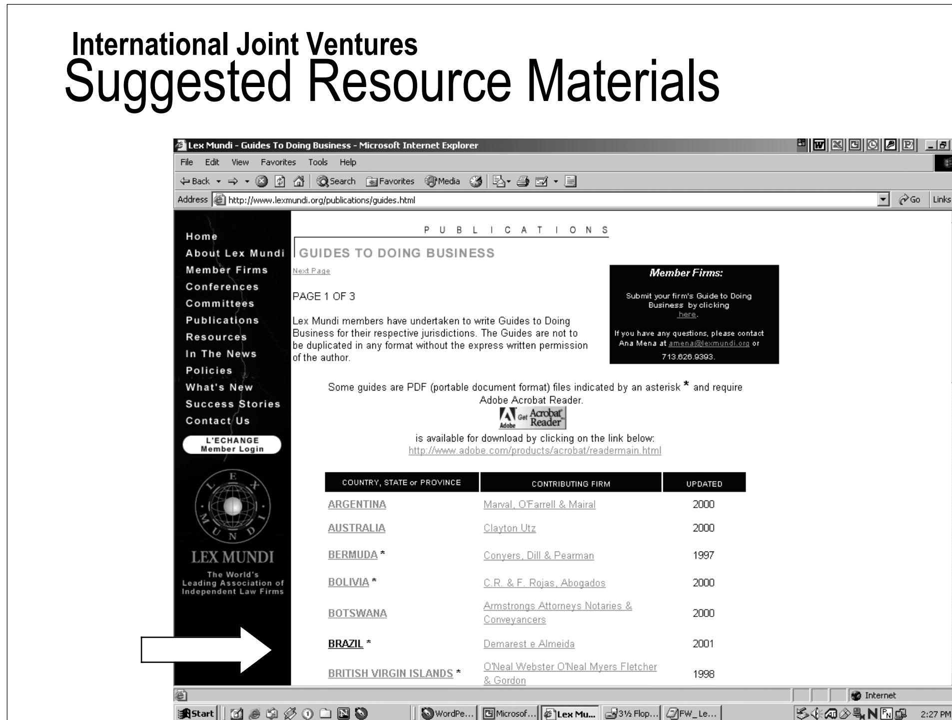
- Cutting yourself too good of a deal
- Lack of an exit strategy
- Failure to use term sheets
- Failure to plan and then keep your eye on the ball
- Negotiating from an ivory tower
- Misplaced haste

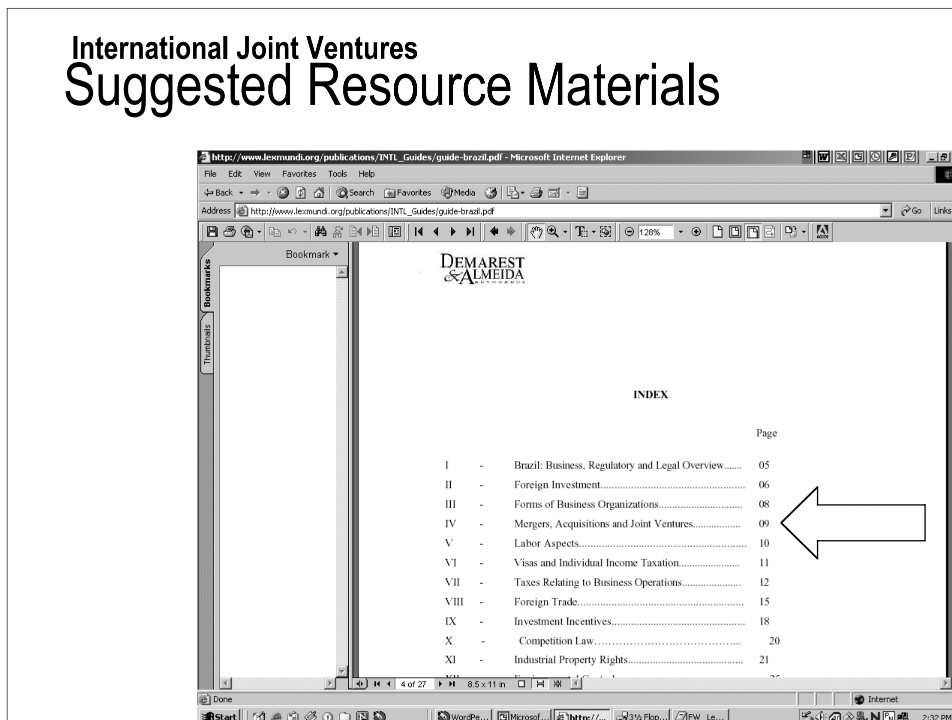
International Joint Ventures

Common Joint Venture Mistakes (Cont'd):

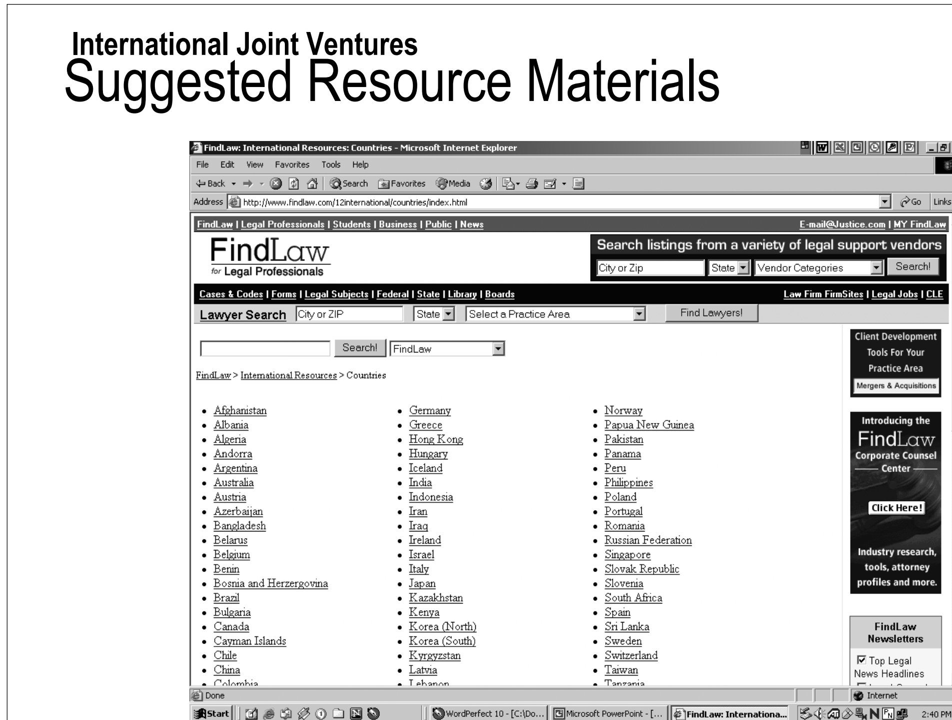
- Ignoring details
- Trapping yourself into awkward positions
- Impairing your ability to "Get Up and Walk"
- Foreclosure of other opportunities
- Wrong deal, wrong partner, wrong reasons

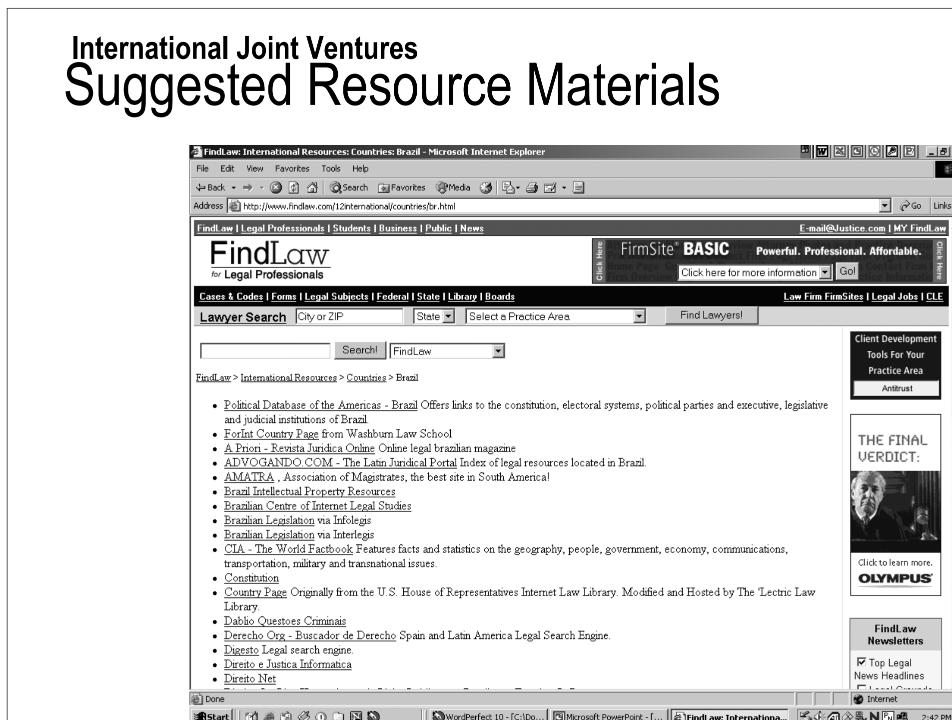
This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

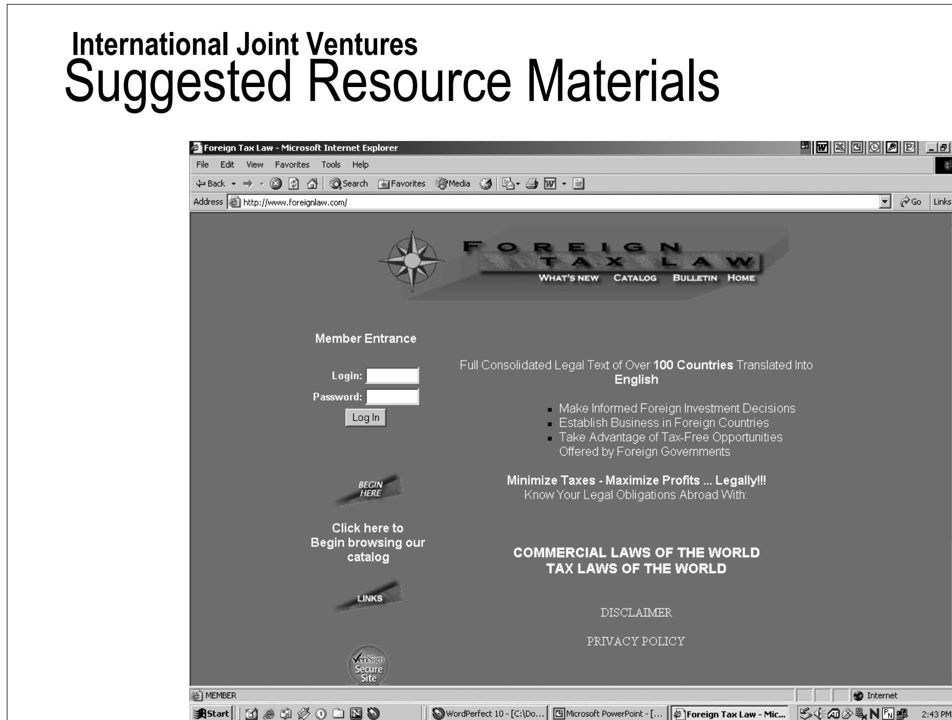


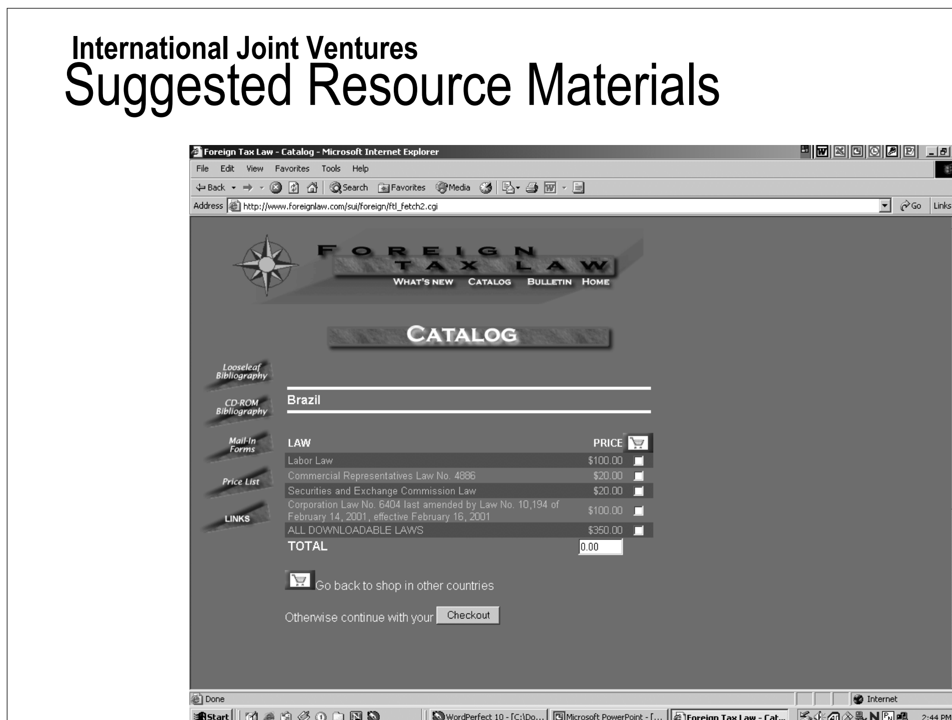


This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).


International Joint Ventures
Suggested Resource Materials
FindLaw: International Resources: Countries - Microsoft Internet Explorer
Address http://www.findlaw.com/12international/countries/index.html
FindLaw | Legal Professionals | Students | Business | Public | News
E-mail@Justice.com | MY FindLaw
FindLaw for Legal Professionals
Search listings from a variety of legal support vendors
Cases & Codes | Forms | Legal Subjects | Federal | State | Library | Boards
Law Firm FirmSites | Legal Jobs | CLE
Lawyer Search
Find Lawyers!
FindLaw > International Resources > Countries
Afghanistan
Albania
Algeria
Andorra
Argentina
Australia
Austria
Azerbaijan
Bangladesh
Belarus
Belgium
Benin
Bosnia and Herzergovina
Brazil
Bulgaria
Canada
Cayman Islands
Chile
China
Germany
Greece
Hong Kong
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Japan
Kazakhstan
Kenya
Korea (North)
Korea (South)
Kyrgyzstan
Latvia
Norway
Papua New Guinea
Pakistan
Panama
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
Singapore
Slovak Republic
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Taiwan
Client Development Tools For Your Practice Area
Mergers & Acquisitions
Introducing the FindLaw Corporate Counsel Center
Click Here!
Industry research, tools, attorney profiles and more.
FindLaw Newsletters
Top Legal News Headlines


International Joint Ventures
Suggested Resource Materials
FindLaw: International Resources: Countries: Brazil - Microsoft Internet Explorer
Address http://www.findlaw.com/12international/countries/br.html
FindLaw | Legal Professionals | Students | Business | Public | News
E-mail@Justice.com | MY FindLaw
FindLaw for Legal Professionals
FirmSite BASIC Powerful. Professional. Affordable.
Cases & Codes | Forms | Legal Subjects | Federal | State | Library | Boards
Law Firm FirmSites | Legal Jobs | CLE
Lawyer Search
Find Lawyers!
FindLaw > International Resources > Countries > Brazil
Political Database of the Americas - Brazil Offers links to the constitution, electoral systems, political parties and executive, legislative and judicial institutions of Brazil.
ForInt Country Page from Washburn Law School
A Priori - Revista Juridica Online Online legal brazilian magazine
ADVOGANDO.COM - The Latin Juridical Portal Index of legal resources located in Brazil.
AMATRA , Association of Magistrates, the best site in South America!
Brazil Intellectual Property Resources
Brazilian Centre of Internet Legal Studies
Brazilian Legislation via Infolegis
Brazilian Legislation via Interlegis
CIA - The World Factbook Features facts and statistics on the geography, people, government, economy, communications, transportation, military and transnational issues.
Constitution
Country Page Originally from the U.S. House of Representatives Internet Law Library. Modified and Hosted by The 'Lectric Law Library.
Dablio Questoes Criminais
Derecho Org - Buscador de Derecho Spain and Latin America Legal Search Engine.
Digesto Legal search engine.
Direito e Justica Informatica
Direito Net
Client Development Tools For Your Practice Area
Antitrust
THE FINAL VERDICT:
Click to learn more.
OLYMPUS
FindLaw Newsletters
Top Legal News Headlines





This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Case Study #3
International Distribution

The Company's subsidiary in a major country decides to terminate all existing distributors and invite them to bid on a single regional distributorship.

The termination letters to the existing distributors say, "Thanks for helping us build a major presence here. We hope you will accept our invitation to compete for a bigger role with us".

Case Study #3
International Distribution

The CFO comes to you shortly thereafter – it seems there is a problem with dealer accounts payable in that country and some nasty letters have come in.

What is the first thing that you do?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Distribution Issues

- Dealership = a property right? A franchise?
- Note these characteristics of a franchise:
  - Exclusivity.
  - Trademark License included.
  - Dealer "invests" in the market.
- Expect local law to make it difficult to terminate a distributor in any case.

International Distribution Issues

- You can try to minimize distribution issues by contract, but consider local statutory traps for the unwary.
- Permit termination by product or product line.
- Enforcing the contract can help:
  - Sales minimums
  - Milestones
  - Quality standards

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

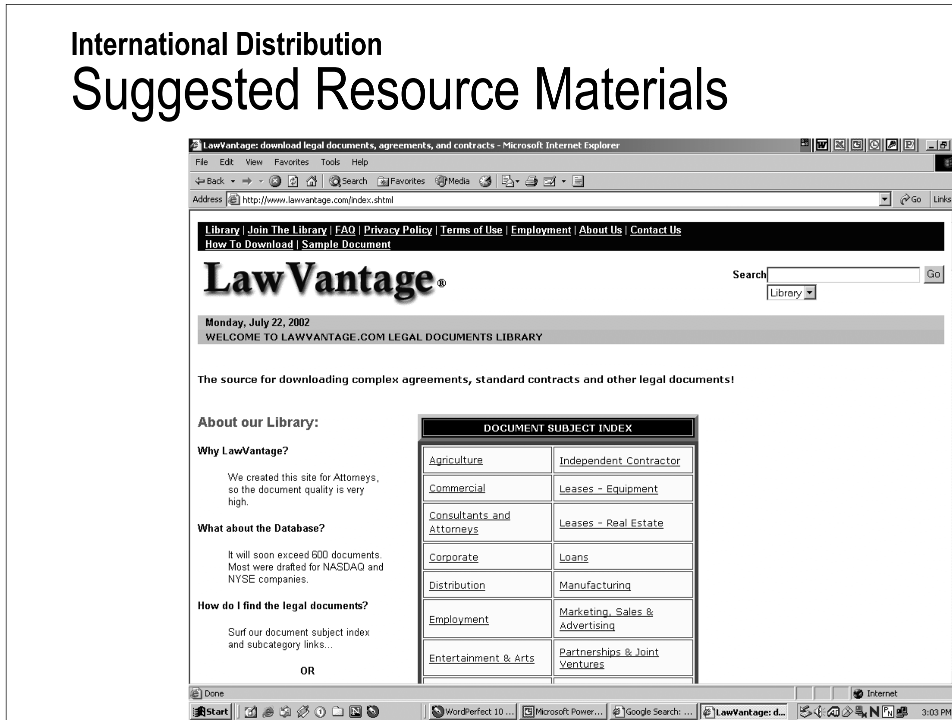
International Distribution Issues

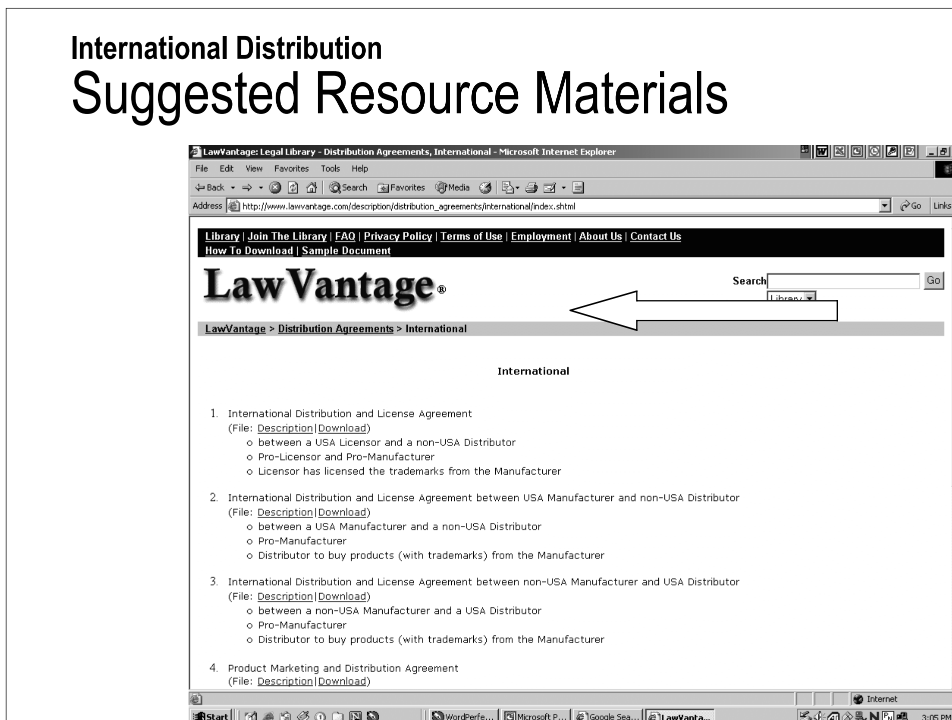
- Dealer litigation is notable for difficulties, delays, and local sympathies - often the dealership must remain in effect pending the outcome
- Consider an OEM or Value-added reseller relationship. For difficult jurisdictions, consider a third-party arrangement.
- Consider letters of credit for payment to avoid repatriation problems and collection work.

International Distribution Issues

- Be aware of differing antitrust regimes, e.g., exclusive arrangements are restricted by European law.
- Be aware of local laws re repatriation of funds and tax withholding.
- Include a suite of protections against "transshipment" = gray market activities.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).





This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Case Study #4

Currency Issues

A software company with excellent domestic market position decides to sell its software through three new offices in Great Britain, Sweden and South Africa. Great Britain is approached as a joint venture with an existing software company with established distribution in the UK. In Sweden, an independent distributor is appointed. And, in South Africa, the company forms a wholly owned South African subsidiary.

What are the implications of the three situations for:

a. Funds Transfer

b. Repatriation of Profits/Capital

c. Currency Hedging

d. Transfer pricing

Currency Issues

Funds Transfer

- Practical Issue
- Requires International Banking Relationship
- Cost is a Consideration

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Currency Issues

Repatriation of Profit/Capital

- See Pricewaterhouse publication “US Corporations Doing Business Abroad”
- IRC§367- Governs funds transfer by a US entity to a foreign corporation
- Many countries outside the US (principally developing third world economies and controlled economies) prohibit or restrict repatriation of capital earned by foreign subsidiaries (and often a division) of a US corporation earned within their jurisdiction. Often includes proceeds of sale or disposition of capital assets in addition to earnings and profits.

Currency Issues

Repatriation of Profit/Capital (Cont’d)

- India and Pakistan are notable historic examples. China too.
- Good news. Restrictions on repatriation have declined dramatically as market economies have developed and government restrictions have abated.
- Very much a matter for local law and consultation with local counsel and companies’ accountants.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Currency Issues

Currency Exchange Risk Management: Currency Hedging

- Even if repatriation of funds is allowed, currency risk is ever present.
- Unless currency speculation is your company's core business, the risk of currency fluctuation should be minimized.
- Example: Recent increase in value of the Euro. Nearly 20% swing in value of earnings if not hedged.
- Direction of movement irrelevant

Currency Issues

Currency Exchange Risk Management: Currency Hedging

- Mechanisms (Options)
  - Forward Hedge
  - Futures Hedge
  - Money Market Hedge
  - Currency Option
  - Currency Swap

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Currency Issues

Practical Hedging Issues

- Large companies have currency exchange departments.
- Smaller companies use international banks to effect a hedge.
- Hedging has become practical and economic for much smaller companies and transactions.
- Currency hedging limits your company's risk to the "business risk of transacting business abroad. It avoids the risk of relative fluctuation of currency values.

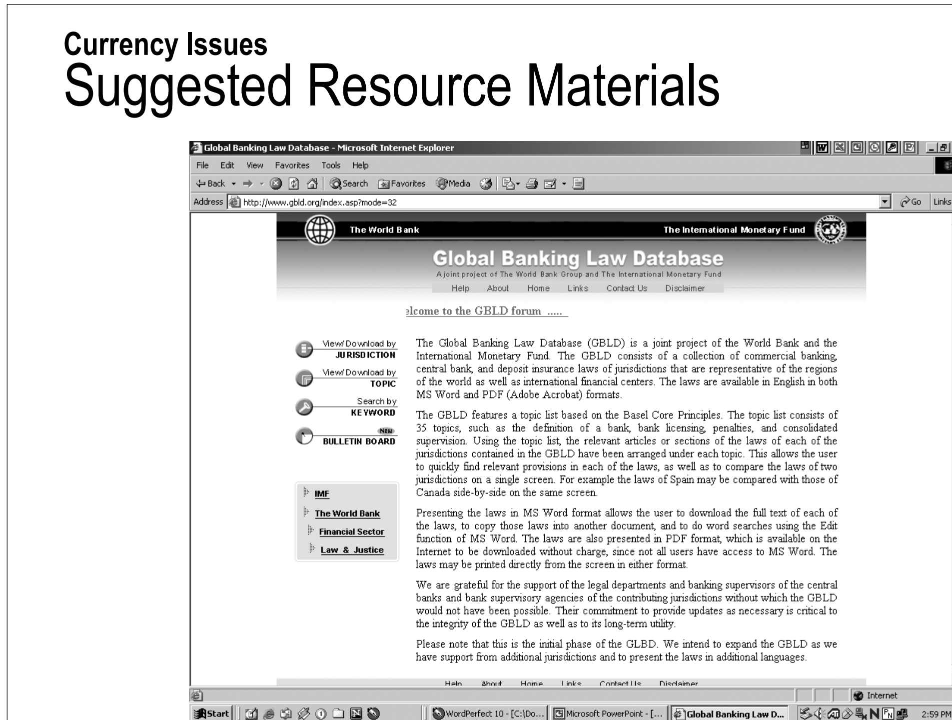
Currency Issues

Transfer Pricing

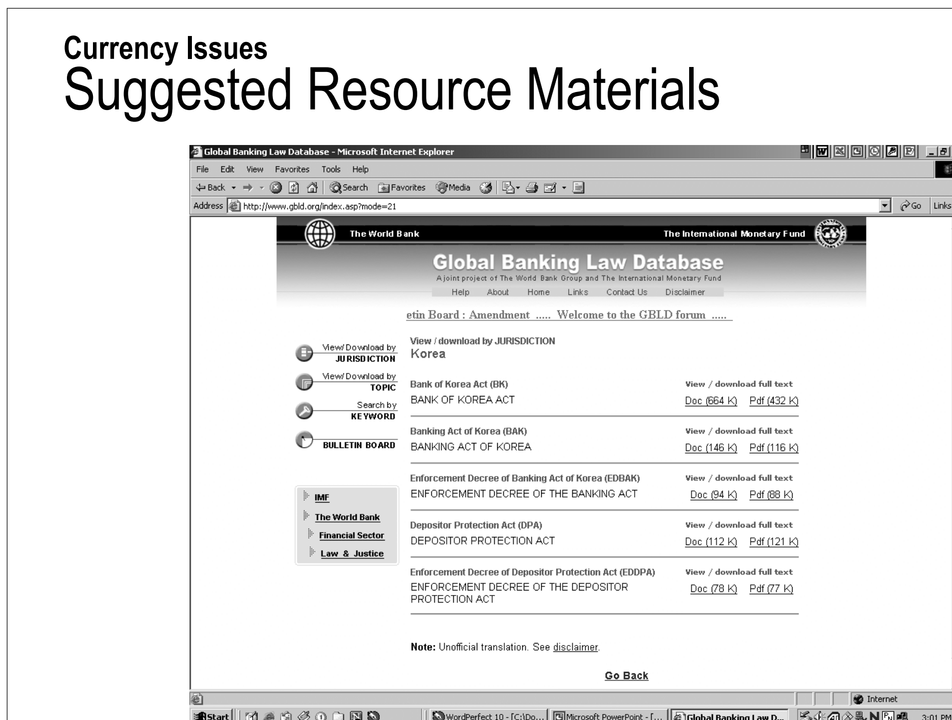
Transfer pricing between US parents and foreign subsidiaries is closely scrutinized both by the Internal Revenue Service and by foreign tax authorities because it affects (and can manipulate) taxable profits in both jurisdictions.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Currency Issues
Suggested Resource Materials



Currency Issues
Suggested Resource Materials



This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Case Study #5

Attorney-Client Privilege

The VP Sales, Australia, requests your advice on a possible infringement of a US Patent.

Your in-house patent counsel issues a reasoned opinion that, at the least, you should be safe from treble damages. The Opinion is marked "Privileged and Confidential Attorney-Client Communication; Attorney Work Product".

You share the Opinion with the VP Sales, Australia, and your cover memo is similarly marked to protect the Privilege, and he is satisfied with the advice.

Case Study #5

Attorney-Client Privilege

Meanwhile, the Company's VP R&D shares the courtesy copy of the Opinion (that you kindly provided) with the head of the R&D unit of your European subsidiary, who shares it with the Company's European patent agent.

The patent owner happens to be a European company and, as luck would have it, shortly thereafter commences an action in Europe against your Company and its European subsidiary.

Who can use the Opinion against whom?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Attorney-Client Privilege

Protecting the Privilege

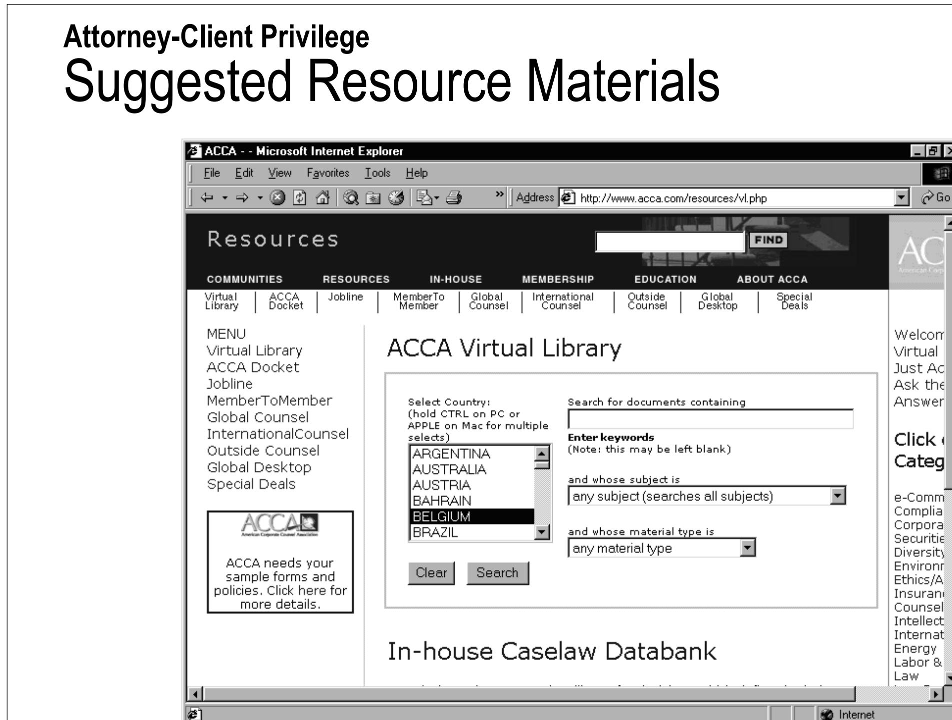
- Consider four tiers:
  - In-house counsel opinion
  - In-house patent attorney opinion
  - Licensed patent agent
  - Law firm opinion
- Always defend the Privilege for all four tiers

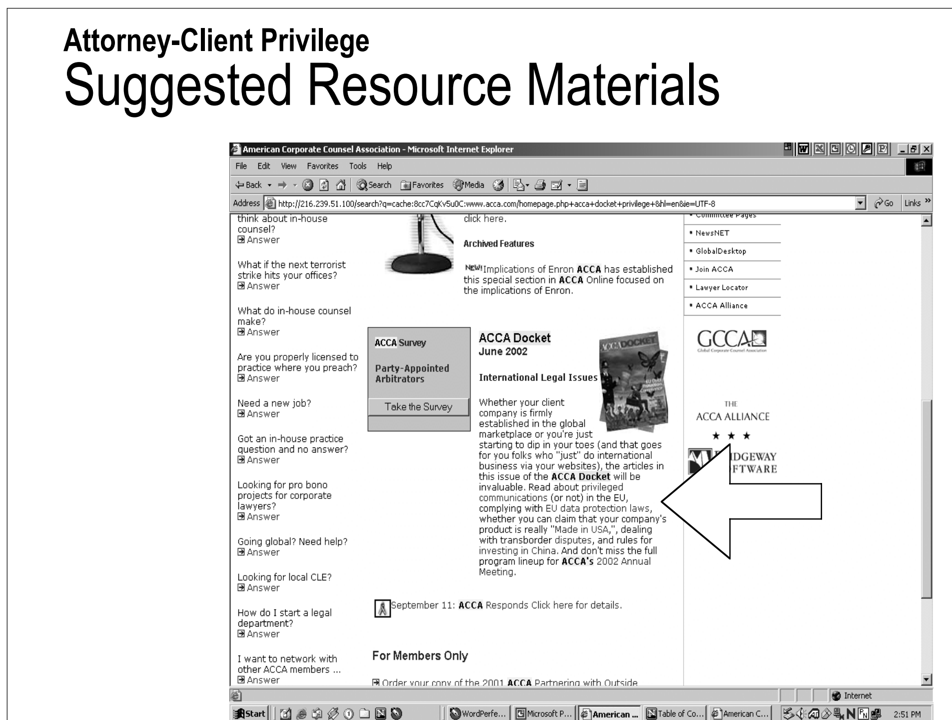
Attorney-Client Privilege

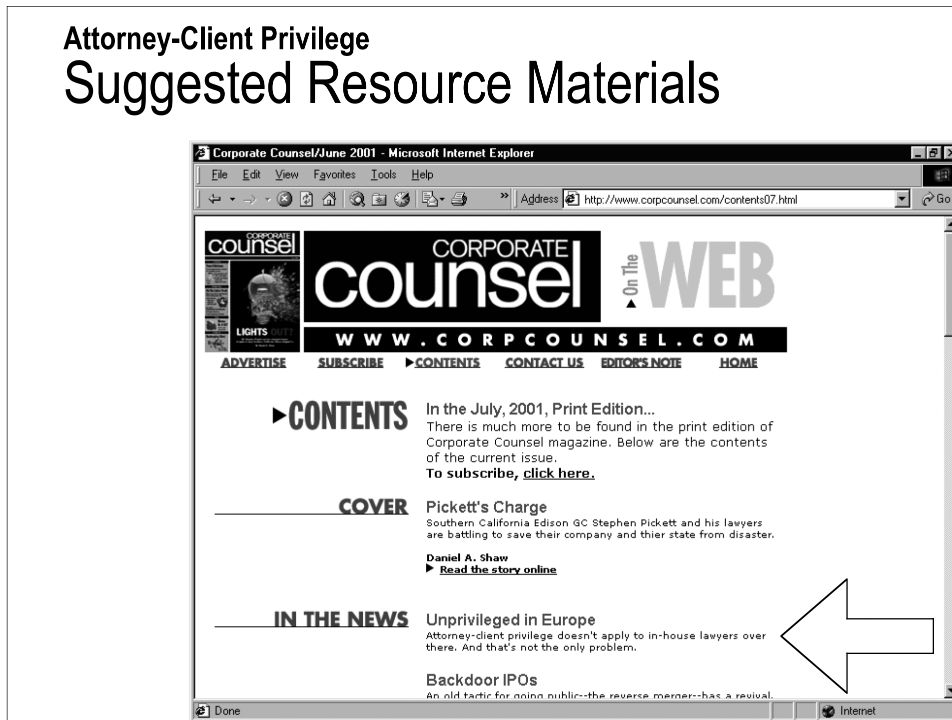
Protecting the Privilege (Cont'd)

- An in-house patent attorney is more likely to be viewed as an expert advisor.
- Some jurisdictions extend the Privilege to opinions of licensed patent agents.
- Some jurisdictions purport to recognize only Law Firm opinions.
- Some jurisdictions assert authority to ignore the Privilege altogether (see EU Merger Control).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).


Attorney-Client Privilege
Suggested Resource Materials
ACCA - - Microsoft Internet Explorer
File Edit View Favorites Tools Help
Address http://www.acca.com/resources/vl.php
Go
Resources
FIND
COMMUNITIES RESOURCES IN-HOUSE MEMBERSHIP EDUCATION ABOUT ACCA
Virtual Library | ACCA Docket | Jobline | MemberTo Member | Global Counsel | International Counsel | Outside Counsel | Global Desktop | Special Deals
MENU
Virtual Library
ACCA Docket
Jobline
MemberToMember
Global Counsel
InternationalCounsel
Outside Counsel
Global Desktop
Special Deals
ACCA needs your sample forms and policies. Click here for more details.
ACCA Virtual Library
Select Country:
(hold CTRL on PC or APPLE on Mac for multiple selects)
ARGENTINA
AUSTRALIA
AUSTRIA
BAHRAIN
BELGIUM
BRAZIL
Search for documents containing
Enter keywords
(Note: this may be left blank)
and whose subject is
any subject (searches all subjects)
and whose material type is
any material type
Clear
Search
In-house Caselaw Databank
Internet


Attorney-Client Privilege
Suggested Resource Materials
American Corporate Counsel Association - Microsoft Internet Explorer
File Edit View Favorites Tools Help
What if the next terrorist strike hits your offices?
What do in-house counsel make?
Are you properly licensed to practice where you preach?
Need a new job?
Got an in-house practice question and no answer?
Looking for pro bono projects for corporate lawyers?
Going global? Need help?
Looking for local CLE?
How do I start a legal department?
I want to network with other ACCA members ...
Archived Features
Implications of Enron ACCA has established this special section in ACCA Online focused on the implications of Enron.
ACCA Survey
Party-Appointed Arbitrators
Take the Survey
ACCA Docket
June 2002
International Legal Issues
Whether your client company is firmly established in the global marketplace or you're just starting to dip in your toes (and that goes for you folks who "just" do international business via your websites), the articles in this issue of the ACCA Docket will be invaluable. Read about privileged communications (or not) in the EU, complying with EU data protection laws, whether you can claim that your company's product is really "Made in USA," dealing with transborder disputes, and rules for investing in China. And don't miss the full program lineup for ACCA's 2002 Annual Meeting.
September 11: ACCA Responds Click here for details.
For Members Only
NewsNET
GlobalDesktop
Join ACCA
Lawyer Locator
ACCA Alliance
GCCA
THE ACCA ALLIANCE
Internet



This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Resource Guide for International Business Transactions

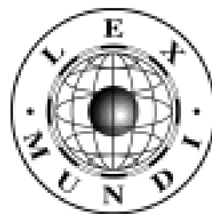
Compiled by:
Hazel L. Johnson
Richmond Librarian
McGuireWoods LLP

To support the program session:

Going International from a One Lawyer Shop

2002 ACCA Annual Meeting
Washington, DC
October 22, 2002

Program sponsored by:



LEX MUNDI

THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Resources Guide for International Business Transactions

The following is a very selective list of publications, online databases, websites and seminar materials that provide resources useful in the transaction of business on an international scale. The guide begins with materials that provide a broad overview of the law of international business transactions, moves to resources the provide more in-depth treatment of specific types of transactions and the law one may encounter in the context of an international business transaction, continues with resources that provide the text of the laws of specific countries and concludes with a listing of agencies involved in international business transactions. Specific international and foreign laws and treaties are not identified, but references are included to resources that identify the laws and treaties that impact specific transactions.

Hazel L. Johnson
Richmond Librarian
McGuireWoods LLP

I. General resources

A. Research Guides

1. American Society for International Law. *Guide to Electronic Resources for International Law*. This guide provides references to free and subscription services. The sections on international economic law, treaties, the United Nations, private international law, international organizations and international commercial arbitration are particularly relevant. http://www.asil.org/resource/home.htm

2. Federation of International Trade Associations. *Web Resources for International Trade*. The site provides links to more than 4000 web sites related to international trade. Topics range from 'Entering International Markets' to "Codes, Standards and Conversions'. FITA also offers a bi-weekly email newsletter that discusses 4-5 sites included in the index. http://www.fita.org/webindex/index.html

B. Treatises

1. *PLC LawDepartment Global* London. Free and fee based. Web service created by the Practical Law Company that materials aimed at corporate counsel in international companies. The site includes practice notes, precedents and checklists giving practical guidance on international transactions. Materials on international acquisitions, international joint ventures, E-commerce and international sales and marketing agreements. According to the website, the precedents are drafted for cross border deals. Commentaries highlight key negotiating, drafting and jurisdiction specific issues. Abstracts and summaries are generally free, with most full text being part of the subscription. A two week free trial is available. http://ldglobal.practicallaw.com

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. Folsom, Ralph H. and Michael Wallace Gordon. *Folsom and Gordon's International Business Transactions.* 2d ed. (Practitioner Treatise Series) Eagan, MN: WestGroup, Inc., 1992 with annual supplementation ($225) Global in scope, this work focuses on trade regulation, licensing, and investment law, with special attention to NAFTA and the Uruguay Round of the GATT. Chapters discuss investments in specific markets (Europe, East Asia, developing nations, and non-market economies) and U.S. and European Union law. http://www.westgroup.com

3. Folsom, Ralph H., Michael Wallace Gordon and John A Spanogle, Jr. *Folsom Gordon and Spanogle's Hornbook on International Business Transactions,* 2d ed. Eagan, MN: WestGroup, Inc., 2001 with annual supplementation ($52). A less detailed (and significantly less expensive) version of the item described above. The text concentrates on trade, licensing, and investment law from a U.S. citizen's perspective. Special attention is given to NAFTA and the Uruguay Round GATT accords. Subjects include sales agent, distributorship, and countertrade agreements; U.S. customs and international trade regulation; export incentives and controls; foreign investing; and antitrust and securities laws. http://www.westgroup.com

4. Nanda, Ved P. and Ralph Lake, eds. *The Law of Transnational Business Transactions*. London: Sweet & Maxwell, 1981 with annual supplementation (£275) The work provides analysis of the legal issues that arise in business transactions involving more than one country. It includes discussion of transnational contracts, transnational bankruptcies, arbitration, and international technology transfer agreements. http://www.sweetmaxwell.com

5. Aresty, Jeffrey M. and James R. Silkenat. *ABA Guide to International Business Negotiations*. 2d ed. Chicago: American Bar Association, 2000 ($145) Focusing on negotiation and dispute resolution, this work provides information about specific national legal cultures. It includes material on Internet business relationships, electronic commerce, and institutional structures for dispute resolution. http://www.abanet.org

C. Seminar/Course Materials

1. ALI-ABA. *Annual Fundamentals of International Business Transactions*. last offered in 2001. The course provides an introductory discussion of the basics of international law, then covers international sales of goods; regulation of imports and exports; contracting with agents and distributors; intellectual property rights and licensing; e-commerce; foreign investment; joint ventures; and dispute resolution. Also included are discussion of immigration issues and ethics and professional responsibility. The course provides analysis of the tax aspects of the transactions. http://www.ali-aba.org/aliaba/CG051.HTM

II. Transaction specific resources

A. Agency, Distribution and Franchise Agreements

1. See Section J on Trade for general materials that discuss this topic.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. Clasen, Thomas. *International Agency & Distribution Agreements.* Newark, NJ: Matthew Bender, 1990 with supplementation through 2002 ($425). This comprehensive treatise provides U.S. and foreign practitioners with the essential information needed to prepare and review foreign sales agency and distribution agreements. In one well-organized source, the author provides legal analysis and legislative background to guide a client through the agreement process. The work is also included on LEXIS but may not be part of flat rate contracts. http://www.lexis.com/bookstore

3. *International Encyclopedia of Agency & Distribution Agreements*. Kluwer International ,1997 with supplementation through 2002 ($253.50) Organized by country, this work summarizes critical definitions from domestic laws and court interpretations. It examines the laws, procedures, and practice relating to commercial agency and distribution agreements in 35 national jurisdictions worldwide. For each country, the Encyclopedia defines the concepts of agency and distribution and identifies and analyses the basic aspects of agency and distribution agreements. http://www.kluwerlaw.com

4. LawVantage A website providing over 600 complex sample agreements retrieved from SEC filings. International distribution agreements are one type of document that is included. http://www.lawvantage.com/index.shtml#distribution

B. Arbitration/Dispute Resolution

1. See Section J on Trade for general materials that discuss this topic.

2. Wenger, Jean. *International Commercial Arbitration: Locating the Resources*. A comprehensive guide to print and electronic materials on international commercial arbitration. http://www.llrx.com/feature

3. Bynum, Charlotte. *International Commercial Arbitration*. A portion of the ASIL *Guide to Electronic Resources for International Law*, this site provides a comprehensive listing of free and subscription electronic resources. http://www.asil.org/resource/arb1.htm

4. Redfern, Alan and Martin Hunter. *Law & Practice of International Commercial Arbitration*. 3rd ed London: Sweet & Maxwell, 1999 (£190) This work provides a comprehensive review of the process of international commercial arbitration: from drafting the arbitration agreement to enforcement of the award. The authors demonstrate efficient and cost effective use of international commercial arbitration. They advise on suitable places of arbitration, review developments in international trade law, and analyze the achievements and opportunities offered by the UNCITRAL Model Law. http://www.smlawpub.co.uk

5. Bergsten, Eric E. *International Commercial Arbitration*. 5 volumes Dobbs Ferry,

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

NY: Oceana Publications, looseleaf ($650). This set provides laws, rules, international treaties and agreements as well as regional conventions that dictate procedure in the conduct of international commercial arbitration. All materials are translated into English and organized according to jurisdiction. http://www.oceanalaw.com

6. Mayer, Brown, Rowe & Maw. *International Arbitration*. The site provides a concise overview of international arbitration, elements that should be considered when drafting arbitration clauses, and the choices that parties must make when contemplating arbitration for dispute resolution. The firm provides a model arbitration clause and extensive commentary, articles by Mayer, Brown, Rowe & Maw arbitration lawyers and other practitioners, information on arbitral institutions, treaties and statutes that govern ADR proceedings around the world, and case law from tribunals and national courts - an excellent free resource. http://www.interarbitration.net/

7. *Arbitration CD-ROM: Resources on International Commercial Arbitration*. New York: Kluwer Law International, 1998, updated through 2002. ($1625 for single user) A complete, continually-updated arbitration library, the cd includes legislation (over 200 national laws); rules (over 180 rules); awards; case law; treaties; conventions and commentary. http://www/kluwerlaw.com

8. InternationalADR.com Kluwer Law International. Produced in conjunction with the Permanent Court of Arbitration and the Institute for Transnational Arbitration, this site includes arbitration laws for 52 countries and provides links to free arbitration resources. The site includes digests of important arbitration cases. This is a subset of the material found at KluwerArbitration.com. http://www.internationaladr.com/

C. Attorney/Client Privilege

1. See Section J on Trade for general materials that discuss this topic.

2. In-House Counsel and the Attorney-Client Privilege – A Lex Mundi Multi-Jurisdictional Survey -- included course handout materials.

3. *Corporate Counsel's Guide to the Attorney-Client, Work-Product, and Self-Evaluative Privileges.* Chesterland, OH: Business Laws, Inc., looseleaf ($155) Although this work is primarily focused on US practice, it does include a section on attorney client privilege in the EU. http://www.businesslaws.com

4. Materials on international and foreign attorney client privilege are most often found in law review and practitioner publications, including one of privilege in June issue of the ACCA Docket. Searches of the ACCA website (http://www.acca.com) or the Lex Mundi website (http://www.lexmundi.org), along with LEXIS and Westlaw are likely to provide the most up to date and practical information.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

D. Banking Economics & Finance

1. See Section J on Trade for general materials that discuss this topic.

2. Institute of International Economic Law. *Researching International Economic Law on the Internet*. Washington, DC: Georgetown University. Maintained by the Foreign and International Librarians at the Georgetown University School of Law, the guide provides annotated links pointing to the "best sites" for many international economic law topics along with links to primary documents. It provides access to research guides on international economic law and related topics and authoritative citations to international instruments. Topics include commercial, competition, development, economics, finance, government and trade. http://www.ll.georgetown.edu/intl/iiel/home.htm

3. *Global Banking Law Database* A joint project of the World Bank Group and the International Monetary Fund, the GBLD is a collection of commercial banking, central bank, and deposit insurance laws of jurisdictions that are representative of the regions of the world as well as international financial centers. The laws are available in English in both MS Word and PDF formats. The laws of 40 countries or regions are available. http://www.gbld.org

E. Export/Import

1. See Section J on Trade for general materials that discuss this topic.

2. U.S. Department of Commerce. *A Basic Guide to Exporting*. 1998. Developed by the U.S. Department of Commerce and Unz & Co. consultants, this resource provides a basic A to Z guide to the ins and outs of exporting, including developing an export strategy, international legal considerations, technical details of shipping and pricing and detailed information on conducting business abroad. http://www.unzco.com/basicguide/index.html

3. Jones, Peter, ed. *Forwarderlaw.com* The site provides a comprehensive resource for legal information on freight forwarding. The site includes an online database of forwarding conditions, commentary, and recent cases on the law of international transport. http://www.forwarderlaw.com

F. Joint Ventures

1. See Section J on Trade for general materials that discuss this topic.

2. *Transnational Joint Ventures*. 3 volumes Chesterland, OH: Business Laws, Inc., looseleaf ($400). This set includes a collection of text, forms and selected laws and regulations to help structure joint ventures between U.S. and foreign countries. A cd-rom with sample joint venture agreements is also included. http://www/businesslaws.com

3. Sayer, Stephen. *Negotiating International Joint Venture Agreements*. London: Sweet & Maxwell, 1998 with annual supplementation, (£245). Sayer covers the legal and commercial aspects of structuring and negotiating international and domestic joint ventures throughout the world. Topics include forms of financing,

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

ancillary agreements such as intellectual property licenses, due diligence procedures, the right to terminate, arbitration, the charter of a joint venture company and restrictive covenants. http://www.smlawpub.co.uk

4. Wolf, Ronald Charles. *Effective International Joint Venture Management: Practical Legal Insights for Successful Organization and Implementation*. Armonk, NY: M.E. Sharpe, Inc., 2000 ($89.95). This work provides step by step guidance to the formation and management of international joint ventures. Wolf presents a clear examination of the legal theory and reality of organizing, negotiating, managing, and protecting international joint ventures. The book provides examples and problem-solving tips. http://www.mesharpe.com

5. *International Joint Ventures*. New York: Practising Law Institute, 2001. Most recently offered in 2002 (course materials - $79). Annual seminar focusing on structuring the international joint venture. Additional sessions discuss tax and antitrust issues relevant to the international joint venture. http://www.pli.edu

G. Licensing

1. See Section J on Trade for general materials that discuss this topic.

2. Ladas & Perry. *International Licensing - Structuring Deals Worldwide.* Focused primarily on intellectual property licensing, this guide includes extensive sample provisions for an international licensing agreement. http://www.ladas.com/ipproperty/Licensing/InternationalIPLicensing/index.html

3. *International Licensing*. London: BNA International, 1997 with regular supplementation ($695). This prodcut examines the nature and types oflicenses currently employed throught the world. It covers all aspects of licensing patent rights, copyrights, and trademarks and includes detailed discussion of the specifics of licensing for 28 countries. http://www.bnai.com

H. Sales

1. See Section J on Trade for general materials that discuss this topic.

2. Kritzer, Albert, ed. *International Contract Manual* 5 volumes Kluwer International. 1990 with periodic supplementation ($256 for guide; $240 for handbook; $146 for checklist) The first volume, *Guide to Practical Applications of the UN Convention on Contracts for the International Sale of Goods*, provides an in-depth analysis of the articles of the convention and a how-to on contracts for the international sale of goods. The second volume, *Country Handbooks*, offers a comparative view of sales codes and practices of over 70 individual countries. It specifically addresses the civil law, common law, socialist and Islamic law of jurisdictions throughout the world. Coverage includes taxation, trade regulations, distributor agreements, statutes of limitations and arbitration. The final segment, *Contract Checklist,* presents business and legal professionals with issues to consider before drafting a proposal or contract or agreeing upon an outside proposal.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

http://www.kluwerlaw.com

3. CISG and International Commercial Law Database. White Plains, NY: Pace University School of Law. A comprehensive site on the UN Convention on Contracts for the International Sale of Goods (CISG), the uniform international sales law of countries that account for two-thirds of all world trade. The site includes a very good guide to researching CISG issues and international commercial law as well as an annotated text of the CISG which includes links to legislative history, scholarly writings and case law. http://www.cisg.law.pace.edu/

I. Taxation
1. See Section J on Trade for general materials that discuss this topic.

2. International Bureau of Fiscal Documentation. Based in Amsterdam, the IBFD is active in the field of tax research, information and education on a worldwide scale. This site includes an international taxation glossary, resources for tax research and publications about taxation throughout the world. http://www.ibfd.nl/

3. *Tax and Accounting Sites Directory*. The site is a comprehensive index of web-based tax and accounting resources. The directory is designed to be a starting point for people who are searching for tax and accounting information, products, and services. The site is maintained by Dennis Schmidt, Professor of Accounting at the University of Northern Iowa. The site includes links to resources in 140 countries, IRS resources, OECD resources. http://www.taxsites.com/international.html

4. *Tax Planning for Domestic & Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances*, 8 vols. New York: Practising Law Institute, last offered in 2001 ($589) - focused primarily on domestic issues, international materials are covered in volumes 7 & 8 http://www.pli.edu

J. Trade
1. Hoffman, Marci. *Revised Guide to International Trade Law Sources on the Internet*. This regularly updated guide provides extensive links to web based resources for international trade research. http://www.llrx.com/features/trade3.htm

2. Vishny, Paul. *International Trade for the Non-Specialist*. Philadelphia: American Law Institute-American Bar Association, 1997 ($159). Designed specifically for the nonspecialist, this book offers the information needed to handle business transactions in the global marketplace. The text stresses the emerging law of the European Union, with an emphasis on mergers, acquisitions, and distribution. It also deals with trade among other entities under NAFTA and the U.S.-Canada Free Trade Agreement, among others. http://www.ali-aba.org

3. Van Houtte, Hans. *The Law of International Trade*. 2d ed. London: Sweet &

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Maxwell, 2001 (£140) Includes discussion of regulatory bodies, transnational sales, distribution, technology transfer, financing and payment, primarily focuses on Western Europe, the US and Canada. http://www.smlawpub.co.uk

4. *International Distribution and Licensing.* Chesterland, OH: Business Laws, Inc., looseleaf supplemented periodically ($185). Includes basic legal rules in a number of jurisdictions and provides over 100 sample forms from a wide variety of industries and countries. The documents have been retrieved from SEC filings and are enhanced by checklists and sample clauses. http://www.businesslaws.com

5. *Laws of International Trade*. 6 volumes Chesterland, OH: Business Laws, Inc., looseleaf, supplemented semiannually ($520). A compilation of guides to laws affecting companies with international business, includes coverage of distribution and agency relationships, export controls, and international arbitration. http://www.businesslaws.com

III. Country Specific Resources

A. Research Guides

1. Reynolds, Thomas H. and Arturo A. Flores. *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World.* 6 volumes Albany, NY: William S. Hein, looseleaf ($1250 print, $2100 print & cd) For each country, the work includes a brief overview of the legal system, general secondary sources, sources of major legislation, sources of court decisions, and a subject index for general legislation. The authors note sources of English and other translations for materials, if available. http://www.wshein.com
2. Germain, Clare. *Germain's Transnational Law Research: A Guide for Attorneys*. Irvington, NY: Transnational Juris Publications, looseleaf. ($117) Among lawyers and students faced with questions involving more than one national legal system, Germain's is the most widely-used legal research guide. This volume: covers all questions pertaining to international and foreign law, with a focus on U.S.-EU relations; offers clear guidance on which questions to ask, where to start, and how to proceed; explains how to analyze a transnational law problem, warning of obstacles and presenting viable strategies and solutions. No website: 914-591-4288

B. "Doing Business" Guides

1. Lex Mundi. *Guides to Doing Business*. Prepared by Lex Mundi law firm members, these guides for more than 40 countries include brief discussions of the factors which impact business transactions, including labor and immigration issues, business structures, import & export controls, etc. http://www.lexmundi.org/publications/guides.html

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. LEXIS - The LEXIS group of databases include doing business guides for seven countries (Germany, Canada, France, Ireland, Japan, Spain and the UK). These are Matthew Bender imprints and may be excluded from flat rate contracts. http://www.lexis.com

C. Organic law
1. Compilations
   a. *Tax and Commercial Laws of the World.* Ormond Beach, FL: Foreign Tax Law, Inc., looseleaf, cd, web access (Print: full $2700, tax only $1500, commercial only $1500, single country $100; CD: full $1000, single country $200; web based; full $1200, varies for single country; individual laws are also available through the web product) This resource features article by article translation and compilations of foreign laws in English from 73 countries. http://www.foreignlaw.com

   b. *International Trade Law Library*. A suite of keyword searchable Folio Infobases containing foreign trade law, treaties, policies, and regulations from around the world. http://www.intl-trade.com/library.html

   c. *The Global Legal Information Network* - A project of the Law Library of Congress, provides a database of laws, regulations, and other complementary legal sources from member nations. The documents are contributed by the governments of the member nations. The database includes full texts of the documents in the official language of the country of origin; summaries or abstracts in English; and thesauri in English and in as many official languages as are represented in the database. http://www.loc.gov/law/glin/GLINv1/

   d. ACCA. *Virtual Library*, The ACCA website includes selected statutes from a variety of foreign countries, along with precedents and sample documents. Access restricted to ACCA members. http://www.acca.com/resources/vl.php

2. Specific countries
   a. Findlaw *Countries* page - A subset of the Findlaw directory, this section offers links to the governing bodies of many countries and to compilations of laws http://www.findlaw.com/12international/countries/index.html

   b. *Foreign and International Law Web* is a service of the Washburn University School of Law Library. The stated goal of this website is to provide links to primary foreign and international legal resources, research aids, and sites useful in conducting research in these areas of the law. http://www.washlaw.edu/forint/forintmain.html

   c. LEXIS – The LEXIS databases include selected laws from 27countries. http://www.lexis.com

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

3. Treaties
   a. *United Nations Treaty Collection*. ($1000/yr for profit organizations; $500/yr non-profit; $250 developing countries, and slightly higher for monthly rates) The largest single collection of treaties on the Internet, it includes approximately 40,000 treaties and related actions already published. The treaties are available in English, French and any other authentic language used. Considerable efforts have been made by the UN to ensure that a treaty could be located with relative ease using such information as type of agreement, date of signature, entry into force, names of the parties and popular names. Production of full-text treaties currently is up to early 1998. One draw-back -- the database will give you the treaty text but no citation. http://untreaty.un.org

   b. Oceana`s *Treaties and International Agreements Online* is a full-text searchable database of over 12,000 U.S. treaties. Searching is free using the Quick US Treaties Index. Access to the full database is priced on a per quarter hour basis. The service includes the full text of US treaties from 1783 to the present. A "Tax Treaties Online" subscription is available that includes a database of 1800 tax treaties for 185 countries. http://www.oceanalaw.com

   c. U. S. State Department. *Trade/Business Transactions Law*. The State Department's list of private international conventions affecting trade and business is focused primarily on conventions to which the US is a party or is considering ratification. http://www.state.gov/s/l/c3536.htm

IV. International Agencies and Organizations
   A. Research Guides
      1. Levy, David A. *Private International Law* A section of the ASIL *Guide to Electronic Resources for International Law*, this site focuses on private international law, the body of conventions, model laws, legal guides, and other documents and instruments that regulate private relationships across national borders. It includes extensive links to primary international organizations and conventions. http://www.asil.org/resource/pil1.htm

   B. Agency/Organization websites
      1. *UNCITRAL* - United Nations Commission on International Trade Law. Established by the UN General Assembly in 1966, UNCITRAL is responsible for progressive harmonization of private international law. The UNCITRAL site contains primary documents and status information about established instruments. The site also provides abstracts of court decisions involving UNCITRAL documents. http://www.un.or.at/uncitral

      2. UNIDROIT - The International Institute for the Unification of Law. Tracing its origins to the League of Nations, UNIDROIT is an autonomous international organization active in the harmonization of private international law. The site includes full text and status information concerning UNIDROIT Conventions. http://www.unidroit.org

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

3. World Trade Organization. The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. http://www.wto.org

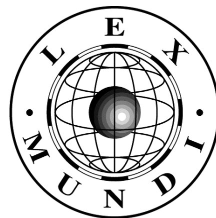
4. Hague Conference on Private International Law The Hague Conference is an intergovernmental organization with the purpose "to work for the progressive unification of the rules of private international law" The principal method used to achieve this purpose consists of the negotiation and drafting of multilateral treaties (conventions) in the different fields of private international law. http://www.hcch.net/e/

5. International Chamber of Commerce. ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy. Although ICC rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade. ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. http://www.iccwbo.org/

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

International Business Transactions Checklist

A publication of:



LEX MUNDI

THE WORLD'S LEADING ASSOCIATION
OF INDEPENDENT LAW FIRMS

developed by the Lex Mundi
International Tax Practice Group

this publication is also available online at:
http://www.lexmundi.org/committees/intl-tax-checklist.pdf

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

INTERNATIONAL BUSINESS TRANSACTIONS CHECKLIST

EDITOR:

Leonard Schneidman, Partner,
Foley Hoag - Boston, Massachusetts
Chair, Lex Mundi International Tax Practice Group

TABLE OF CONTENTS

I. Geography And Culture
II. Investment Environment
III. Investment Incentives
IV. Financial Facilities
V. Exchange Controls
VI. Import/Export Regulations
VII. Structures For Doing Business
VIII. Requirements For The Establishment Of Business
IX. Operation Of The Business
X. Cessation Or Termination Of Business
XI. Labor Legislation, Relations And Supply
XII. Tax On Corporations And Other Entities
XIII. Tax On Individuals
XIV. Tax On Other Legal Bodies
XV. General Tax Considerations
XVI. Immigration Requirements
XVII. Expatriate Employees

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

I. GEOGRAPHY, CULTURE AND SOCIETY

1. **Culture**
   - Are there cultural influences or prohibitions on the way business is conducted?

2. **Geography**
   - What are the neighboring countries?

3. **Judicial System**
   - What is the type of judicial system?
   - Is the judicial system generally perceived to be impartial?
   - Must disputes be resolved in the country?
   - Is there a political method of resolving disputes?
   - Are alternative methods of dispute resolution permitted?
   - How long does it take to resolve disputes?
   - Can foreign judicial decisions be enforced in the country?
   - Can decisions from the country be enforced outside the country?
   - Are there separate tribunals depending upon the subject matter of the case?
   - Are there different legal systems within the country or its political subdivisions?
   - Can the investor choose to be subject to the country's jurisdiction or not?

4. **Languages**
   - What languages are spoken?

5. **Public Services/Communications**
   - What is the state of the public services (e.g. water, electricity, gas, etc.)?
   - What is the state of the communications system?
   - What is the state of the country's infrastructure (e.g. roads, railways etc.)?

6. **Religion**
   - Are there religious influences or prohibitions on the way business is conducted?

II. INVESTMENT ENVIRONMENT

1. **Demography**
   - What locals are available to an investor (e.g. industrial zones, duty free zones)? (see also Section III, no. 3 and 4)
   - What are the size of the different markets?
   - What other types of businesses are being conducted in the country?

2. **Diplomatic Relations**
   - Are there established diplomatic relations with the country?
   - What embassies or consulates are in the country?
   - Are there prohibitions or restrictions on certain business dealings with the country?
   - Are there any travel restrictions to or within the country?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

3. **Environmental Considerations**
   - What is the attitude and state of environmental regulation?

4. **Government**
   - Are elections scheduled or is there an anticipated change in the present government?
   - Has the government been historically stable?
   - What is the administrative decision making process like in the country?

5. **Investment Climate**
   - Does the country generally welcome investment?
   - Are investments protected against nationalization or expropriation?
   - Are there governmental or private agencies devoted to the promotion of investment?
   - What is the rate of inflation?

6. **Investment Regulations**
   - Are foreign investments restricted or prohibited (e.g. depending on the sector of the economy)?
   - Must the investor be in association with a national of the country or a related state, (e.g. the EEC) to be permitted to invest?
   - Is the investor limited in the amount of his investment?

7. **Political System/Climate**
   - What is the present political system?
   - What type of political system has existed in the past?
   - Has the political system been historically stable?
   - Is there a federal system?
   - If so, what are the principle areas of federal versus provincial jurisdiction?
   - Is the country socially stable?

8. **Treaties**
   - Are there any treaties relevant to the anticipated investment?

III. INVESTMENT INCENTIVES

1. **Export Incentives and Guarantees**
   - Are there tax incentives for exports?
   - If so, are they limited to certain types of products?
   - Is export financing available from government or private sources?
   - If so, what forms of financing or guarantees are available?
   - Is there any governmental insurance for exports?
   - Must a national be a participant in the enterprise in order for the investor to benefit from these incentives?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. Grants, Subsidies and Availability of Funds

- Can the investor receive grants or subsidies?
- Are grants and subsidies restricted by the type of activity?
- What is the process for obtaining approval for these grants or subsidies?
- How long does it take to receive approval?
- Can the investor receive loans from the government or governmental agencies?
- Must a national be a participant in the enterprise in order for the investor to receive these grants or subsidies?

3. National Tax Incentives

- Are there national tax incentives for the investor (whether in the country of investment or from the investors' own country)?
- Are the incentives restricted by the type of activity?
- Are the incentives restricted by the duration of the activity?
- Does the investor need to receive approval to be eligible for these incentives?
- If so, what is the process of application?
- How long does such approval take?
- Must a national be a participant in the enterprise in order for the investor to benefit from these incentives?

4. Regional Tax Incentives

- Are there tax incentives for the investor that exist only in certain regions of the country?
- Does the investor need to receive approval to be eligible for these incentives?
- Are the incentives restricted by the type of activity?
- Are the incentives restricted by the duration of the activity?
- What is the process of application?
- How long does such approval take?
- Must a national be a participant in the enterprise in order for the investor to benefit from these incentives?

IV. FINANCIAL FACILITIES

1. Banking/Financial Facilities

- What kind of financial institutions exist?
- Must the investor maintain a bank account in the country?
- What are the requirements for opening a bank account?
- What are the restrictions, if any, on the investor's use of the account?
- What is the type of financial system in the country?
- How is the banking system structured?
- Is there a stock market?
- Can the investor receive bank loans?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

V. EXCHANGE CONTROLS

1. Business Transactions with Nationals, Residents or Non-Residents

- How are nationals, residents and non-residents defined?
- Are there restrictions on conducting business with nationals, residents or non-residents?
- Are there reporting requirements?
- Can the investor receive loans from nationals, residents or non-residents?

2. Investment Controls

- Are there restrictions on direct investment in the country?
- Are there restrictions on indirect investments in the country? Must the investor make declarations regarding the nature of his investment?

3. Money Transfer

- Is there free determination of exchange rates?
- Are there restrictions on the transfer of money into or out of the country?
- Are there restrictions on the remittance of profits abroad?
- Are there reporting requirements?
- Can hard currency be taken out of the country?

VI. IMPORT/EXPORT REGULATIONS

1. Customs Regulations

- Is the country a member of GATT?
- Is the country a member of the EEC?
- Is the country a party to a regional free trade agreement?
- Does the Customs Department value the goods?
- How are goods cleared through customs?
- Are there applicable tariffs?

2. Exports

- Are there restrictions on exports?
- Are export licenses required?
- Are there applicable export duties?

3. Foreign Trade Regulations

- Are there foreign trade regulations on the import or export of goods involved in the business?

4. Imports

- Are import licenses required?
- Are there applicable import duties?
- Are there applicable import quotas?
- Are there applicable import barriers?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

5. Manufacturing Requirements
- Must the product contain ingredients or components which are found or produced only in the country?
- Will the importation of certain component parts be permitted only if they are to be ultimately incorporated in a final product?

6. Product Labeling
- Are there applicable labeling or packaging requirements (e.g. multi-lingual notices, safety warnings, listing of ingredients, etc.)?

VII. STRUCTURES FOR DOING BUSINESS

1. Governmental Participation
- Will the government seek to participate in the ownership or operation of the entity (e.g. depending on the type of activity involved)?
- If so, to what extent?
- What is the investor's potential liability to partners, investors or others?
- Are there restrictions on capitalization?
- What are the investor's tax consequences? (see also Sections XII and XIII)

2. Joint Ventures
- Are joint ventures permitted?
- If so, what is the registration or incorporation procedure?
- How long do these procedures take?
- What costs and fees are involved?
- Must a national of the country or a related state, (e.g. the EEC) be a participant, manager or director?
- What is the investor's potential liability?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?

3. Limited Liability Companies
- Are limited liability companies permitted?
- If so, how are they registered or incorporated?
- How long do these procedures take?
- What costs and fees are involved?
- Must a national of the country or a related state be a participant, manager or director?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?

4. Liability Companies, Unlimited
- What are the forms of liability companies?
- How are these companies registered or incorporated?
- How long do these procedures take?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

- What costs and fees are involved?
- Must a national of the country be a participant, manager or director?

5. Partnerships, General or Limited
- Are partnerships recognized or permitted?
- Must a national of the country or related state be a partner?
- If so, to what extent?
- What costs and fees are involved?
- What is the investor's potential liability?
- What are the investor's tax consequences?

6. Partnerships, Undisclosed
- Do undisclosed partnerships exist?
- If so, how are they formed?
- What costs and fees are involved?
- Must a national of the country or a related state be a participant, manager or director?
- What is the investor's potential liability?
- What are the investor's tax consequences?

7. Sole Proprietorships
- Can the investor be a sole proprietor?
- How is the sole proprietorship registered or established?
- How long does this process take?
- What costs and fees are involved?
- What is the investor's potential liability?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?

8. Subsidiaries/Branches/Representative Offices
- Can the investor establish a branch, subsidiary or representative office?
- If so, how long does registration or incorporation take?
- What costs and fees are involved?
- What is the investor's potential liability?
- Must a national of the country be a participant, manager or director?
- Are there restrictions on capitalization?
- What are the investor's tax consequences?
- Are these tax consequences different than those of a local company?

9. Trusts and Other Fiduciary Entities
- Are trusts or other fiduciary entities recognized?
- If so, how are each defined?
- What are the legal consequences of a transfer of assets to a trust or fiduciary?
- Can the investor be the grantor, trustee or beneficiary?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

VIII. REQUIREMENTS FOR THE ESTABLISHMENT OF A BUSINESS

1. Alien Business Law
- Is the business subject to any alien business law?
- Are there registration or reporting requirements?

2. Antitrust Laws
- Do the entity's operations comply with anti-trust laws?
- Are there filing requirements?

3. Environmental Regulations
- Is the business of the investor subject to environmental regulation? If so, are there added costs involved (e.g. audit requirements)?

4. Government Approvals
- Are government approvals required for the anticipated business?
- If so, how long does this process take?
- What fees are involved?

5. Insurance
- Must the enterprise carry insurance?
- If so, what kind of risks must be insured?
- Is there a state monopoly on insurance?

6. Licenses/Permits
- Are licenses or permits required for the anticipated activity?
- If so, how does the investor apply for and receive the necessary license or permit?
- How long does it take to receive the license or permit?

IX. OPERATION OF THE BUSINESS

1. Advertising
- Are there restrictions on advertising?

2. Attorneys
- Is it necessary to have local counsel?
- How can local counsel be found?
- How much are attorneys fees?

3. Bookkeeping Requirements
- Must the investor keep local books of accounts?
- In what form must the investor keep accounts (e.g. GAP, in what language, etc.)?

4. Business Ethics/Codes
- Are there certain business ethics or codes which the investor must follow (e.g. GAAP for accountants, etc.)?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

5. **Consumer Protection Laws**
   - Are there consumer protection laws which apply to the investor's operations?

6. **Construction**
   - What are the costs of construction?
   - Are permits required for construction?
   - How is authorization to construct obtained?
   - How long does it take to receive authorization?
   - What fees are involved?

7. **Contracts**
   - Can the investor freely enter into local contracts?
   - Can the contracts be governed by the law of another country?

8. **Price Controls**
   - Are there applicable price controls?

9. **Product Registration**
   - Must the entity register its product?
   - If so, how is registration obtained?
   - How long does the process take?
   - Are there fees involved?

10. **Reduction or Return on Capital**
    - Can capital be repatriated while the corporation is still ongoing?

11. **Sale of Goods**
    - Are there restrictions on the manner, time or place of sale of goods?

12. **Trade Associations**
    - Are there trade associations the investor can or must join?
    - If so, are there fees involved?
    - Are there mandatory trade practices?

X. CESSATION OR TERMINATION OF BUSINESS

1. **Termination**
   - What are the tax consequences of terminating the business?
   - What costs are involved in termination?
   - How long does it take to terminate the business?
   - How is the investor's particular form of business treated in
   - termination?
   - Can the business be terminated without government approval or intervention?
   - What are the obligations toward creditors, employees and others upon termination?
   - What are the tax consequences of termination?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. Insolvency/Bankruptcy
- What is the extent of the investor's liability in the event of insolvency or bankruptcy?
- What choices, if any, are available to the investor with regard to the restructuring of the business?

XI. LABOR LEGISLATION, RELATION, AND SUPPLY

1. Employer/Employee Relations
- What laws govern employer/employee relations?
- Are there obligations to train employees?

2. Employment Regulations
- Must the investor hire nationals of the country?
- Is there a minimum wage?
- Is there a maximum number of hours an employee can work each week?
- Is there a minimum number of vacation and sick days to be given?

3. Hiring and Firing Requirements
- Must the investor employ a minimum number of people?
- Must the investor employ a minimum number of nationals?
- Must certain positions in the company be held by nationals?
- Are there rules to follow in hiring/dismissing personnel (e.g. notice)?
- Does the investor have an continuing obligation towards dismissed employees?

4. Labor Availability
- Is adequate skilled or unskilled labor available for the anticipated business?

5. Labor Permits
- Are labor permits required?
- If so, how are they obtained?
- How long does the process take?
- What fees are involved?

6. Safety Standards
- Are there safety codes which must be followed?

7. Unions
- Are unions recognized?
- What are the unions in the investor's business?
- What are these unions' political affiliations, if any?
- Is there an obligation on the part of the employer to organize unions?
- Are there mandatory collective bargaining agreements for the business involved?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

XII. TAX ON CORPORATIONS

1. Allowances
- What are the major allowances (e.g. capital cost depreciation)?
- What are the major deductible items?
- What are the major expenses that are excluded from deductibility?

2. Calculation of Taxes
- How is the taxable base determined?

3. Capital Gains
- What are the federal or national tax rates on capital gains?
- What are the regional or state taxes on capital gains?
- What are the municipal or local taxes on capital gains?

4. Filing and Payment Requirements
- When must the corporation file its tax return, if any?
- When must the corporation pay its taxes?
- Are taxes paid in installments or annually?

5. Miscellaneous Taxes Due
- Is there a tax on capital?
- Is there a business license tax?
- Is there an apprenticeship tax?
- Is there a training tax?
- Are there other taxes?
- What are the filing and payment requirements?

6. Registration Duties
- Are there registration duties due upon the incorporation of a company?
- Are there registration duties due upon an increase in capital?
- Are there registration duties due upon the transfer of the company's shares?
- Are there registration duties due upon a transfer of corporate assets?
- Are there any other registration duties due?

7. Sales Tax or Other Turnover Tax
- What is the system of sales tax (e.g. V.A.T., cumulative)?
- Is input tax creditable against output tax?
- What are the tax rates?
- What are the filing and payment requirements?

8. Social Security and Welfare System Contributions
- Are social security contributions due?
- Are retirement or pension contributions due?
- Are unemployment insurance contributions due?
- What are the filing and payment requirements for any such contribution?

9. Special Tax Schemes
- Are there particular tax consequences of doing business in the country?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

10. Tax on Profits
- What are the federal or national income tax rates on profits?
- What are the regional or state tax rates on profits?
- What are the municipal or local tax rates on profits?

11. Tax Treaties
- Are there any applicable tax treaties?
- Are there any rules against treaty-shopping?

12. Territoriality Rules
- Where is the corporation subject to tax?
- Is the corporation subject to tax on its worldwide income?

13. Treatment of Tax Losses
- How are corporate tax losses treated?

14. Wealth Tax
- Is there an applicable wealth tax?

15. Withholding Taxes
- What are the rates of withholding tax on dividends?
- What are the rates of withholding tax on royalties?
- What are the rates of withholding tax on interest?
- What are the rates of withholding tax on profits realized by a foreign corporation?

XIII. TAX ON INDIVIDUALS

1. Allowances
- What are the major allowances?

2. Calculation of Taxes
- How is the taxable base determined?

3. Capital Gains Tax
- Are capital gains taxable?

4. Filing and Payment Requirements
- When must the individual file a tax return, if any?
- When must the individual pay his taxes?

5. Inheritance and Gift Tax
- Does the individuals' presence in the country subject him to inheritance or gift tax?
- What kind of assets are subject to tax?
- What are the tax rates?
- Are allowances available?
- What are the payment and filing requirements?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

6. **Miscellaneous Taxes Due**
   - What are the miscellaneous taxes to which the individual may be subject?
   - What are the filing and payment requirements?

7. **Real Estate/Habitation Tax**
   - Is the individual subject to real estate or habitation tax?

8. **Sales Tax**
   - Does the individual pay sales tax?

9. **Social Security and Welfare System Contributions**
   - Are contributions to social security due?
   - Are contributions to the welfare system due?
   - If so, what are the payment and filing requirements?

10. **Stock Option, Profit Sharing and Savings Plans**
    - Is there taxation of stock option plans?
    - Is there taxation of profit sharing plans?
    - Is there taxation of savings plans?

11. **Taxation of Benefits In Kind**
    - What is the rate of taxation on benefits in kind (e.g. automobile, housing and utilities, education, etc.)?

12. **Taxes on Dividends**
    - Are dividends taxable regardless of their form?

13. **Tax on Income**
    - What are the federal or national tax rates on income for residents?
    - What are the federal or national tax rates on income for non-residents?
    - What are the regional or state tax rates on income for residents?
    - What are the regional or state tax rates on income for non-residents?
    - What are the municipal or local tax rates on income for residents?
    - What are the municipal or local tax rates on income for non-residents?

14. **Tax Treaties**
    - Are there any applicable tax treaties?
    - Are there any rules against treaty-shopping?

15. **Territoriality Rules**
    - Where is the individual subject to tax?
    - Is the individual subject to tax on his worldwide income?

16. **Wealth Tax**
    - Is the individual subject to tax based upon his wealth?
    - If so, what are the rates?
    - Are there any allowances available?
    - What are the payment and filing requirements?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

17. Withholding Tax
- Is salary subject to a withholding tax at the source?
- What is the treatment of residents as compared to non- residents?

XIV. TAX ON OTHER LEGAL BODIES

1. Allowances
- What are the major allowances (e.g. capital cost depreciation)?
- What are the major deductible items?
- What are the major expenses that are excluded from deductibility?

2. Calculation of Taxes
- How is the taxable base determined?

3. Capital Gains
- What are the federal or national tax rates on capital gains?
- What are the regional or state taxes on capital gains?
- What are the municipal or local taxes on capital gains?

4. Filing and Payment Requirements
- When must the entity file a tax return, if any?
- When must the entity pay its taxes?
- Are taxes paid in installments or annually?

5. Miscellaneous Taxes
- Due Are other taxes due?
- What are the filing and payment requirements?

6. Registration Duties
- Are there registration duties or fees due upon the setting up of the legal body?
- Are there registration duties or fees due upon a change in the capital of the legal body?
- Are there registration duties due upon the transfer of capital?
- Are there registration duties due upon a transfer of assets?
- Are there any other registration duties due?

7. Sales Tax or Other Turnover Tax
- Is the legal body subject to sales tax or any other turnover tax (e.g. VAT., cumulative)?
- Is input tax creditable against output tax?
- What are the tax rates?
- What are the filing and payment requirements?

8. Social Security and Welfare System Contributions
- Are social security contributions due?
- Are retirement or pension contributions due?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

- Are unemployment insurance contributions due?
- What are the filing and payment requirements for any such contribution?

9. Special Tax Themes
- Are there particular tax consequences of doing business in the country under the form of the particular legal body?

10. Tax on Profits
- What are the federal or national income tax rates on profits?
- What are the regional or state tax rates on profits?
- What are the municipal or local tax rates on profits?

11. Tax Treaties
- Are there any applicable tax treaties?
- Are there any rules against treaty-shopping?

12. Territoriality Rules
- Where is the legal body subject to tax?
- Is the legal body subject to tax on its worldwide income?

13. Treatment of Tax Losses
- How are tax losses treated?

14. Wealth Tax
- Is there an applicable wealth tax?

15. Withholding Taxes
- What are the rates of withholding tax on the legal body's activities?

XV. GENERAL TAX CONSIDERATIONS

1. Taxes Generally
- Is there a generally accepted way of structuring the company or other entity so as to insure the desired tax consequences?
- Is there an advance tax ruling that can be used to validate or invalidate the chosen form of doing business?
- Is there a general anti tax avoidance system?
- Can the chosen form of business be treated as a deferent form for tax purposes?

XVI. IMMIGRATION REQUIREMENTS

1. Immigration Controls
- Are there immigration quotas?
- Are vaccinations required?
- Are medical certificates required?
- Are entry permits required?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

- If so, must you apply for an entry permit before entering the country?
- Are exit permits required?
- Are re-entry permits required?

2. Immigration Requirements/Formalities
- Is a residence permit required?
- If so, does the investor have to apply for one before entering the country?
- What information must be supplied to the immigration authorities?
- How long does it take to receive authorization?

3. Visas
- Is a visa required for travel or stay in the country?
- If so, for how long is the visa valid?
- How does the investor apply for a visa?
- What documents are required?
- How long does it take to receive a visa?
- What fees are involved?

XVII. EXPATRIATE EMPLOYEES

1. Cost of Living and Immigration
- How does the cost of living compare to that in the investor's home country?
- What is the rate of inflation?

2. Drivers' Licenses
- Must the investor obtain a driver's license for that country?
- How does the investor obtain a driver's license?
- What fees are involved?
- Is an examination, either practical or written, required?

3. Education
- What type of schools are available for the investor's family?
- What fees are involved?
- What is required for enrollment?
- Can the investor or company receive a tax benefit?

4. Housing
- What type of housing is available for the investor?
- Can the investor own property?
- Must the investor have housing before he enters the country?
- Can the investor subsidize housing and receive a tax benefit?

5. Importing Personal Possessions
- How can the investor import his personal belongings?
- Are import duties payable?
- Are there requirements for clearing the belongings through customs?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

6. **Medical Care**
   - What level of medical care is available?
   - Is there national health care?

7. **Moving Costs**
   - What costs are involved in moving?
   - Can the investor receive any tax allowances?

8. **Tax Liability**
   - What is the expatriate's tax liability? (see also Section XIII)
   - What are the allowances?
   - Are there any applicable tax treaties?

9. **Work Contracts**
   - Does the investor need a work contract to work in the country?
   - If so, does the contract have to be for a certain duration, for the performance of a specific job or for a specific position?
   - Does the contract have to be with a national or resident of the country or related state?

10. **Work Permits**
    - Does the investor need a work permit to work in the country?
    - How and where does the investor apply for the permit?
    - What documents are required?
    - What fees are involved?
    - How long does it take to receive the permit?
    - For how long is the permit valid?

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Sample Distribution Agreement
For discussion purposes, not intended as legal advice
F. J. Salek, August 2002

DISTRIBUTION AGREEMENT

This AGREEMENT dated as of _______________, 2002 by and between _________________________, having an address at ______________________________, USA ("MANUFACTURER") and ______________________________, having an address at ____ ("DISTRIBUTOR").

WHEREAS, MANUFACTURER is engaged in the development, manufacture and sale of certain products and services; and

WHEREAS, MANUFACTURER desires to sell certain of its products and services, as defined pursuant to this Agreement (the "Products"), in the Territory on the terms and conditions set forth herein; and

WHEREAS, DISTRIBUTOR desires to purchase the Products from MANUFACTURER on the terms and conditions set forth herein for the purpose of reselling the Products in the Territory.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements contained herein, and intending to be mutually bound, the parties agree as follows:

1. Definitions. For the purposes of this Agreement, the following terms shall have the meanings set forth herein:

(a) "End User" shall mean customers who purchase the Products for their own use in their business.

(b) "Products" shall collectively mean the equipment set forth in Schedule A attached hereto (the "Equipment") and the software listed on Schedule B attached hereto (the "Software"). MANUFACTURER may from time to time amend Schedules A and B by written notice to DISTRIBUTOR to accommodate the phasing in of new Products and/or the phasing out of mature Products.

(c) "Software License" shall mean the license on Schedule C granted to DISTRIBUTOR and End-User to use the object code of the Software in connection with the Products.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

(d) "Territory" means the country of ______, including its possessions ____ and ____.

(e)

2. Distribution Rights.

(a) Subject to the terms of this Agreement, MANUFACTURER hereby grants to DISTRIBUTOR a personal, non-exclusive, non-transferable and revocable license to use, market, sell and distribute the Product solely during the term of this Agreement and in accordance with the terms and conditions of this Agreement (the "License"). Commencing as soon as practicable after the date hereof, DISTRIBUTOR shall diligently and in good faith use commercially reasonable efforts to promote and maximize, within the Territory, the demand for the Product in accordance with the Program Plan and the Milestones set forth on Schedule A-1 attached hereto. MANUFACTURER shall have the right to approve the method and strategy of distribution and sale of the Product developed by DISTRIBUTOR. In the event that DISTRIBUTOR fails to meet its obligations under any of the Milestones on or before the date specified on Schedule A-1, MANUFACTURER may terminate this Agreement upon written notice to DISTRIBUTOR.

(b) DISTRIBUTOR shall not directly or indirectly, use, market, sell or distribute the Product outside of the Territory. Without limiting any right or remedy of MANUFACTURER under this Agreement or in law or at equity, in the event MANUFACTURER has knowledge of the sale, distribution or use of the Product outside of the Territory by or on behalf of DISTRIBUTOR, MANUFACTURER may, at MANUFACTURER's option: (i) terminate this Agreement upon written notice to DISTRIBUTOR, and/or (ii) require DISTRIBUTOR to take such actions as MANUFACTURER deems necessary or appropriate in order to prevent such manufacture, sale, distribution or use of the Product outside of the Territory. DISTRIBUTOR shall compensate, indemnify and hold harmless MANUFACTURER and its successors and assigns with respect to all losses, damages, costs and expenses (including, without limitation, costs incurred in enforcing MANUFACTURER's rights under this Section 2 (b)) suffered or incurred as a result of any such marketing, sale, distribution or use of Product outside of the Territory. Notwithstanding any provision hereof to the contrary, DISTRIBUTOR may from time to time enter into sub-distribution agreements with respect to the Product, provided that DISTRIBUTOR obtains the advance written approval of MANUFACTURER as to (i) the persons or entities to act as sub-Distributors and (ii) the form of the sub-distribution agreement and any and all amendments or modifications thereto.

(c) DISTRIBUTOR shall not design, market, sell, manufacture or distribute (or cause or permit to have designed, manufactured, marketed, sold or distributed) any product line which is competitive with the Product.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

(d) In connection with its marketing, sale and distribution of the Product, DISTRIBUTOR shall have a non-exclusive license to use the trade name "_______" to refer to the Product, but may not use this trade name or any other trademark, service mark, trade name, or other such rights that MANUFACTURER may have (the "Marks") to refer to itself or its business. The rights granted to DISTRIBUTOR hereunder shall not in any way affect the exclusive ownership by MANUFACTURER of the Marks.

(e) In using such marks, DISTRIBUTOR may imprint the Marks (and only such Marks) on labels approved in advance in writing by MANUFACTURER (collectively, the "Approved Labels"), and shall cause the packaging of the Product to bear the Approved Labels. MANUFACTURER shall have and retain all rights to any Marks used in connection with the Product and shall have the right to use any Approved Labels after termination of this Agreement. All packaging, labeling and advertising used by DISTRIBUTOR on or for the Product shall be in strict compliance with Specifications from time to time approved by MANUFACTURER.

(f) DISTRIBUTOR agrees to use the Marks consistent with such standards and policies established by MANUFACTURER from time to time during the term of this Agreement and otherwise in a professional and high quality manner. If at any time MANUFACTURER determines in good faith that DISTRIBUTOR shall have failed to satisfy such standard of quality, upon notice from the Company, DISTRIBUTOR shall immediately cease the use of the Marks. DISTRIBUTOR may thereafter resume use of the Marks only after demonstrating to MANUFACTURER that such further use will be consistent with MANUFACTURER's specified policies and standards of quality.

3. Non-Exclusivity. DISTRIBUTOR acknowledges that this is a non-exclusive Distribution arrangement and understands that MANUFACTURER may itself market, sell, service, support and distribute Products and/or appoint other Distributors for the Products in the Territory and elsewhere.

4. Purchase Orders. The terms and conditions of this Agreement shall govern exclusively all the purchases made under this Agreement, and any additional or different terms and conditions found in any purchase orders, term sheets, memoranda, instrument or any other documents submitted by the DISTRIBUTOR, other than the specific quantity information, shall be of no force or effect.

5. Forecasting.

6. (a) On or before the end of each calendar quarter, DISTRIBUTOR shall provide MANUFACTURER with a written forecast of its purchases of Products for each of the following four calendar quarters, and shall issue a binding non-cancelable purchase order to MANUFACTURER that covers the first two calendar quarters of that order forecast. DISTRIBUTOR agrees to update such forecasts and purchase orders in writing every ninety (90) days until this Agreement is terminated in accordance with the terms and conditions herein.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

7. (b) DISTRIBUTOR shall provide MANUFACTURER with monthly written reports of all actual sales of Products and installation of Software within thirty (30) days after the end of each calendar month.

8. © The DISTRIBUTOR shall have the right to carry on commercial activities relating to other equipment of other MANUFACTURER's [when such activities do not hamper or interfere with the sale of the Products in the Territory].

9. (d) MANUFACTURER, upon receipt of a new purchase order and written forecast, reserves the right to reject it within fifteen (15) days of receipt for credit reasons or if it should exceed MANUFACTURER's capacity to deliver the Products in the time frame specified. Each order received shall be subject to MANUFACTURER Credit Department approval and shall not be considered binding or valid unless and until accepted in writing by a designated officer of MANUFACTURER in its _____________ office.

10. Letter of Credit. To secure payment for Products delivered to DISTRIBUTOR, DISTRIBUTOR shall obtain an irrevocable confirmed Letter of Credit in favor of MANUFACTURER from a bank acceptable to MANUFACTURER in an amount sufficient to cover all outstanding balances due plus forecast purchase amounts for the next two calendar quarters.

11. Price and Payment. For the Products and Software License, DISTRIBUTOR shall pay MANUFACTURER the amounts set forth in Schedule D. All payments shall be made in United States Dollars in immediately available funds by wire transfer to MANUFACTURER's designated account per the wire transfer instructions set forth in Schedule D. Prices are F.O.B. point of shipment.

12. Transportation. All shipments of the Products will be made F.O.B. point of shipment by the method MANUFACTURER deems most advantageous. Transportation and insurance charges, expenses and costs will be collected, or, if prepaid, will be invoiced to DISTRIBUTOR and are not included in the prices shown.

13. Risk of Loss; Title. Risk of loss or damage to the Products shall automatically pass to DISTRIBUTOR when Products are placed with a common carrier for shipment to DISTRIBUTOR's location. If the Letter of Credit required by Section 5 of this Agreement is in place, title to the Products shall automatically transfer to DISTRIBUTOR upon shipment, free and clear of all liens and claims.

14. Shipment Discrepancies. To be eligible for credit against defective shipments, DISTRIBUTOR must report any errors in any defective package immediately upon receipt to MANUFACTURER's Distributor Service Center, and requests for adjustments on concealed shortages involving packages received intact must be reported to the MANUFACTURER's Distributor Service Center within fifteen (15) days of receipt of the shipment.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

15. Return of Goods. In general, all items are sold without return privileges. Returns require prior authorization by MANUFACTURER. When contacting MANUFACTURER for return authorization, MANUFACTURER must be given the invoice number and date of the shipment. Except where items were damaged in transit, returns must be in clean factory packaging. All returns must be made by prepaid transportation unless otherwise specified by MANUFACTURER. The credit for authorized returns will be based on the net price to DISTRIBUTOR, based on the price listed on the original invoice less all applicable discounts and allowances.

16. Shortages. MANUFACTURER reserves the right to change or discontinue Products and to revoke or change any prices or terms of sale, except when otherwise expressly indicated in this Agreement. If, at any time, it becomes necessary to discontinue shipment to any of MANUFACTURER's other distributors, to revoke or modify any provisions in this Agreement, or to allocate distribution of any of the Products, MANUFACTURER will take whatever action which in its judgment is fair and appropriate.

17. Importer of Record. DISTRIBUTOR shall be importer of record of the Products and Software into the Territory, and therefore DISTRIBUTOR (i) shall be responsible for compliance with customs laws and regulations, (ii) shall pay all import duties or tariffs, and (iii) shall apply for and obtain any regulatory approvals required in order to allow the Products and Software to be sold by DISTRIBUTOR in the Territory.

18. Duties of DISTRIBUTOR. DISTRIBUTOR shall:

(a) have available qualified personnel to demonstrate and offer to End Users the Products;

(b) require End Users to execute and deliver Software Licenses prior to selling or licensing MANUFACTURER's Products to End User, and DISTRIBUTOR will not loan, rent, lease or otherwise temporarily transfer the Products to any End User or other third party;

(c) [for OEM's: sell the Products only in conjunction with a unit of DISTRIBUTOR's own Products;]

(d) at DISTRIBUTOR's expense, supply the Software Products to End Users on appropriate media with any required installation, maintenance, services, support and training;

(e) provide first-level maintenance support for End Users sufficient to determine the cause of problems, and shall promptly notify MANUFACTURER if such problems are found to be caused by the Products;

(f) provide MANUFACTURER with copies of any and all DISTRIBUTOR advertising or sales or other literature using MANUFACTURER trademarks or product names;

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

(g) adhere strictly to the proprietary rights restrictions in this Agreement and Schedules and use its best efforts to protect the proprietary rights of MANUFACTURER with respect to third parties, reporting promptly any infringements of which DISTRIBUTOR becomes aware and cooperating with MANUFACTURER in its efforts to protect its proprietary rights,

(h) keep, for five (5) years following any sale to an End-User, accurate customer and product information as may be necessary for technical support or to adequately administer a recall of any Products and/or Software, and accurate product information necessary for technical support of such Product or Software to adequately administer a recall, and

(i) carry products liability insurance with respect to the Product sold or distributed by it in such amounts and against such risks and losses as are reasonably acceptable to MANUFACTURER and shall have MANUFACTURER named as a co-insured on any such insurance. DISTRIBUTOR shall be solely responsible for any premium for such insurance including any premium that is applied in connection with MANUFACTURER being named as co-insured thereunder.

19. Duties of DISTRIBUTOR and End User. DISTRIBUTOR and End User shall be solely responsible for installation, integration with third-party products, training of operating personnel, and all other matters connected with sales of Equipment (including, without limitation, all cabling and related items), and for all operating, network, application and other software, hardware and firmware interfaces. DISTRIBUTOR will make every reasonable effort to correct any problems arising from such equipment, software, hardware, firmware and interfaces.

20.

21. Term of Agreement and Termination.

(a) The term of this Agreement shall be for _______ (_) years from the date of this Agreement subject to MANUFACTURER's right of termination pursuant to subsection (b) of this Section.

(b) This Agreement may be terminated by MANUFACTURER in the following circumstances:

(i) DISTRIBUTOR's failure to meet any of the Milestones [or Minimum sales targets] set forth in Schedule A-1,

(ii) breach of any agreement, covenant or representation by DISTRIBUTOR made in this Agreement or Schedules attached hereto; or

(iii) any misrepresentation by DISTRIBUTOR; or

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

(iv) if DISTRIBUTOR neglects or fails to perform or observe any of its obligations including, but not limited to, timely payment of any sums due MANUFACTURER; provided however, that MANUFACTURER will provide ten (10) days written notice to DISTRIBUTOR prior to such termination. Termination will automatically occur at the end of such ten (10) day period unless DISTRIBUTOR has cured such default within that period; or

(v) immediately upon the filing of bankruptcy, arrangement for the benefit of creditors, insolvency, or receivership proceedings by or against the DISTRIBUTOR; or

(vi) at any other time by MANUFACTURER upon ninety (90) days prior written notice to DISTRIBUTOR. Termination of this Agreement pursuant to this subsection 12(b)(v) will not serve to cancel previously issued and accepted purchase orders.

© The provisions of this Agreement and Schedules attached hereto relating to the protection of MANUFACTURER’s confidential and proprietary information shall survive the expiration or termination of this Agreement. In addition, paid End User Licenses shall remain in effect in accordance with their terms.

(d) DISTRIBUTOR understands that, at the end of the term of this Agreement or upon earlier termination hereof, neither it nor any of its agents shall have any right whatsoever in connection with the subject matter of this Agreement, regardless of any undocumented continuation of the relationship, nor be entitled to any compensation in connection with such termination. To the extent legally permissible, any such rights or possible claims are hereby expressly waived by DISTRIBUTOR.

DISTRIBUTOR further understands that these termination rights are absolute, nonexclusive and independent of any other remedies which may be available at law or in equity. Neither party shall incur any liability for damage, loss or expenses incurred by the other incident to a party's termination of the Agreement in accordance with its terms. In addition to provisions which survive according to their terms, the following provisions shall survive: __, __, and __.

22. Specifications. The Products shall be in accordance with the then current published specifications of MANUFACTURER but may vary in non-material details from the descriptions in any literature or from any display or other model inspected by DISTRIBUTOR. MANUFACTURER may include used or refurbished components and sub-assemblies in the manufacture of Products. MANUFACTURER may make material improvements or changes to the Products at any time provided that MANUFACTURER will first notify DISTRIBUTOR in writing of such material change at least thirty (30) days prior to the effective date of the change.

23. Documentation. MANUFACTURER shall supply to DISTRIBUTOR, at no charge, five (5) printed copies or one (1) electronic copy of the documentation for each of the Products. DISTRIBUTOR may reproduce the documentation for its End Users, provided that any such documentation shall be the property of MANUFACTURER subject to the restrictions of

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Section 17 below and all copies of said documentation in DISTRIBUTOR's possession shall be returned to MANUFACTURER or destroyed upon termination or expiration of this Agreement.

24. Export Controls. DISTRIBUTOR shall comply with all export laws, restrictions, national security controls and regulations of the United States. DISTRIBUTOR shall not export or re-export, or allow the export or re-export of, any Product or Software or any copy, portion or derivative thereof in violation of any such restrictions, laws or regulations. DISTRIBUTOR shall not export or re-export, or allow the export or re-export, to any Group D:1 or E:2 country (or any national of such country) specified in the then current Supplement No. 1 to Part 740, or in violation of the embargo provisions in Part 746, of the U.S. Export Administration Regulations (or any successor regulations or supplement thereto), except in compliance with and with all licenses and approvals required under applicable export laws and regulations, including without limitation, those of the U.S. Department of Commerce. DISTRIBUTOR shall comply with the U.S. Foreign Corrupt Practices Act (regarding among other things, payments to government officials)

25. Proprietary Rights. Patents, trademarks, copyrights and any other proprietary property and information pertaining to the Products are acknowledged by DISTRIBUTOR as the exclusive property of MANUFACTURER and neither DISTRIBUTOR nor End Users shall have any right, title, interest in or to or a license in any such property except where expressly assigned or granted in writing by MANUFACTURER hereunder.

DISTRIBUTOR shall, at the request and expense of MANUFACTURER, execute and deliver or procure the execution and delivery of all necessary documents, instruments, certificates, assignments and other documents and take all necessary action for the registration and protection of the patents, trademarks, copyrights or any other intellectual property rights of MANUFACTURER pertaining to the Products. DISTRIBUTOR shall promptly report to MANUFACTURER any infringement of which DISTRIBUTOR may become aware in connection with the patents, trademarks, copyrights or other intellectual property rights of MANUFACTURER pertaining to the Products. DISTRIBUTOR shall not, either on its behalf or on behalf of others, register or attempt to register or make any claim of ownership adverse to MANUFACTURER regarding any of the patents, trademarks, copyrights or intellectual property rights of MANUFACTURER or any other rights resembling those of MANUFACTURER. DISTRIBUTOR shall not, without first obtaining the written permission of MANUFACTURER, misuse, remove, obliterate, deface, change, replace, or apply any trademark, copyright or other proprietary notices including any patent, trademark, copyright or other proprietary notice of MANUFACTURER used on or in connection with Products, documentation and other related materials supplied to DISTRIBUTOR under this Agreement. MANUFACTURER may, from time to time, supply data for the proper installation, testing, operation and maintenance of its Products. Such data is proprietary in nature and will be so marked and DISTRIBUTOR agrees to abide by the terms of all such markings. MANUFACTURER retains for itself all proprietary rights to any Products specified in this Agreement and to all discoveries, inventions, patent, copyrights and other rights arising out of

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

work done by MANUFACTURER or DISTRIBUTOR in connection with this Agreement and to any and all Products developed by MANUFACTURER or DISTRIBUTOR as a result thereof, including the sole right to manufacture, reproduce and sell any and all such Products.

26. Confidential and Proprietary Information.

(a) DISTRIBUTOR shall maintain and shall cause its officers, directors, employees, and agents to maintain the confidentiality of, and shall in no event use adversely to the interests of MANUFACTURER other than strictly in accordance with the purposes and terms of this Agreement, any trade secrets, know-how, DISTRIBUTOR lists, financial information or other confidential and proprietary information of MANUFACTURER which is not a matter of public knowledge at the time of its disclosure to DISTRIBUTOR (together, the "Proprietary Information") both during the term of this Agreement and thereafter, until such time as that Proprietary Information becomes a matter of public knowledge through no act or omission of DISTRIBUTOR or its officers, directors, employees or agents, except to the extent that disclosure may be required by enforceable legal process. For purposes hereof, Proprietary Information shall not include information disclosed by MANUFACTURER to DISTRIBUTOR which DISTRIBUTOR can establish was (i) known by it prior to the date of disclosure hereunder, (ii) acquired by it as a result of independent research or development by it or (iii) received by it from a third party having the lawful right to disclose such information.

(b) Upon the expiration or termination of this Agreement for any reason, DISTRIBUTOR shall immediately (i) cease using any Proprietary Information belonging to MANUFACTURER, and (ii) return to MANUFACTURER all materials including, but not limited to, any manuals, diskettes, tapes and instructions (exclusive of purchased Products) pertaining to or containing any Proprietary Information belonging to the MANUFACTURER.

27. Software; Limitations on Sale of Software by DISTRIBUTOR. (a) DISTRIBUTOR agrees to sell the Products only in conjunction with the sale or licensing of the Products to End Users. DISTRIBUTOR shall not sell or license the Software on a standalone basis. DISTRIBUTOR shall distribute to End Users the Software only in object code form and only upon End User's execution and delivery of the Software License and End User's agreement to abide by the terms thereof. Except for the purposes stated herein, DISTRIBUTOR shall not otherwise use and distribute the Products for its own use and purpose or for the use and purpose of others.

28. (b) DISTRIBUTOR shall not (i) disassemble, decompile or otherwise attempt to reverse engineer any portion or component of the Software or otherwise attempt to derive or obtain any source code, structure, algorithms, process, technique, technology, know how or ideas underlying or contained in the Products or the Software, (ii) rent, lease or otherwise provide temporary access to the Products or the Software or portion or components thereof, (iii) copy, alter, use, modify or create derivative works of any portion or component of the OEM Products or Licensed Materials, or (iv) allow, assist or permit others to do any of the foregoing.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

29. Infringement Indemnification. MANUFACTURER shall defend and indemnify and hold DISTRIBUTOR harmless against any action brought against DISTRIBUTOR to the extent that it is based on a claim that the Products, when properly used within the scope of this Agreement, infringe a United States patent or copyright, provided DISTRIBUTOR notifies MANUFACTURER promptly in writing of the action and gives MANUFACTURER the sole control of the defense, all negotiations and any settlement. If the Products become, or are likely to become, the subject of an infringement claim, MANUFACTURER may, at its option, secure DISTRIBUTOR's right to continue using the Software or replace or modify it to make it noninfringing with substantially similar functions and levels of performance. If neither of these alternatives is reasonably available, MANUFACTURER may discontinue the Products upon one (1) month's prior written notice. MANUFACTURER shall have no liability for any infringement claim (i) based on the use of the Products with software, data, or systems not supplied by MANUFACTURER; or (ii) concerning the Software based on use of other than a then current unaltered release of the Software; or (iii) based on use of the Software in a manner not authorized by MANUFACTURER under this Agreement. THIS SECTION STATES THE ENTIRE RESPONSIBILITY OF MANUFACTURER CONCERNING PATENT, COPYRIGHT OR OTHER PROPRIETARY RIGHT INFRINGEMENT.

30. Limited Warranties; Limited Liability. The Products are hereby sold and the Software is hereby licensed subject to the terms and conditions set forth in this Agreement, including, without limitation, the Software License. No warranties, either express or implied, are made with respect to the Products or any part thereof except as expressly set forth in this Agreement and the Schedules thereto.

The exclusive remedy of DISTRIBUTOR and sole liability of MANUFACTURER in connection with the performance or non-performance of the Products, is the repair or replacement of the defective part, provided that the part is returned and the defect confirmed by MANUFACTURER. If MANUFACTURER, in its sole opinion, is unable to install the Products as warranted, DISTRIBUTOR may recover actual and direct damages to the following limits, upon return of the Products to MANUFACTURER. The aggregate liability of MANUFACTURER for any cause, whether in contract or tort, including negligence, shall be limited to the price paid by DISTRIBUTOR for the item or Product which is the subject of the cause of action. This limitation will not apply to claims for personal injury caused solely by the negligence of MANUFACTURER.

THE WARRANTIES EXPRESSLY SET FORTH HEREIN ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT WILL MANUFACTURER BE LIABLE FOR (1) LOST PROFITS, LOST DATA OR LOST USE, OR ANY OTHER INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR FOR ANY INDIRECT, SPECIAL, OR PUNITIVE DAMAGES REGARDLESS OF THE FORM OF ACTION, WHETHER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT PRODUCT LIABILITY OR OTHERWISE,

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

EVEN IF DISTRIBUTOR OR ANY OTHER PERSON HAS ADVISED MANUFACTURER OF THE POSSIBILITY OF SUCH DAMAGES; (2) DAMAGE CAUSED BY DISTRIBUTOR'S FAILURE TO PERFORM ITS RESPONSIBILITIES; (3) REPAIRS, SERVICING OR ALTERATIONS DONE WITHOUT THE WRITTEN APPROVAL OF MANUFACTURER; OR (4) USE OF PRODUCTS IN A MANNER WHICH IS NOT AUTHORIZED BY THIS AGREEMENT.

The Products and Software are not designed or intended for use in on-line control of aircraft, air traffic, aircraft navigation or aircraft communications, or in the design, construction, operation or maintenance of any nuclear facility, or in the operation or maintenance of any direct life support system. MANUFACTURER disclaims any express or implied warranty of fitness for such uses. DISTRIBUTOR agrees that it will not use, market or expressly authorize licensees to use the hardware or software for any such purpose.

31. Warranties by DISTRIBUTOR to End User.

(a) DISTRIBUTOR agrees that any and all warranties made to End Users shall be made only by DISTRIBUTOR, without obligation or liability of MANUFACTURER, except for the limited warranties expressly made by MANUFACTURER to DISTRIBUTOR herein. DISTRIBUTOR AGREES THAT DISTRIBUTOR WILL MAKE NO REPRESENTATIONS OR WARRANTIES TO END USERS WITH RESPECT TO ANY COMMITMENT OR WARRANTY MADE BY MANUFACTURER EXCEPT FOR THOSE EXPRESSLY MADE BY MANUFACTURER IN WRITING HEREIN.

(b) DISTRIBUTOR shall take all necessary action permitted or required to ensure that the limited warranties and liability of MANUFACTURER as set forth in this Agreement and the Software License are valid and enforceable as against whomever they are applicable. DISTRIBUTOR shall immediately inform MANUFACTURER as soon as DISTRIBUTOR becomes aware of any liability claim by a third party.

(c) DISTRIBUTOR hereby agrees to defend, indemnify and hold harmless MANUFACTURER and its respective officers, directors and employees from and against any and all losses, suits, claims, actions, damages, liabilities, expenses (including, without limitation, fees and disbursements of legal counsel and expenses of litigation) or other obligations of any nature arising from or in connection with DISTRIBUTOR's actions hereunder or its relations with its, End Users, distributors or dealers or DISTRIBUTOR's failure to comply with DISTRIBUTOR's obligations hereunder with respect to warranties. The indemnification obligations of DISTRIBUTOR shall survive any expiration or termination of this Agreement.

32. Taxes. Value-added, sales, use, or other taxes measured by sales or receipts are not included in the prices shown, and DISTRIBUTOR is required to remit applicable taxes directly to the taxing authorities and shall fully indemnify MANUFACTURER for its failure to do so.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

33. Notices. Any notice provided by a party to another party under this Agreement shall be in writing and shall be deemed properly given or made on the date delivered by hand or sent via telefax (with electronic and verbal confirmation thereof), or three (3) business days after deposited with a reputable international courier service for express delivery, in each case to the address listed for such party as follows or any subsequent address supplied by such party by notice to the other party.

If to MANUFACTURER: If to DISTRIBUTOR:

With a Copy to:

If to MANUFACTURER: If to DISTRIBUTOR:

34. Year 2000. All software provided as part of the Software shall accept input and provide output, record, store, process, display, and present the calendar dates April 1, 1999 and September 9, 1999 and all calendar dates falling on or after January 1, 2000 and all date data in the same manner and with the same functionality, as such software accepts input and provides output, records, stores, processes, displays, and presents all other calendar dates and all date data falling on or before December 31, 1999, and in all other aspects, the software shall not in any way lose functionality or degrade in performance as a consequence of such software operating at a date later than December 31, 1999.

35. Relationship of Parties. The parties hereto expressly understand and agree that each is an independent contractor in the performance of each and every part of this Agreement, that each is solely responsible for its respective employees and agents and all related labor costs and expenses. Nothing contained in this Agreement shall be construed or implied to create a franchise, partnership, agency, joint venture, or employment relationship between the parties, and neither party shall have any authority to bind the other party.

36. DISTRIBUTOR Qualifications. [for Value-added reseller: DISTRIBUTOR must add value to the Products provided under this Agreement. DISTRIBUTOR shall complete the statement of value added set forth in Schedule E and shall, during the term of this Agreement, meet the qualifications, as determined by MANUFACTURER in its sole discretion, set forth in such statement.]

37. Privacy; Investigations. MANUFACTURER and DISTRIBUTOR shall cooperate to assure protection of confidential data regarding End-users and their customers as required by U.S. or other law or treaty. If DISTRIBUTOR is requested to disclose any books, documents, or

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

records relevant to this Agreement for the purpose of an audit or investigation, DISTRIBUTOR shall (unless restricted by law) notify the MANUFACTURER of the nature and scope of such request and shall (unless restricted by law), at MANUFACTURER's cost and expense, make available to the MANUFACTURER, all such books, documents, or records.

38. Non-Solicitation of Employees/Agents. During the term of this Agreement and for one (1) year thereafter, neither party to this Agreement shall employ or otherwise retain any person who was an employee, independent contractor or other representative or agent of the other party during the negotiation or term of this Agreement.

39. Assignment. This Agreement may not be assigned in whole or in part by DISTRIBUTOR without the prior written approval of MANUFACTURER. This Agreement shall be deemed to have been cancelled immediately on the transfer of the assets or stock of the DISTRIBUTOR to persons other than those holding the stock or assets on the date this Agreement was signed.

40. Miscellaneous.

(a) Force Majeure. The term **"Force Majeure"** shall be defined as fire or other casualty or accident; act of God; severe weather conditions; strikes or labor disputes; war or other violence; law, order, proclamation, regulation, ordinance, demand or requirement of any governmental agency; or any other act or condition whatsoever beyond the reasonable control of the parties hereto. If the performance of this Agreement by either party or any obligation hereunder is prevented, restricted, or interfered with by reason of a Force Majeure event, the party whose performance is so affected, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such Force Majeure event, provided however, that the party so affected shall take all reasonable steps to avoid or remove such causes of nonperformance and shall continue performance hereunder with dispatch whenever such causes are removed.

(b) Waiver. The waiver by either party of a breach of any provisions contained herein will be in writing and will in no way be construed as a waiver of any succeeding breach of such provision or the waiver of the provision itself. If either party fails to perform any term of this Agreement and the other party does not enforce that term, failure to enforce on that occasion will not prevent enforcement on any future occasion.

(c) Severability. In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole.

(d) Controlling Law; Jurisdiction; Venue. This Agreement and the rights of the parties hereto and any other agreement or transaction between the parties hereto shall be governed by the laws of the State of _____________ without regard to conflicts of laws principles. DISTRIBUTOR hereby irrevocably consents to the exclusive jurisdiction of the Federal District Court for the District of _____________ in connection with any action or

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

proceeding arising out of or related to this Agreement or any other agreement or transaction between the parties hereto. In any such litigation, DISTRIBUTOR waives personal service of any summons, complaint or other process and agrees that service may be made by certified or registered mail to it, at the address provided herein. DISTRIBUTOR waives trial by jury in any litigation arising out of or related to this Agreement or any other agreement or transaction between the parties hereto.

(e) [Or consider Alternate Dispute Resolution: progressing from lower level review, to top level review, to arbitration.]

(f) Survival of Terms. Neither the expiration nor the termination of this Agreement shall terminate any obligations or liability accrued to the time of such expiration or termination. The terms and conditions outlined above may not be applicable if the Products are not purchased directly from Company.

(g) No Third Party Rights. This Agreement is not intended to and does not create any rights in favor of any person or entity not a party hereto.

(h) Entire Agreement. This Agreement, inclusive of Schedules A, B, C, D, and E attached hereto and incorporated by reference into this Agreement, constitute the entire Agreement between the parties with respect to this subject matter, superseding all prior agreements, whether written or oral, and may not be altered, amended or modified except in writing by both parties.

(i) Counterparts. This Agreement may be signed in two counterparts which together shall form a single agreement as if both parties had executed the same document.

(j) Warranty of Authority. The person who signs this Agreement on behalf of DISTRIBUTOR warrants that he or she has authority to sign this Agreement and bind DISTRIBUTOR to observe and perform its terms and conditions.

(k) Acceptance of Agreement. This Agreement shall not be binding upon MANUFACTURER until accepted by MANUFACTURER at its home office located in _____________ and executed by an authorized corporate officer of MANUFACTURER. When so executed and delivered to DISTRIBUTOR this Agreement shall be the legal, valid and binding obligation of MANUFACTURER.

41. Audit. MANUFACTURER shall be entitled, during business hours and upon reasonable notice, to inspect the relevant books and records of DISTRIBUTOR for the sole purpose of verifying compliance with and information to be provided under this Agreement.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized officers or partners on the date first above written.

Executed as of the last date set forth below.

MANUFACTURER	**DISTRIBUTOR**
By:___________________________	By:___________________________
Title:_________________________	Title:_________________________
Date:_________________________	Date:_________________________

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

SCHEDULE A

The Products

SCHEDULE A-1

Program Plan and Milestones

SCHEDULE B

Software

SCHEDULE C

Software License

SCHEDULE D

Price and Payment

SCHEDULE E

Statement of Value Added

Description of DISTRIBUTOR's product:

Description of DISTRIBUTOR's product as it relates to adding value to the MANUFACTURER Products:

DISTRIBUTOR represents and warrants that MANUFACTURER Products will be sold as part of a DISTRIBUTOR system or to existing users of DISTRIBUTOR's systems.

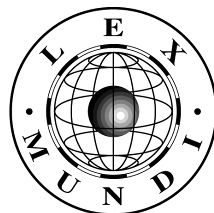
SCHEDULE F

[Any Terms and Conditions Unique to this DISTRIBUTOR]

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

In-House Counsel and the Attorney-Client Privilege

A Lex Mundi Multi-Jurisdictional Survey



LEX MUNDI

THE WORLD'S LEADING ASSOCIATION OF INDEPENDENT LAW FIRMS

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

About This Survey

The Lex Mundi multi-jurisdictional survey 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 -- covering virtually all of the jurisdictions of the world -- 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 information?*

The descriptions set forth below are, of course, intended only as a general overview of the law as of July 1, 2002. 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 such case or circumstance should consult with counsel admitted in the relevant jurisdiction.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Anguilla, British West Indies

Webster Dyrud Mitchell

Since there is no domestic law governing privilege, the position will broadly follow English common law principles, which are well summarized in the sections below on the British Virgin Islands and the Cayman Islands. There is no difference between the application of those principles to employed ("in-house") counsel and their application to lawyers in private practice.

As regards an in-house lawyer qualified in foreign law, the principles will apply to advice given in respect of that foreign law, but it is not clear that they would apply to advice given on domestic law unless the lawyer concerned was also called to the Anguilla bar. The principles do not apply to non-lawyer professionals who may purport to advice on legal issues.

As in most jurisdictions these days, whether onshore or offshore, there is a body of anti-money laundering legislation which may in certain circumstances override or at least make inroads into the general common law principles. As this statutory framework is currently in flux, no attempt will be made to summarize its provisions.

The normal grounds upon which disclosure may be resisted apply, e.g., irrelevance, the privilege against self-incrimination, public interest immunity and diplomatic immunity.

The Confidential Relationships Act, Revised Statutes of Anguilla 2000, Chapter C85, protects confidential information concerning any property or commercial transaction that has taken place, or that any party concerned contemplates may take place that the recipient thereof is not, otherwise than in the normal course of business or professional practice, authorized by the principal to divulge. There are certain exceptions, including confidential information given to or received by a professional person acting in the normal course of business or professional practice or with the consent, express or implied, of the relevant principal, and including certain specific statutory disclosure requirements. Infringement of the Act is a criminal offence.

Argentina
Marval, O'Farrell & Mairal

Under Argentine legislation all attorney-client communications are protected from disclosure; no distinction is made between inside and outside counsel. Argentine law only requires that the communications relate to legal matters entrusted to lawyers and protection is automatically granted to them. Attorneys have both the right and the obligation not to disclose these communications. Clients can also refuse disclosure on the basis of the constitutional right not to declare against themselves.

Australia
Clayton Utz

In Australia, communications between in-house counsel and officers, directors and employees of the company are treated no differently than communications between external attorneys. The protection, known as 'legal professional privilege' provides that confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser, if made either:

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

1. to enable the client to obtain, or the adviser to give, legal advice; or
2. with reference to litigation that is actually taking place or was in the contemplation of the client.[1]

Only those communications made or documents brought into existence for the dominant purpose of one of the two purposes above are entitled to immunity from production.[2]
In some jurisdictions[3] the parliament has enacted legislation providing a 'client legal privilege' which operates in a similar way to 'legal professional privilege'. In these jurisdictions, evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of:

> *a confidential communication made between the client and a lawyer, or*
> *a confidential communication made between two or more lawyers acting for the client, or the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer.*[4]*Under the legislation the protection will attach to communications if they were made for the dominant purpose of providing legal advice to the client.*

Central to these approached is the existence of a legal adviser. Where the lawyer is an "in-house" counsel employed by the client it will be necessary to analyze precisely in what capacity that person deals with the communication for it is only a communication which is sent or received by a lawyer that is entitled to protection.[5] That is to say, to invoke the privilege, the communications must be made or received by the in-house counsel in their capacity as a lawyer, which necessarily invokes obligations of competence, (through qualification to practice), and independence. Provided these obligations are met, the mere fact that a lawyer is a salaried employee of the client, is not sufficient to deny to communications between them and that company, or other officers within it, legal professional privilege if such privilege would otherwise be attracted.[6]

Austria
Cerha, Hempel & Spiegelfeld

The attorney-client privilege protects correspondence in hands of a lawyer and grants the right and establishes the duty to refuse to testify in courts as to all information confided in course of the mandate. It is applicable only to self-employed lawyers (Rechtsanwälte).

The attorney-client privilege is not applicable to in-house counsels as they are not Professionals (Rechtsanwälte). There are different criteria, which have to be fulfilled in order to be deemed as a Professional. Only Professionals are members of a bar and subject to a disciplinary control by the Bar Association. They need to be independent and not under control of the client. This does not apply to an in-house counsel who is integrated in the organization of his client (legal department). He/she usually has various functions, which extend beyond his consultancy services, sometimes including management functions. In-house counsels are not subject to any disciplinary control. This principle is in accordance with the AM&S-decision of the European Court of Justice.

---

[1] Heydon JD, Cross on Evidence, Sixth Australian Edition, Butterworths (2000) at 704
[2] *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).
[3] Federal Courts, the Australian Capital Territory and New South Wales
[4] s118, *Evidence Act* 1995 (Cth), *Evidence Act* 1995 (NSW)
[5] Heydon JD, *Cross on Evidence*, Sixth Australian Edition, Butterworths (2000) at 715
[6] *Ritz Hotel Ltd v Charles of the Ritz Ltd and anor* (1987) 14 NSWLR 100

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

There is no protection of communications between in-house counsels and officers, directors or employees of the company. However, Austrian labor law establishes a general duty of loyalty of the employees towards the employer. This means that all employees of a company (including the in-house-counsels) are obliged to protect the employer's business interests. This duty can be deduced from various statues (e.g. Art. 27 subpara. 1 *Angestelltengesetz*, Austrian Employment Act: Disloyalty while on duty may be a ground for dismissal). It includes the obligation to keep secret relevant information concerning the enterprise towards third persons.

This duty of secrecy lasts for the period of employment. At a later stage, the employee is only committed to secrecy if this is especially agreed with the employer. Communications between in-house-counsels on one hand and officers, directors or employees of the company on the other are subject to this general duty of secrecy if this is in the interest of the employer. There is no legal or statuary protection of that purely internal duty of loyalty.

Under Art. 15 DSG, Austrian Data Protection Act, data which have been accessible during and by virtue of one person's employment, have to be treated as confidential as far as there is no legal reason for the transmission of these data.

Azerbaijan
Baker Botts L.L.P.

Under the legislation of the Azerbaijan Republic, the concept of attorney-client privilege with respect to the communications of in-house counsel is not developed and there appears to be no method of protecting the contents of such communications from disclosure in court proceedings.

Both the Law on Advocates and Advocates' Activity (1999) and the Criminal Code (2000) include provisions that protect the professional secrets of *advocates*. Advocates are lawyers who are members of the Advocates' Association. Advocates have the full right to represent clients in court proceedings and cannot be employed as in-house lawyers. The provisions on attorney-client privilege in those laws do not apply to the activities of lawyers who are not advocates.

There are no other laws of the Azerbaijan Republic that provide for attorney-client privilege, and thus lawyers who are not advocates, including in-house counsel, do not benefit from the privilege. To protect their communications from disclosure, in-house counsel in Azerbaijan may only rely upon general protection methods (such as confidentiality clauses).

Bahamas
McKinney, Bancroft & Hughes

Communication between in-house council and officers, directors, servants and agents of their employer attract the same legal/professional privilege as communications between attorneys and their clients. The privilege extends to communications between in-house council and their employer for the purposes of securing legal advice and also for communications in anticipation of litigation so as to provide evidence and information for the arbitration. Accordingly, memoranda, notes, minutes, correspondence, reports and schedules passing between the employer, (including its officers, servants and agents) and in-house council, which are prepared sent or received confidentially for the purpose of obtaining or furnishing information or for the evidence with reference to or for the purpose of pending or contemplated litigation, will be privileged. The privilege does not extend to casual conversations with in-house council or communications outside the scope of securing advice or anticipated litigation.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Bahrain
Hassan Radhi & Associates

A reference is made to attorney-client privilege in Article 29 of the Legal Practice Act promulgated by Legislative Decree No. 26 of 1980 in Bahrain. It reads as follows:

> *Any lawyer, who acquires in the course of his practice knowledge or any incident or information, may not disclose it* even *after the expiry of his appointment as attorney unless he intends to prevent any crime or misdemeanor or report its occurrence. A lawyer may not be asked to testify in respect of any dispute for which he has been appointed as attorney or asked to give advice with regard thereto unless he obtains the client's prior written consent.*

The Legal Practice Act permits only Bahraini nationals whose names are in the Rolls to practice in Bahraini Courts. Thus the Bahraini law imposes an obligation on a lawyer who is on the Rolls not to disclose information he acquires in the course of his legal practice except for the purpose of preventing any crime or misdemeanor or reporting its occurrence.

Many of the in-house lawyers in Bahrain are non-Bahrainis or Bahrainis not on the Rolls. Consequently, the aforesaid protection is not available to them. Thus, there is no specific law in Bahrain that gives protection to an in-house lawyer from disclosure of communications between in-house lawyers and officers, directors or employees of the companies they serve. The company is, however, entitled to include in its conditions of employment a confidentiality clause whereby the communications between in-house lawyers and officers, directors or employees shall be confidential and privileged and shall not be disclosed to others. However, if there is an enquiry by a government official, or if a case is filed in the Court, then, nobody can take shelter behind the confidentiality clause.

Also Article 67 of Legislative Decree No. 14 of 1996 with respect to the Law of Evidence prohibits lawyers and attorneys who have become aware of some events or information through their practice or capacity from divulging it even after their period of service is over or they no longer serve in that capacity, unless it was told to them for the sole purpose of committing a felony or misdemeanor. This article further stipulates that the lawyer or attorney must give evidence concerning the event or information when asked to do so by the person who confided in them, provided it does not jeopardize the provisions of special laws regarding them. This prohibition is pursuant to the practice or capacity of the person. Therefore, I am of the opinion that this provision is applicable to both in-house counsel who is non-Bahraini and Bahraini not on the Rolls.

Bangladesh
The Law Associates

Professional Communication is protected under Bangladesh Law. No barrister, Advocate, or Attorney shall at any time be permitted unless with his/her client's express consent, to disclose any communication made to him/her in the course and for the purpose of his/her employment as such. He/She can not be permitted to state the contents or conditions of any document with which he/she has become acquainted in the course and for the purpose of his/her professional employment or to disclose any advice given by him/her to his/her client in the course and for the purpose of such employment.

This protection will not however extend to:

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

a) any such communication made in
b) furtherance of any illegal purpose
c) any fact observed by any lawyer in the course of his/her employment as such, showing that any crime of fraud has been committed since the commencement of his employment.

The same principle will apply to an in house lawyer. The communication however needs to be for legal purpose as distinct from administrative.

Professional Communication is protected both under Evidence Act as well as under cannons of Professional conduct and the Rules framed by Bangladesh Bar Council.

Barbados
Clarke Gittens & Farmer

In Barbados the law does not differentiate between in-house counsel and outside counsel. The Legal Profession Code of Ethics Chapter 370 of the laws of Barbados provides that attorney-client privilege is available to protect from disclosure, communications between attorneys-at-law and clients.

Attorney-client privilege does not extend to circumstances where a statute or an order of the court requires the attorney-at-law to disclose what has been communicated to him in his capacity as an attorney-at-law by his client. The duty not to disclose extends to the attorney's partners, to junior associates at law assisting him and to his employees.

Attorneys-at-law are permitted to reveal confidences or secrets where it is necessary to establish or collect fees or to defend themselves or their employees or associates against an acquisition of wrongful misconduct.

Belize
Barrow & Williams

In Belize, all communications between attorneys and their clients, in the course of giving or seeking legal advice within the scope of the professional work as a legal advisor, are privileged at the instance of the client. Such communications are also protected from discovery under civil or criminal proceedings. By statute a legal advisor or his client shall not be compelled to disclose any confidential communications, oral or written which passed between them, directly or indirectly through an agent of either, if such communication was made for the purpose of obtaining or giving legal advice. Therefore, attorney-client privilege is available in Belize to protect from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve.

Bolivia
C.R.& F. Rojas, Abogados

Based on Articles 10 and following of the Professional Ethics Code for the Legal Profession approved through Executive Decree 11788 dated September 9, 1974, we consider that the availability of the attorney client privilege to protect from disclosure communications between in-house counsels and officers, directors or employees of the companies they serve are privileged. Under Bolivian Law there are no limitations on the privilege but those mentioned above.

Specifically, Articles 10 and following of the Professional Ethics Code for the Legal Profession approved through Executive Decree 11788 dated September 9, 1974 establish as follows:

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> In his relationship with clients, attorney client privilege is a right and obligation of the lawyer. In his relationship with judges, it is a right, as the lawyer cannot be obliged to disclose confidential information received from his clients.

Should the lawyer be summoned to testify in a lawsuit as a witness, he must comply but at his own option he can refuse to answer to the examination, whereby he cannot be obliged to violate the attorney- client privilege.

This obligation of observing attorney client privilege also applies to confidential information received by the lawyer, third persons, colleagues or necessary conversations to reach an agreement that was not achieved.

The lawyer who receives confidential information from his client cannot accept defense in other trials without the previous consent of his client.

However, should a lawyer be accused by his client, he will have the right to disclose the attorney client privilege in honor of the truth. When the client informs his lawyer on his intention to commit a crime or offense, this confidence is not protected by professional secret and the lawyer is obliged to tell this information to those in danger so as to avoid the crime or offense is committed.

Brazil
Demarest e Almeida

The relationship between attorney and client is regulated in Brazil by the Federal Law no. 8.906/94 (Brazilian Bar Association Statute), by the General Regulations of the Brazilian Bar Association Statute and also by the Brazilian Bar Association Code of Ethics and Discipline. These provisions apply to all Brazilian lawyers, including in-house attorneys.

There are express and specific provisions in the Statute and in its Regulations about the attorney-client privileged relationship, which guarantee the attorney the right to protect, and not disclose, the information received from its clients.

All the information supplied to the attorney by the client, including written communication, is confidential. As per this privilege, it cannot be revealed, unless if used in the defense limits, when authorized by the client. The confidentiality privilege is extended to the attorney's office, files, data, mail and any kind of communication (including telecommunications), which are held inviolable.

The privilege of confidential communication between the attorney and his client applies even when the client is arrested and imprisonment is considered incommunicable.

The attorney has the right to refuse making deposition as witness (i) in a question in which the attorney has acted or may act, or (ii) about facts qualified as professional secrecy related to a person who is or has been his/her client, even if authorized by the last.

The Code of Ethics, in its Chapter III, also provides that the attorney-client relationship is protected by professional secrecy, which can only be violated in the cases of (i) severe threat to life or honor; or (ii) when the attorney is insulted by its own client; and (iii) in self defense. The violation of the professional secrecy must be restricted to the interest of the question under discussion.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

British Virgin Islands
O'Neal Webster O'Neal Myers Fletcher & Gordon

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 were 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.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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.

Bulgaria
Lega InterConsult Penkov, Markov and Partners, Law Offices

The attorney-client privilege is regulated in Bulgarian legislation by article 18 of the Law on Advocacy, which contains the regime of attorneys-at-law (advocates). This provision states that the files and documentation of the attorneys-at-law, as well as the client-attorney correspondence are inviolable and cannot be used as evidence either.

The in-house counsel activities on the other hand are very scarcely regulated. The most important provision in this regard is Article 20 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 counsel 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 the 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 secrets) 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 Law on Advocacy.

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.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Canada

Privilege attaches to communications between a solicitor and client or their agents/employees made in order to obtain professional legal advice[7]. Privilege also attaches in a number of other circumstances, including to certain communications made to non-clients in contemplation of litigation[8]. As a matter of principle there is no difference between in-house and outside counsel when it comes to privilege; rather the difficulties and therefore the case law deal with sensitivities inherent in the role(s) in-house counsel are called on to play-often a mix of legal and managerial responsibilities, and the potential for conflict between the corporation and its managers.

Communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that they 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. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. As with any lawyer, the privilege does not apply to communications of in-house counsel in some other capacity, such as that of an executive. It is the greater opportunity for blurring of the lines between in-house counsel's legal function and their role on the executive and involvement in business issues that may give rise to issues of privilege. In determining whether or not privilege is applicable the character of the work performed will be examined.

Even where litigation is not contemplated, communications between an in-house counsel and corporate client are privileged if undertaken in the capacity as a solicitor for the purpose of giving professional legal advice[9]. However, privilege does not attach to portions of communications made in another capacity, which the in-house counsel holds, such as executive or director[10]. The capacity, in which the solicitor is acting, must be determined based on the facts of each case.

Canadian cases have found privilege to apply to in-house counsel's notes of advice given, legal research, draft documents, working papers, documents collected for the purpose of giving legal advice, documents between employees commenting upon or transmitting privileged communications with counsel, copies of documents not otherwise privileged upon which the lawyer has made notes, and communications between in-house counsel and outside lawyers for the company, copies of which were sent to employees of the company. Canadian courts have extended a broad protection to communications between an employee and in-house counsel, regardless of the employee's level in the corporate hierarchy. Lawyers can be sued for breach of confidentiality and may face disciplinary action.

Specifics on the province levels:

Alberta
Blake, Cassels & Graydon LLP

Alberta continues to follow the common law regarding in-house counsel as set out by Lord Denning M.R. in *Alfred Crompton Amusement Machines Limited* v. *Commissioners of Customs*

[7] R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* [Toronto: Butterworths, 1993] at 7-8.
[8] Manes & Silver, *supra* at 8-9.
[9] Manes & Silver, *supra* at 53-55
[10] Manes & Silver, *supra* 53-55; A.W. Bryant, S.N. Lederman & J. Sopinka, *The Law of Evidence in Canada*, 2d ed. ;Toronto: Butterworths, 1999] at 743-744

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

and Excise (No. 2)[11]. Communications between in-house counsel and directors, officers and employees of the companies they serve are privileged provided that they 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. Solicitor-and-client privilege does not extend to work or advice provided by in-house counsel that is outside their role as counsel. This may include work that would normally be done by in-house counsel but is not in fact legal work (e.g. investigation)[12]. In instances where in-house counsel perform a dual role in the corporation, communications made by in-house counsel in an executive or capacity other than as solicitor will not be protected by privilege. In determining whether or not privilege is applicable, the character of the work performed will be examined.

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 and providing legal advice, the communications will be privileged. However, a lawyer employed in a non-legal capacity (e.g. a manager) will not have communications protected by privilege, even if the lawyer is providing legal advice[13].

In Alberta, in-house counsel are also bound by Chapter 12 of the Code of Professional Conduct (the "Code"), which sets the rules applicable to lawyers in corporate and government service, and Chapter 15 of the Code which sets out a lawyer's obligations when engaging in activities outside the practice of law. The Code is clear that in-house counsel are still bound by the same ethical obligations as all lawyers. The Code further states that the client of the in-house counsel is the corporation itself, and not the board of directors, shareholders, officers, employees, or any other component of the corporation

British Columbia
Farris, Vaughan, Wills & Murphy

In Canada, privilege attaches to communications between a solicitor and client or their agents/employees made in order for the client to obtain professional legal advice.[14] Privilege also attaches in a number of other circumstances, including to certain communications made to non-clients in contemplation of litigation.[15]

Even where litigation is not contemplated, communications between an in-house counsel and the corporate client are privileged if undertaken in the former's capacity as a solicitor for the purpose of giving professional legal advice.[16] However, privilege does not attach to portions of communications made in another capacity, which the in-house counsel holds, such as executive or.[17] The capacity in which the solicitor is acting, and thus the question of whether privilege attaches, must be determined based on the facts of each case.

---

[11] [1972] 2 All E.R. 353 at 376 (C.A.)("Alfred Crompton"); see also Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records), [1981] 2 S.C.R. 494 for general approval of Alfred Crompton principles
[12] Gainers Inc. v Canadian Pacific Ltd., [1993] 4 W.W.R. 609 (Alta.Q.B.).
[13] Husky Oil Operations Ltd. et al v. MacKimmie Matthews et al (1999), 271 A.R. 115 (Alta.Q.B.).
[14] R.D. Manes & M.P. Silver, Solicitor-Client Privilege in Canadian Law [Toronto: Butterworths, 1993] at 7-8.
[15] Manes & Silver, supra at 8-9
[16] (Manes & Silver, supra at 53-55)
[17] director (Manes & Silver, supra at 53-55; A.W. Bryant, S.N. Lederman & Sopinka, The Law of Evidence in Canada, 2d ed. [Toronto: Butterworths, 1999] at 743-744

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Manitoba
Thompson Dorfman Sweatman

The law in Manitoba (and Canada for that matter) is well settled that in-house counsel enjoys the same professional privileges and shares the same professional duties as does a lawyer in private practice. Accordingly, with respect to the issue of attorney-client privilege there is no distinction between the two.

The leading Anglo-Canadian case 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 practise 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 honour 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 most recently by the Supreme Court of Canada in *R.* v. *Campbell* [1999] 1 S.C.R. 565, per Binnie J. who, speaking for the court, said at page 602:

> A comparable range of functions [to those undertaken by lawyers in private practice] 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.**

While Binnie J. did not elaborate upon the "corporate context", it would include the following:

a. There is a 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 matters, either pursuant to formal job responsibility, or informally as part of day to day operations;
c. The structure of many organizations, their way of operating and the desire to broaden in-house counsel's knowledge and reach contributes to confusion of counsel's role
d. from time to time, and adoption of careless practices in circumstances to which attorney-client privilege would otherwise attach;
e. As a practical matter, corporate decisions are often made by executives after consultation with, and consideration by, employees and other persons. Attorneys are 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 (and in relation to which recent privilege litigation has dealt) are:

1. who is the client;

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

2. attorney acting in his legal advisory capacity (as distinct from some other capacity).

With regard to the identity of the client the law here is clear that the client is the corporation and accordingly the privilege is for its benefit and may be only waived by it. However, a corporation essentially only acts through its officers and employees and in this jurisdiction the United States Supreme Court decision in *Upjohn Co.* v. *United States* 449 U.S. 383 (C.A. 6th CIR., 1981) has been adopted. Accordingly Canadian Courts will extend broad protection to communications with employees regardless of the level of the employee in the corporate hierarchy (assuming the general attorney-client privilege tests are otherwise met).

Regarding the second issue given the multiplicity of roles, and role confusion referred to above, privilege will only attach where in-house counsel is acting in his legal capacity, and as a consequence care must be taken in terms of day to day practice as well as the structuring of things like internal investigations to ensure that communications are accorded the privilege.

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 the employees.

In summary there is no "structural" distinction to be drawn between in-house and private practice counsel in terms of the availability of attorney client privilege to their client communications. The difficulties arise however given the context in which they operate.

New Brunswick
Clark Drummie

In New Brunswick, there is no distinction between in-house and outside counsel with respect to communications between in-house counsel and directors, officers and employees of their company. Provided that any communication is confidential, is made to such in-house counsel in his or her capacity as legal advisor and the reason for such communication is to receive professional legal advice, then such communication is privileged from disclosure in accordance with the well-established common law principles and rules of solicitor-client privilege.

In Daly v. Petro-Canada (1993) 132 N.B.R. (2d) 346, Jones J. referred to "The Law of Evidence in Canada" by Sopinka, Lederman and Bryant, 1992. To summarize, the situation is as follows: "Lawyers who are employed by a corporation and therefore have only one client are covered by the privilege provided that they are performing the function of a solicitor. Lawyers, however, whether in-house counsel or not, often occupy a dual function and only the portions of the communications made in the capacity of solicitor are protected.

Newfoundland and Nova Scotia
McInnes Cooper

In Nova Scotia and Newfoundland, solicitor-client privilege applies to in-house counsel and their corporate employers as long as the in-house counsel is acting in that role. If in-house counsel is acting in some other role, and communication arises out of that other role, it is doubtful that solicitor-client privilege would apply.

The law in Nova Scotia and Newfoundland with respect to the application of solicitor/client privilege to in-house counsel stands on the same footing. In *Quinn* v. *Federal Business Development Bank* (1997), 151 Nfld. & P.E.I.R. 212 (Nfld.S.C.T.D.), Hickman C.J. reviewed the

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

law pertaining to solicitor/client privilege, and particularly as it applies to in-house counsel, at paragraph 18:

> While the position of in-house counsel insofar as solicitor and client privilege is concerned has not been the subject matter of adjudication by this Court, the principle has been reviewed and well defined by Courts on many occasions. Solicitor-Client privilege attaches to all communications between in-house counsel and their fellow employees if such communications contain legal advice, to the same extent, as it attaches to communications between private practitioners and their clients.

In *Nova Aqua Salmon Ltd. Partnership (Receiver and Manager of) v. Non-Marine Underwriters, Lloyd's London*, [1994] N.S.J. No. 418 (S.C.), Tidman J. denied an application for an Order compelling discovery of in-house counsel and the filing of a list of all communications with "in-house" counsel. In arriving at this decision, Tidman J. stated at paragraph 6:

> The question arose whether Mr. Soward attracts solicitor/client privilege. Several previous cases have decided that communications with 'in house' counsel are entitled to the same solicitor/client privilege as accorded other legal counsel. Ms. Arab on behalf of the plaintiff in arguing that such is not always the case refers me to *Scallion v. Halifax Insurance Co.* (1993), 117 N.S.R. 2d 213 (T.D.). In that case I decided that a solicitor employed by one of the parties was not entitled to solicitor/client privilege. In Scallion*, supra,* however, the solicitor in question was employed as a claims adjuster and was acting in that capacity in relation to the document in question. That is not the case here where Mr. Soward is employed as and clearly acts as 'in house' legal counsel to the defendant.

Both the *Nova Aqua, supra,* and *Quinn, supra,* cases refer to *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise* (No. 2), [1972] 2 All E.R. 353 (C.A.) where Lord Denning very clearly discussed the role of in-house counsel at p. 376:

> They are regarded by the law as in every respect in the same position as those who practise 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 honour and 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. I have myself in my early days settled scores of affidavits of documents for the employers of such legal advisers. I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege: and I have never known it questioned.

Quinn, supra, also mentioned the Federal Court of Appeal decision in *IBM Canada Ltd. v. Xerox Canada Ltd.*, [1978] 1 F.C. 513 (C.A.). In that case, the Federal Court of Appeal also relied on the decision in the *Alfred Crompton, supra,* case. At page 516, Urie J. stated:

> There appears to be no doubt that salaried legal advisers of a corporation are regarded in law as in every respect in the same position as those who practise on their own account. They and their clients, even though there is only the one client, have the same privileges and the same duties and their practising counterparts.

In *Quinn, supra,* Hickman C.J. summarizes at paragraph 22:

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> *In summary, communications between in-house corporate counsel and their co-employees which contains legal advice is entitled to the same privilege as that which prevails over documents between practicing solicitors and their clients.*

Ontario
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 they 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. 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.

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.

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.

Prince Edward Island
Patterson Palmer

The law relating to privileged communications between solicitor and client falls into two categories: solicitor-client privilege and litigation privilege.

In general, communications between a solicitor and his or her client for the purpose of giving or receiving legal advice are privileged. The privilege relates to confidential communications, and a formal retainer is not a prerequisite. What is important is the purpose of the communications: so long as the purpose of the contact is to seek legal advice, the communications between solicitor and client are protected. Client communications with a solicitor's secretary or clerk are included in this protection.

Not every communication between solicitor and client is privileged. The communication must be made with a view to obtaining legal advice. For example, communications between a client and his or her solicitor regarding business matters, not related to legal advice, are not privileged communications. In addition, a document that is simply copied to a solicitor is not privileged if it would not otherwise have attracted privilege.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Solicitor-client privilege is determined document by document, and can only be legitimized if there is a communication between solicitor and client; with a view to obtaining legal advice, and which is intended by the parties to be confidential.

Privilege does not apply to documents that existed prior to the solicitor-client relationship, with one exception: Prince Edward Island case law demonstrates that privilege attaches to some insurance adjuster documents prepared before a solicitor is retained, as an of extension of litigation privilege (which is discussed below). Nor does privilege attach to physical objects, although communications regarding physical objects that take place between solicitor and client are privileged. Therefore it is the communication, and not positive acts or physical objects, that is protected by solicitor-client privilege.

Canadian courts have opted for flexibility over certainty in determining whether privilege can be overridden. Although the approach in the United States and Britain dictates that "once privileged, always privileged", the Canadian courts have taken a more flexible approach, allowing exceptions to this rule. Normally privilege survives the confidential relationship, and even the death of the clients. Solicitor-client privilege may be overridden, however, when the public interest so demands. No privilege is absolute. Public interest can override solicitor-client privilege in two situations: To prove guilt or innocence in criminal cases; and When public safety is at risk.

In *Smith* v. *Jones*, Justice Cory describes what constitutes a public safety risk that warrants setting aside solicitor-client privilege: "…situations where the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm." [(1999), 132 C.C.C. (3d) 225 at 251 (S.C.C.)]

Litigation Privilege

Communications between a solicitor and third persons attract litigation privilege if the primary or dominant purpose of the communications was for use in the contemplation of litigation. This form of privilege is based on the rationale that opposing parties must be given the opportunity to prepare their respective cases as best they can.

Rules of Court

Rule 30.02 of the Prince Edward Island Rules of Court addresses privileged documents.

Under Rule 30.02 every document must be disclosed, in order that the opposing party may ascertain as to what documents privilege is claimed, and on what basis. Pursuant to Rule 30.04(6) the Court, on motion, may inspect a document to determine the validity of the privilege claimed.

Under the P.E.I. Rules of Court, every document must be disclosed (but not necessarily inspected, due to privilege) to the other party. The relevant section states:

> 30.02 (1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in Rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. [emphasis added]

Pursuant to Rule 30.03 (1), within 10 days after the closing of pleadings a party must serve an Affidavit of Documents disclosing all documents in the party's knowledge. The relevant section states:

> 30.03 (1) A party to an action shall, within ten days after the close of pleadings, serve on every other party an affidavit of documents disclosing to the full extent

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.

For privileged documents in particular, the Rules state that unless a privileged document is produced within 10 days after the action is set down for trial, it may not be used except to impeach a witness, or with leave of the trial judge. The relevant section states:

> 30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection not later than ten days after the action is set down for trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge.

The foregoing must be read in light of the recent decision by the New Brunswick Court of Appeal in *Lamey (Litigation guardian of)* v. *Rice*. Apart from the privilege that may attach to adjuster's reports in the contemplation of litigation (litigation privilege), the Court's commentary in *Lamey* opens up the possibility that insurance adjuster's reports may be subject to solicitor-client privilege as well. This possibility is premised on the principle of agency, providing that the communications of an adjuster to a client's solicitor, when acting as an "intermediary" agent for the client, may be privileged. It will be important to note how other Appellate courts treat this case in the future.[18]

Québec
Desjardins Ducharme Stein Monast

In Québec, the attorney-client privilege is considered as a fundamental right. Indeed, section 9 of the *Charter of Human Rights and Freedoms*[19] (hereinafter "The Charter") states:

> Every person has a right to non-disclosure of confidential information. No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

Furthermore, even if the person who has the right to claim the attorney-client privilege or the professional concerned fails to raise the privilege, paragraph 2 of section 9 of The Charter provides that the tribunal must *ex officio* ensure the respect of professional secrecy.

> The tribunal must, *ex officio*, ensure that professional secrecy is respected.

As well, the *Civil Code of Quebec* (hereinafter "The Civil Code") provides that "the court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental

---

[18] *Sources:* D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 2nd ed. (Toronto: Irwin Law, 1999), online: QL.; *Breau* v. *Naddy*, [1995] P.E.I.J. No. 108 (P.E.I.S.C.T.D.), online: QL.; *Cormier* v. *Compton*, [1995] P.E.I.J. No. 44 (P.E.I.S.C.T.D.), online: QL.; *Lamey (Litigation guardian of)* v. *Rice*, [2000] N.B.J. No. 271 (N.B.C.A.), online: QL

[19] R.S.Q., c. C-12.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute"[20].

We also find dispositions related to the attorney-client privilege in the *Professional Code*[21] (which refers to regulations of each profession). Insofar as attorneys are concerned, we have to look as the *Code of ethics of advocates*[22] and *An Act respecting The Barreau du Québec*[23]. Section 131 of the latter states that:

1. An advocate must keep absolutely secret the confidences made to him by reason of his profession.
2. Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved there from by the person who made such confidences to him.

The Supreme Court of Canada[24] has established three conditions for the application of the attorney-client privilege:

1. The professional has to be a member in good standing of the Quebec Bar Association;
2. The client must wish the communication to be confidential;
3. The lawyer has to be consulted in his capacity as an attorney, to obtain legal advice.

Attorney-client privilege requires the consultation to be related to his practice: if the attorney is consulted simply as a friend or administrator or director of a company, there would be no privilege of confidentiality[25].

Consequently, communications between in-house counsel and officers, directors or employees of the company will be protected only if the purpose or the consultation or communication is to obtain legal advice[26] and is intended to be confidential.

On the other hand, communications will not be protected where in-house counsel fulfils administrative functions, such as participating to administrators or shareholders meetings[27].

These conditions have been reiterated by the Quebec Court of Appeal: the fact that the attorney is a full-time employee does not render inapplicable the privilege of confidentiality considering provisions of section 9 of the The Charter and section 131 of *An Act respecting The Barreau du*

---

[20] Civil Code of Quebec, L.Q. 1991, c. 64, art. 2858 al. 1.
[21] R.S.Q., c. C-26, art. 60.4.
[22] R.R.Q., 1981, c. B-1, r. 1, 3.06.01, 3.06.02 et 3.06.03.
[23] R.S.Q., c. B-1.
[24] Descôteaux c. Mierzwinski, [1982] 1 R.C.S. 860; Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc c. Société d'énergie Foster Wheeler ltée, J.E. 2001-1973 (C.A.)
[25] Sous-ministre du Revenu du Québec c. Legault, [1989] R.J.Q. 229 (C.A.); Raymond Doray, « Le devoir de confidentialité », dans Collection de droit 2001-2002, Barreau du Québec, Éthique, déontologie et pratique professionnelle, Cowansville, Éditions Yvon Blais, p. 100.
[26] Targau Construction Inc. c. Dominion Bridge Co. Ltd., [1979] R.P. 118 (C.A.).
[27] Purzon du Canada c. La Cour municipale de Montréal, [1976] R.P. 152 (C.A.); Duncan c. City of Vancouver, 36 D.L.R. 218 (B.-C.C.A.); A. Amyot et Fils c. Lauzon, J.E. 93-681 (C.S.); Côte-St-Luc (Cité de) c. Vecsei, J.E. 89-544 (C.Q.); Re Sokolov, (1968) 70 D.L.R. (2d) 325 (Man. Q. B.).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Québec[28], respecting confidential information obtained by that attorney for the purpose of obtaining legal advice[29].

Section 9 of The Charter provides that confidential information can be disclosed in spite of the existence of a privilege of confidentiality where provided by an express provision of a specific law: laws of public interest, such as the *Youth Protection Act*[30] and the *Public Health Protection Act*[31], may provide for such limitations. A new federal law to fight money laundering contains specific provisions encroaching on the professional secrecy. This law is presently challenged before the Courts.

Also, any consultation related to inappropriate or illegal purpose or involving fraud will not be protected.

Furthermore, it has to be reminded that the attorney-client privilege belongs to the client. Thus, a client may decide to relieve the attorney from his obligation.

Finally, when an attorney appears before the Bar, he cannot raise the attorney-client privilege. Indeed, the *Professional Code*[32] provides that a professional testifying before the Disciplinary Committee or being under inquiry by such committee is bound to answer all questions and may not invoke his obligation to protect the attorney-client privilege as a ground for refusing to answer. This limit only occurs when the attorney is testifying before the Disciplinary Committee with regard to an ethical question. In other circumstances, the attorney-client privilege would still apply before this Committee.

When evidence is given in violation of the attorney-client privilege, the *Civil Code* provides that such evidence will not be considered[33]. The attorney who breaks his duty with regard to the privilege of confidentiality may be sued by his client (or the company for which he acts as in-house counsel). He may even be condemned to punitive damages where conditions of section 49 of The Charter are met:

> 1. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting there from.
>
> 2. Punitive damages.
>
> 3. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

The attorney may also have to answer for this breach of his duties before the Disciplinary Committee[34].

---

[28] Précité, note 5.
[29] Compagnie Montreal Trust c. American Home Assurance Co., (1993) 56 Q.A.C. 158
[30] R.S.Q., c. P-34.1.
[31] R.S.Q., c. P-35.
[32] Précité, note 3, art. 14.3(2) et 149.
[33] Léo Ducharme, Précis de la preuve, 5e édition, Montréal, Wilson & Lafleur, 1996, p. 233.
[34] Alain Cardinal, « Quelques aspects modernes du secret professionnel de l'avocat », (1984) 44 R. du B. 237, p. 257.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Saskatchewan
MacPherson Leslie & Tyerman

Attorney-client privilege (known in Canada as solicitor-client or lawyer-client privilege) is available in Saskatchewan to protect communications between in-house counsel and officers, directors or employees of their companies. The test for privilege and the scope of the privilege is essentially the same as that applied to communications with outside counsel. Privilege will arise if the lawyer was at the time of the communication acting wholly or primarily in their capacity as a lawyer and the dominant purpose of the communication was to obtain or provide legal advice. As with any lawyer, the privilege does not apply to communications of in-house counsel in some other capacity, such as that of an executive. It is the greater opportunity for blurring of the lines between in-house counsel's legal function and their role on the executive and involvement in business issues that may give rise to issues of privilege.

In this area of the law, two issues of significance appear to remain unsettled. First, it is not clear in Saskatchewan that portions of documents (such as meeting minutes) reflecting legal advice may be severed or redacted from a document that substantially deals with other business matters and is therefore relevant and producible. It is therefore advisable to create a separate document dealing with such issues, under a heading such as "Legal Issues" or "Legal Report" and treat the legal document as an attachment to the other document. Second, it is not clear whether privilege will attach where the matter upon which advice was given was a matter governed by the law of a jurisdiction in which the in-house counsel is not licensed to practice. Again, this is an issue that would arise in connection with communications by outside lawyers, but may be faced more often by in-house counsel for companies with multi-national operations. It is likely that this approach would be considered by a court to be too restrictive.

Canadian cases, which would likely be applied in Saskatchewan, have found privilege to apply to in-house counsel's notes of advice given, legal research, draft documents, working papers, documents collected for the purpose of giving legal advice, documents between employees commenting upon or transmitting privileged communications with counsel, copies of documents not otherwise privileged upon which the lawyer has made notes, and communications between in-house counsel and outside lawyers for the company, copies of which were sent to employees of the company. Canadian courts have extended a broad protection to communications between an employee and in-house counsel, regardless of the employee's level in the corporate hierarchy.

Cayman Islands
Walkers

To date, there has been no reported Cayman Islands case dealing with the idea of attorney-client privilege; however, the courts of the Cayman Islands would be more than likely to apply the English common law principle. This is summarized in *Alfred Compton Amusement Machines Limited v. Commissioners of Customs and Excise (No. 2)* [1972] 2 QB 102 at 129 (in the Court of Appeal) in which Lord Denning M.R. confirmed that salaried legal advisors are regarded by the law as in every respect in the same position as those who practice on their own account and that they and their clients have the same privileges. In the Cayman Islands, the position is likely to be that legal privilege will apply to employed ("in-house") attorneys as well as those in private practice, therefore protecting confidential communications of this nature exchanged in the course of and for the purpose of seeking or giving legal advice.

The privilege will be subject to the same limitations as those imposed on legal advice privilege generally. (For example, communications in furtherance of a criminal purpose will not be protected.)

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

In addition, the privilege covers only confidential communications and not all documents prepared by the in-house counsel or all information which the in-house counsel knows about his employer. The test set out above must be applied. The rule applies in relation to work done by the in-house counsel in his capacity as a legal advisor and not to work that is simply executive in nature (again, per Lord Denning in *Alfred Compton*).

It is also important to note that in house counsel in the Cayman Islands (as are all other professionals) are subject to statutory requirements[35] to report knowledge/suspicion of money laundering to the relevant authority and such reporting will not constitute a breach of privilege.

There are alternative methods to protect communications. Even where the material in question does not attract legal advice/professional privilege, production of documents may still be resisted on other grounds if and when applicable. These other grounds are: irrelevance; the privilege against self incrimination; public interest immunity; diplomatic immunity. The last two grounds are likely to be rare in the Cayman Islands.

In addition, the Cayman Islands Confidential Relationships (Preservation) Law (1995 Revision) ("the CRPL") prohibits the disclosure of "confidential information". Confidential information is defined in the CRPL as information concerning any property which the recipient thereof is not, other than in the normal course of business, authorized by the principal to divulge. This statute is likely to apply to communications between an in-house counsel and his employer. Disclosure in breach of the CRPL constitutes a criminal offence for which penalties are prescribed. Section 4 of the CRPL outlines a procedure whereby directions may be obtained from the Cayman Islands Grand Court where a person is required to give, or intends to give, confidential information in evidence in legal proceedings.

Channel Islands-Guernsey
Carey Langlois

The situation in Guernsey is the same as that in England: communications between in-house counsel and their employer-client are protected by the same privilege as those of any lawyer and client. Therefore, as long as the communication is made as part of the Counsel's legal function, it is privileged. Further, any communication by a non-legally qualified person may be privileged if the in-house legal department under the direction of the in-house counsel produces it.

Channel Island -Jersey
Mourant du Feu & Jeune

The situation in Jersey is the same as that in England. Communications between in-house counsel and officers, directors or employees of the company they serve are protected by the same privilege as those in any lawyer/client relationship and therefore as long as the communication is part of the Counsel's legal role, it is privileged. Furthermore, any communication by a non lawyer may be privileged if produced by an in house legal department under the direction of in-house counsel. It should be noted however that the privilege is subject to certain limitations as it is in England but it would be inappropriate to endeavor to provide an exhaustive list, rather suggest that specific enquiry be made if circumstances so require.

[35] The Proceeds of Criminal Conduct Law (2001 Revision) and the Money Laundering Regulations 2000

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Chile
Claro & Cía.

The attorney-client privilege is governed in Chile by the Professional Ethics Code for the Legal Profession approved by the Chilean Bar Association (the "Code"). Pursuant to the Code, professional secrecy is a right and a duty of all legal counsels. It does not differentiate between in-house counsels and outside counsels or self-employed counsels.

As provided by the Code, legal counsels are committed vis-à-vis their clients to strictly keep in secret and confidence all the professional matters brought to their attention, duty which has no time limit and extends even after the legal services have been rendered.

Legal counsels are entitled and have full right to maintain and protect their professional secrecy before the courts and judges and other authorities, when called to depose in any legal proceedings or to participate in any action that may lead or expose them to reveal or disclose professional confidential information.

Consequently, should a legal counsel be summoned to testify in a legal proceeding, he must attend the audience convened but he must refuse to answer to the examination, if by doing so he may violate the attorney-client privilege.

This duty of honoring attorney-client privilege applies also to confidential information received by legal counsels from third parties and colleagues, as well as to that information that derive from negotiations towards certain agreement that failed to succeed.

A legal counsel who receives confidential information from a client cannot undertake any case or defense in trial that directly or indirectly involves such information, unless the previous consent of the client is obtained.

If an attorney is accused or sued by his client for alleged malpractice or other matter related with the legal services thus rendered, the attorney may reveal or divulge confidential information that such client or a third party had entrusted him to the extent that the rendering of such information is directly necessary to defend his case.

The attorney-client privilege does not extend to information or communications which are made in furtherance of a criminal purpose, in which case the legal counsel must reveal the necessary information in order to prevent a criminal act or protect a person that may be in danger.

In-house counsels are entitled to the same privileges and are subject to the same obligations as all other legal practitioners, provided that the former are acting in their capacity as lawyers and not in some other capacity, as would be the case when they provide business or investment advice to their employer.

Colombia
Brigard & Urrutia

Colombian regulations on the professional duties of legal practitioners, as contained in article 47 of Decree No. 196 of 1971, impose on all lawyers the generic 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.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Furthermore, article 74 of the Colombian Constitution establishes that professional secrecy is inviolable. This formulation, which is phrased in absolute terms, 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. Thus, article 28 of the Code of Criminal Procedure 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; and article 268 of the same 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. Furthermore, 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.

Costa Rica
Facio & Canas

In Costa Rica, the attorney-client privilege (secreto profesional) is not properly regulated by law. It is governed by sections 33 and 34 of the Lawyer´s Professional Moral Code (Código de Moral Profesional del Abogado) enacted by the Costa Rican Bar Association on February 16, 2002 and by general principles.

Communications among attorneys and their clients, colleagues, counterparts or any third party related with the attorney due to his profession are protected. Consequently, if called as a witness, a lawyer may refuse to answer any question that could violate privileged information.

There are some exceptions to this rule: i) If the attorney is accused he is authorized to disclose any information that directly benefits his defense; ii) Limited information pertaining to academic publications or collection of unpaid legal fees may also be revealed; iii) If a client informs a lawyer about his intention to commit a crime such communication is not deemed privileged and the attorney shall make proper disclosure to prevent the crime; and iv) In restricted cases, the attorney may reveal privileged information to prevent the conviction of an innocent person.

Even though the Code makes no distinction between in-house lawyers and external counsel, we are of the opinion that section 33 of the Code protects communications to both in-house and external lawyers. An alternative method to enhance the protection of the communications between in-house counsel and officers, directors or employees of the companies they serve contractually, could be by means of confidentiality agreements.

Cyprus
Dr. K. Chrysostomides & Co.

In Cyprus, unlike England, the distinction between solicitors and advocates does not exist. All persons that are admitted to the Bar are permitted to practice both as an advocate and as a solicitor and they are both considered to be attorneys. The attorney – client privilege applies to all attorneys. The strict adherence to the confidentiality of a case through this privilege is sought

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

because it creates the important pre- requisite to the attainment of trust between an attorney and his client. In this regard, an attorney is regarded as a custodian of the confidential information and of the secrets that have been entrusted to him by his client. This privilege has been established in Cyprus with The Advocates Law (Cap. 2) and the recently amended Advocates Professional Etiquette Regulations (17.05.2002).

A fundamental right and duty that an attorney possesses and is protected by the Cypriot Court System is that of professional confidentiality. A lawyer has the privilege not to disclose any confidential information, which has arisen from communications with his client, whether at a trial or at a discovery process. Having said that, it is clear that the attorney – client privilege can generally be invoked by an attorney whenever he is dealing with a judicial or any other authority. However, if a client wishes to raise any charges against his attorney, or if an attorney is facing either a criminal or disciplinary action, then, he is allowed to divulge any information entrusted to him regarding either the charges or the case, even if this results in the disclosure of entrusted information given by the client.

If an attorney practices in a firm or partnership the rules of confidentiality and professional privilege apply to all members of the firm or partnership. Confidential information arising from another attorney is 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 subsequently failed to materialize.

Czech Republic
Prochazka Randl Kubr

Czech law strictly distinguishes between external and internal counsel as regards the availability of privilege to protect from disclosure of communication. Only the external counsel, members of the Czech Bar Association, are 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 its employer as privileged. In a limited number of cases, the communication may be subject to a special duty to maintain confidentiality (typically, in-house counsel at state organisations or regulated businesses may be subject to non-disclosure requirements). 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.

Denmark
Kromann Reumert

The communication (at least with respect to confidential information) between a qualified attorney, including an in-house attorney, and his client (in case of an in-house attorney the employer) is generally subject to the attorney-client privilege.

The Danish Administration of Justice Act and the Danish Penal Code set out provisions governing attorney-client privilege. The rules apply to all Danish attorneys, whether in-house, self-employed or otherwise, provided that the attorney is qualified as such in Denmark, i.e. has obtained a formal practicing certificate from the Ministry of Justice on the basis of having fulfilled the requirements for this.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

It follows from the Danish Administration of Justice Act and the Danish Penal Code that an attorney who illegitimately discloses or exploits information, which is confidential due to private interests, is punishable by fine or detention of up to six months. However, this does not apply in cases where the attorney is obliged to disclose information or is acting under the legitimate safeguarding of clear common interests or in that of his own or others. Information is confidential if deemed as such by valid stipulation, or if the information must be kept confidential in order to safeguard conclusive consideration of private interests.

The attorneys' own code of professional and ethical rules of conduct state that trust and confidentiality are necessary prerequisites for the performance of the attorney, that discretion is a basic both legal and ethical duty for attorneys, which is to be respected not only in the interest of the single individual but also in the interest of society, and that an attorney must treat all information learned of in his course of business as confidential.

The main legal rule on attorneys' duty to give evidence in legal proceedings is section 170 of the Danish Administration of Justice Act according to which evidence cannot be demanded from attorneys regarding matters communicated to them in the course of carrying on their profession, if the party who has a right to confidentiality does not want this. The court may, however, order attorneys (apart from defense counsel in criminal cases) to give evidence, when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence being given.

Further, according to section 299 of the Danish Administration of Justice Act a court may - at the request of a party - order a third party, including an attorney, to produce or surrender documents which are at his disposal and which are important to the case, unless this will result in the disclosure of matters, on which he would otherwise be excluded or exempted from giving evidence.

In 1999, a council under the Danish Ministry of Justice made a report (report no. 1379/1999) on inter alia the role of attorneys in relation to white-collar crime, including the attorney-client privilege, duty to give evidence, duty of disclosure and duty of notification. The council found that attorneys who act as counsel for the defendant or represent a party has an attorney-client privilege, and that attorneys should not be subject to a duty to report white-collar crime, including laundering of profits from crimes already committed.

Under the auspices of EU, an agreement has now been reached to amend the directive on prevention of the use of the financial system for the purpose of money laundering (Council Directive 91/308). This amendment implies that attorneys in Denmark will probably be subject to a duty to report clients where there is a probable cause to believe that laundering has taken place.

Dominican Republic
Pellerano & Herrera

Confidential communications between attorneys and clients in the Dominican Republic generally are protected under an attorney-client privilege. Indeed, a statute specifically provides that attorneys may not disclose information given to them in confidence by a client. The exceptions to this rule relate primarily to criminal matters and typically do not apply in situations involving business clients or civil litigation.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Ecuador
Pérez Bustamante & Ponce, Abogados

The laws of Ecuador do not establish specifically the confidentiality of relations between client and attorney or between companies and their in-house counsel. All attorneys, including in-house counsel, are subject to the Professional Code of Ethics approved by the National Lawyers Federation in 1969. According to the Code, maintaining professional secrecy is a right and a duty of all lawyers; it is an obligation, which continues even when the attorney receives a fee to render his/her services. It is a right vis-à-vis the judges and court and other authorities when a lawyer is called to declare as a witness and is asked to reveal a professional secret. The Code also forbids lawyers from participating in matters that can lead them to reveal professional confidential information, or use such information for their own benefit or for the benefit of other clients. According to the Law on the National Lawyers Federation, the Courts of Honor at the Bar Association are competent to decide on matters of violations and professional secrecy.

It would be valid for the company and its in-house counsel to sign a confidentiality agreement in addition to the above mentioned provisions.

Egypt
Shalakany Law Office

Protection of client information or secrets from disclosure is a fundamental principle of the Egyptian Bar Association Law. According to article 79, each attorney is obliged to keep all client's information and secrets confidential and prevent any disclosure, unless otherwise permitted by the client.

Articles 79 and 80 of the above-mentioned law, concerning the obligation of an attorney to protect client information or secrets from disclosure and to abstain from giving guidance or advice to any party having conflicting interests with his client, apply to an in-house counsel who is subject to the regulations of the Egyptian Bar Association Law. An attorney cannot disclose information to anyone other than his client. In the case of an in-house counsel, his client is the person with the authority to appoint him and to represent the entity he serves.

Pursuant to the provision of the Egyptian Bar Association Law any attorney who deliberately violates the provisions of this law shall be subject to certain disciplinary sanctions as described under article 98 of the same law. These disciplinary sanctions varies according to the severity of the violations committed by the defaulting attorney from the practicing law for a period of not more than three years as well as deleting the attorney's name from the Bar Association Registry. Such sanctions shall not prejudice the right of the client to claim for damages.

Estonia
Lepik & Luhaaar

The attorney-client privilege does not apply to the communications between in-house counsels and officers, directors or employees of the companies they serve. Only the communication between the in-house counsel and the attorney is protected by the attorney-client privilege.

According to the Estonian Bar Association Act, the attorney-client privilege is available only to attorneys who are members of Estonian Bar Association. According to the Bar Association Act, working as in-house counsel under an employment contract or a contract of service is not allowed. In addition to working as an attorney, members of the Bar Association may only engage in teaching or research.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Therefore the communication between in-house counsels and officers, directors or employees of the companies they serve is not privileged. But if that communication is forwarded to the attorney and the related documents are put to a file bearing a heading “communications with a law office,” then that file should be protected with attorney-client privilege.

Finland
Roschier Holmberg Attorneys Ltd.

The communications between in-house counsels 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 counsels 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.

France
Gide Loyrette Nouel

Contrary to Common law which provides that in-house lawyers (juristes d’entreprise) enjoy the same status as private practitioners (avocats), French law still considers these two professions as totally separate.

According to the French Bars Harmonized Regulations (Règlement Intérieur Harmonisé des Barreaux de France), which provide for professional rules of conduct, lawyers are subject to an obligation of absolute professional secrecy. Indeed, a lawyer must not reveal to a third party neither her/his client’s secret information, nor the legal opinions she/he expresses to the client. A breach of such a duty by lawyers constitutes a professional misconduct and a criminal offense under the French Criminal Code. The lawyer can solely be released from this obligation in the exclusive case of defending herself/himself against a charge alleged by her/his client.

These texts also provide that communications between a lawyer and her/his client whether to advise or to defend are covered by legal privilege. Therefore, a lawyer is entitled in the event of an investigation by public authorities or Court to assert confidentiality over communications, written or verbal between herself/himself and her/his client.

Besides, a lawyer can decline to testify on such confidential information.

Under French law, in-house counsel are obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed as a criminal offense.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Nevertheless, as only lawyers are covered by a strict code of professional conduct, legal privilege is not extended to communications between in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subject related to their work.

At Community law level, both the Court of Justice and the European Commission reject for the same reasons the concept that the confidentiality privilege should apply to in-house counsels.

Consequently, in a legal procedure, the prosecuting authority has the right and the ability to use documents communicated between the in-house counsel and her/his «client». Therefore, an in-house counsel can neither resist an investigation by public authorities (either EU or national public authorities), nor refuse a domiciliary visit in the business premises, nor oppose a seizure related to evidence. For instance, French or EU trade Administrations for an inquiry into unfair trading practice may use internal memos against the company.

In addition, unlike lawyers, in-house counsel can be called to testify or to provide evidence against the company they work for. However, they have no access to criminal files, which is not the case for lawyers who have full and free access to criminal files.

The major problem is that privilege may be lost when the communication is made with the in-house counsel in a country that does not recognize legal privilege with in-house counsels. A remedy may consist for in-house counsels in avoiding giving written advice especially on competition law. Furthermore, legal advice of major importance should be provided by outside counsels in order to ensure the protection of legal privilege. Outside counsel may always undertake to himself write what the in-house counsel would normally write in order to have full confidentiality applicable to a legal opinion.

Germany
Nörr Stiefenhofer Lutz

Today it is commonly acknowledged that an in-house counsel acting in his capacity as his employer's legal adviser can have the right to refuse to give evidence of information obtained from his employer, its directors, employees or agents in civil and criminal cases if (i) the in-house counsel is permitted to practise as an attorney in Germany and (ii) the information is obtained in the course of providing legal advice and not in the course of management, controlling, accounting or similar services. Therefore, it is essential that an in-house counsel keeps separate files for affairs where he provides legal services and for all other affairs. An in-house counsel who is not permitted to practise as an attorney (legal officer) has no more rights to secrecy than any other third party.

§ 43a (2) BRAO [Federal Regulation concerning Attorneys] and § 2 BORA [Regulations concerning the Legal Profession] provide a duty for attorneys and in-house counsel to observe confidentiality in regard to all information received from their clients. A breach of that confidentiality obligation constitutes a criminal offence under § 203 (1) (1) StGB [Criminal Code] and is punishable with imprisonment for not more than one year or a fine. This also applies to assistants and staff of an attorney or in-house counsel (§ 203 (3) StGB).

In civil cases, pursuant to § 383 (1) (6) ZPO [Code of Civil Procedure] attorneys and in-house counsel acting in their capacity as legal advisors are entitled to refuse to give evidence on any information provided to them while performing such services. However, this does not apply to information obtained while performing management or similar duties or obtained before they were instructed as legal advisor. This right is also extended to personnel assisting the in-house counsel in the performance of legal work (§ 383 (1) (6) ZPO). It is not yet decided, whether in-

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

house counsel admitted to practice abroad should have the same rights.

Legal officers do not have a right to refuse testimony in general. Nevertheless, according to § 384 (1) (3) ZPO they may refuse to answer questions by which they would have to reveal their own or a third party's trade secrets. But this does not cover any trade secrets of the parties in the proceeding (Damrau, in: Munich Commentary, 2nd. ed., Code of Civil Procedure, § 384 margin no. 13).

Under German law the duty to produce documents is restricted to a limited number of cases: (i) if a party refers to a document in order to furnish evidence or in the pleadings if such document is in his own (§ 420 ZPO) or the opposing party's (§ 423 ZPO) possession or (ii) if pursuant to provisions of civil law a party has a duty to surrender a document (§ 422 ZPO). That applies inter alia to documents which are drawn up in the requesting party's interests, record legal relations between the requesting party and the other party or negotiations on the legal transaction between the requesting party and the other party or an intermediary (§ 810 BGB [Civil Code]), to documents in the possession of an agent in relation to his principal (§§ 675, 680 BGB), to business letters and books of account (§§ 258 et seq. HGB [Commercial Code]). The same applies to documents which are in the possession of a third party (§ 429 ZPO). There is no duty of a party to disclose any communication or information between itself and its in-house counsel. Beside this, an in-house counsel has the right to refuse to produce documents to the same extent as he is entitled to refuse testimony (§ 142 (2) ZPO).

In criminal cases, in-house lawyers admitted to practise as attorneys in Germany are entitled to refuse testimony on matters entrusted to them or on information which they have obtained in their capacity as attorneys (§ 53 (1) (3) StPO [Code of Criminal Procedure]). The same applies to assistants and office personnel. However, in-house lawyers not admitted to practise as attorneys in Germany or legal officers do not have such privilege. As far as an in-house lawyer is entitled to refuse testimony, memos, documents and communications with his clients in his possession are also privileged from seizure (§ 97 StPO). But such documents can be seized by the public prosecutor as far as they are in the possession of the company. There are exceptions to the privilege from seizure rule: if (i) the documents or materials have been used in the commission of a crime or obtained as a result of a crime or (ii) the in-house counsel himself is suspected of having committed or participated in a crime or of being an accessory after the fact or of acting to obstruct criminal proceedings.

In civil and criminal cases the right of the in-house counsel and his assistants to refuse testimony extinguishes if the employer waives its right to keep the information secret (section 385 (2) ZPO, section 53 (2) StPO).

Gibraltar
Marrache & Co.

The relationship between a lawyer and the client and the preparation of documents and other materials for litigation are privileged from disclosure. This privilege extends to two classes of documents (a) communications between the lawyer and the client made in the course of seeking and the giving of advice or assistance by the lawyer to his client within his professional capacity, when no litigation is contemplated and (b) communications passing between the client or lawyer and third parties when litigation is contemplated, provided that the dominant purpose of the communication is for litigation.

Communications between a client and his solicitor made through a clerk or agent employed by a solicitor are also privileged.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Not ever communication is privileged, there are limitations to the general rule. Legal professional privilege may not extend to the following

(i) documents which are in the public domain
(ii) where the communication is a step in a criminal or illegal act
(iii) where a party has a proprietary right to documents and asserts this right

Under the Civil Procedure Rules which are in force in Gibraltar, parties have the right to inspect and take copies of relevant documents from their opponents and third parties. If one party claims privilege over a document, this document may be put before a Judge in private in order that the Court can rule whether the claim for privilege is a legitimate one.

Greece
Zepos & Yannopoulos

The privilege of the attorney-client communications is a well-established principle in Greek legislation. There is no distinction between the protection of the communication between in house counsel and independent legal counsel with corporate officers and employees. All communications held within the scope of the professional relationship of attorney-client are regarded as privileged. The Attorney Code of Conduct, the Code that regulates the practice of Law, the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code, are sources that contain specific provisions, granting protection from disclosure of the content of such communications. All information (oral, written, electronic etc.) obtained in the course of legal practice is treated by the law as strictly confidential, even after the termination of the attorney client relationship, and cannot be used even for the purposes of judicial proceedings. Infringement of the above confidentiality constitutes a criminal offence.

Disclosure is legal, however, if it is the ultimate means of protection against potential harm, or the single option of prevention of illegal activity.

Guatemala
Mayora & Mayora

In Guatemala there are two basic sources of law relating to the attorney-client privilege question. One is article 2033 of the Civil Code, 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.

Honduras
Bufete Gutierrez Falla

According to the Honduran code of Professional Ethics for Law (Código de Etica Profesional Hondureño del Derecho") adopted by the Honduran Bar Association on April 30, 1966, which does not differentiate between in-house and independent counsel, any member of the Bar Association of Honduras, as well as procurators who may not be members of the Bar, are

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

obligated to observe the most rigorous professional secrecy, even after providing services to the client, and have the right to refuse to testify against their client and can abstain from answering any question which would involve revealing a secret or would violate any client's confidence (Articles 23 and 60 of said Code). An exception thereto being the right that counsel has, if accused by a client before a court of law, to reveal the client's secrets within the limits necessary for the counsel's own defense (Article 25 of said Code). As the Code of Professional Ethics does not differentiate between in-house and independent counsel, we are of the opinion that the conduct required by said Code with respect to professional secrecy would include in-house counsel, and would cover communications between in-house counsel and officers and directors of the companies they serve, as well as (ex Article 24 of the same Code) the communications between in-house counsel and the employees of said companies.

Hong Kong
Johnson Stokes & Master

In general, for communications between lawyers and clients to be privileged, the following requirements must be satisfied:

- the communications must be made in the course of the client's obtaining legal advice from the lawyer, in his professional capacity (even if no formal retainer is entered into, i.e. merely seeking advice by the client and the lawyer responding to them is sufficient);
- the communications must be given in confidence, i.e. not in front of any third party and no instruction has been given by the client to the lawyer to inform a third party of the content of the communications; and
- whether or not in connection with pending legal proceedings.

The legal position of in-house counsel is that salaried legal advisers are regarded by law in every respect as being in the same position as those who practice on their own account. Thus, they owe to their clients the same duty of confidentiality and the duty to assert privilege on behalf of their clients as those in private practice do. Likewise, communications between in-house lawyers and the employees of the company they serve enjoy the same privileges.

Exceptions to the privilege exist where the communication was made before the attorney was employed as such, or after his employment had ceased; or where, although consulted by a friend because he was an attorney, yet he refused to act as such and was therefore only applied to as a friend. Privilege is inapplicable if the communications were made in furtherance of a crime or fraud. Privilege can be overridden by law, e.g. the Prevention of Bribery Ordinance and the Inland Revenue Ordinance. It can also be overridden by a Court Order which clearly purports to do so.

In any case, when disclosure is required by law or by court order, care must be taken such that no more information than is required is divulged.

It is possible to argue that although the communications are not privileged, yet they are confidential. The client can either rely on a contractual duty not to disclose confidential information to protect the information, or he may rely on the broad principle of equity that he who has received information shall not take unfair advantage of it and thus claim breach of confidence.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Hungary
Cerha, Hempel & Spiegelfeld, Austria

The attorney-client privilege is not available to in-house counsel in Hungary. If an in-house counsel is a Bar member (and thus an attorney), the privilege is applicable. In general in-house counsels are not self-employed attorneys and not Bar members but employed trained lawyers who are permitted to represent only the company they work for in court proceedings.

The Law-Decree No 3 of 1983 on In-house Counsels previously regulated the activity of in-house counsels under Hungarian law. However, the provisions on confidentiality contained in this Law-Decree were abolished in 1991 when the Law-Decree was subject to a major change. The change eliminated the old style “collectives of in-house counsels” causing every in-house counsel thereafter to act as an employee of a company, association or state institution, etc. Therefore the employers regulate the duty of confidentiality of in-house counsels in the contract of employment.

In general, there is not any protection of communication between in-house counsels and officers, directors or employees of the company. The Labour Code Act XXII of 1992 (hereinafter “Labour Act”) contains the general provisions regarding the duty of confidentiality of employees of a company. According to Section 3 Paragraph 5 of the Labour Act, in the course of the existing employment, the employee shall not behave in such a way that could endanger the lawful economic interests of the employer. This duty may continue after the termination of the employment, up to three years if the parties so agree, for which the employee shall be compensated. According to Section 103 Paragraph 3 of the Labour Act, the employee is obliged to keep confidential all information about the employer or its activity, which he learned during the course of his employment. In addition, the employee shall not inform unauthorized persons about data which he has learned in connection with his work and which could result in negative effects to the employer.

Iceland
Logos

Under Icelandic law, communications between in-house counsel and officers, directors or employees of the companies they serve enjoy in principle the privilege of protection from disclosure. This privilege is, however, not absolute. Firstly, by the order of a court ruling, an in-house counsel (as well as external counsel) may be obligated to disclose information that becomes known to the interests at stake; the specific interests of having the information disclosed are deemed to outweigh the private interests of the attorney-client relationship of not disclosing the information. Secondly, the attorney-client privilege would not be available to in-house counsel if the in-house counsel would have obtained the information in a different capacity within the company.

Indonesia
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.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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. The in-house counsel can in such case, however, ask the court to have the disclosure made in a court session that is closed for the public.

Ireland
Arthur Cox

Privilege can be defined as the entitlement to refuse to disclose the contents of a document the existence of which is discoverable. It is an objection to the production of a relevant document, which has been disclosed in an Affidavit of Discovery. The party making discovery must disclose the existence of a document subject to privilege in his list of documents. Where the claim of privilege is upheld, the document is immune from production. Only the courts may decide if a claim of privilege is justified.

Legal professional privilege is just one of the categories of privilege recognized in Ireland. It is a well-established principle and includes two distinct categories of communication between lawyer and client: confidential legal advice and confidential documents created in contemplation of litigation.

The former refers to the privilege that exists over certain confidential communications between a legal professional advisor and his client. It has long been accepted by the Irish courts that where a legal adviser and his client communicate with each other for the purpose of giving or obtaining confidential legal advice that such advice is private between parties and cannot be disclosed to another person without the consent of the client.

The second category concerns confidential documents created because of an apprehension or contemplation of litigation or for the purpose of the litigation. A claim that privilege exists over such documents will be accepted by the courts where it can be shown that the documents were made in the apprehension or contemplation of and for the purpose of litigation.

The privilege is that of the client not of the lawyer and consequently, if the client wishes, it may be waived.

The privilege does not extend to communications which are made in furtherance of a criminal purpose, fraud, abuse of statutory powers, etc., such communications do not come into the scope of professional legal advice.

The rule of legal privilege extends to communications from solicitors in private practice, solicitors employees acting on his behalf, barristers and, with one exception applies to employed ("in-house") lawyers. The single exception relates to the European Commission's power to require production of documents in the course of an investigation into the infringements of Article 81 and 82 of the Treaty of Rome. That power is limited by lawyer/client privilege where the lawyer is independent of the client, but not where the lawyer is an employee of the client, as decided in AM & S Limited -v- EC Commission (1982). In that case the European Court of

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Justice ruled that legal privilege applies to correspondence between an undertaking and its external lawyer entitled to practise in an EU Member State following the start of formal proceedings by the Commission, or before that date but relating to the subject-matter of the proceedings. The privilege does not extend to advice from in-house lawyers. The Commission has upheld that decision on several occasions; and has gone as far as using advice from in-house lawyers as evidence of an infringement or of intention.

In practical terms, where there is a dispute concerning the privilege of a document, the undertaking should refuse to hand over the document concerned, then challenge the Commission's decision before the Court of First Instance.

While new arguments in favor of privilege for in-house lawyers are to be found in the United Kingdom decision of General Mediterranean SA –v- Patel and another (1999) these have yet to be applied by the European Commission. In that case it was upheld that inference with the right to consult a lawyer of one's choosing may constitute a violation of the European Convention on Human Rights: in particular, Article 6, the right to a fair trial and also Article 8, the right to privacy.

Isle of Man
Cains Advocates Limited

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 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.

Certain communications by or with a lawyer attract litigation privilege if they are: confidential; made after litigation has been commenced or contemplated; and, made for the sole or dominant purpose of such litigation.

Litigation privilege will extend to communications that meet the afore-mentioned criteria if they are made between the lawyer and his client, between the lawyer and either his agent or the agent of his client, and between the client and either his agent or that of the lawyer. In order for litigation privilege to apply, litigation must have been reasonably in prospect, although it need not have be the same litigation as those proceedings in which inspection of documents is being sought.

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-

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

qualified employee is effectively acting as the agent of the in-house lawyer, but not if he works independently of him.

Israel
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 it 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.

Italy
Chiomenti Studio Legale

Pursuant to Article 200 of the Italian Code of Criminal Procedure concerning witness testimony, a few professional categories have the right to invoke some form of privilege, and are allowed to refuse to witness on circumstances concerning their relationship with clients and, more generally, information acquired in the course of their profession.

Attorneys are expressly named as one of said categories. However, this rule is not applicable to in-house counsel, although the activity of in-house counsel is similar to the activity of attorneys.

In Italy, the two roles are technically distinct. In fact, those who have been practicing as attorneys in a law firm and are subsequently hired by a company to serve in-house, are obliged to quit the Bar Association pursuant to the Italian Professional Law (R.D.L. n. 1578/1933). This implies that in-house counsels do not have the status of a professional attorney and, as a consequence, confidentiality rules applicable to in-house counsel are the same applicable to any other employee.

Therefore, if requested to testify before a Court, an in-house legal counsel, as any other employee, will not have the right to be exempted from the duty to witness under the attorney-client privilege rules.

Apart from the issue of a specific duty of confidentiality applying to attorneys, under Italian law all employees are bound to an obligation of faithfulness towards their employer under Article 2105 of the Italian Civil Code. This provision, concerning the obligation to maintain confidentiality on the organization and production methods of employers and providing a mean of protection of know-how and trade secrets from unlawful dissemination by employees, is of great importance if considering that as our system does not protect such information otherwise (e.g. very often the content of company information, even if commercially valuable, is not patentable).

Therefore, if an employee, in breach of his confidentiality obligation as to any information acquired in carrying out his service for the company, reveals to third parties the content of confidential information or communications, then the employer shall have the right (pursuant to

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Articles 2105 and 2106 of the Italian Civil Code) to apply disciplinary sanctions proportioned to the seriousness of breach (in some cases termination for cause is permitted).

Finally, criminal remedies are also available for breach of confidentiality on general secret information (Article 622 of the Italian Criminal Code) or, more specifically, for breach of confidentiality on secret information having a scientific or industrial value (Article 623 of the Italian Criminal Code).

Ivory Coast
Dogué, Abbé Yao & Associés

The applicable legislation in Côte d'Ivoire is based on French law. So the provisions of the both are the same in many fields. This is the case about the protection of the communication between attorney and client.

Ivorian law considers provides the in-house lawyers (juristes d'entreprise) as a totally separate profession from the one of the private practitioners (avocats). The Ivorian Bar Association Regulations (Règlement Intérieur du Barreau Ivoirien) provides for professional rules of conduct, lawyers are subject to. According to these Regulations lawyer is submitted to an obligation of absolute professional secrecy. That is the reason why, a lawyer cannot, except to engage his responsibility, reveal to a third party neither his client's secret information, nor the legal opinions he expresses to the client.

Failure to comply with this obligation is a professional misconduct and a criminal offence. So the lawyer who does not respect this rule can be brought before the disciplinary committee of the Ivoirian Bar Association or the criminal court.

The only way to be released from this obligation is the exclusive case of defending himself against a charge alleged by his client.

This confidentiality also applies for communications between a lawyer and his client whether to advise or to defend are covered by legal privilege. Therefore, a lawyer is entitled in the event of an investigation by public authorities or Court to assert confidentiality over communications, written or verbal between himself and his client. Besides, a lawyer can decline to testify on such confidential information.

Under Ivorian law, in-house counsels are obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed as a criminal offence.

Nevertheless, as only lawyers are covered by a strict code of professional conduct, legal privilege is not extended to communications between an in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subject related to their work.

Jamaica
Myers, Fletcher & Gordon

All communications between a legal adviser and his/her client, made for the purposes of giving or receiving legal advice are privileged[36]. In this context, legal advisors include both foreign lawyers

[36] Anderson v Bank of British Columbia [1876] 2 Ch.D 644, Balabel v Air India [1988] 2 WLR 1036.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

and in-house lawyers[37]. Once the communication is for the purpose of giving legal advice, privilege applies. Where in-house counsel is concerned, it becomes necessary to distinguish between situations where that lawyer is acting either as legal adviser to his/her employer, or as a client to external lawyers, or in his executive capacity within his client company. If it is determined that he was acting in his executive capacity, then the communications will not be privileged.[38]

Japan
Asahi Law Offices

Under the laws of Japan, the concept of an attorney-client privilege does not exist. However, there are other options in-house counsel can use to protect confidential communications with the officers, directors and employees of the companies they serve from disclosure orders by the Japanese court in a civil litigation and from criminal proceedings.

Current and former *Bengoshi* (lawyers admitted in Japan) and *Gaikokuho Jimu Bengoshi* (foreign law business lawyers registered in Japan) have the right and obligation under statutory law to hold in confidence secret information obtained during the course of their professional duties (Article 23 of Lawyers Law [Law No. 205 of 1949, as amended]; Article 50, paragraph 1 of Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers [Law No. 66 of 1986, as amended]).

Japan's Code of Civil Procedure (Law No. 109 of 1996, as amended) (the "Civil Procedure Code") further provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may refuse to testify as a witness in a civil court when questioned about their knowledge of facts obtained during the course of their professional duties, so long as such facts are still considered confidential (Article 197, paragraph 1, item 2).

In order for lawyers to be able to comply with their duties of confidentiality in relation to clients' documents which include such confidential information (referred to in Article 197, paragraph 1, item 2 of the Civil Procedure Code), the Civil Procedure Code also provides that the holder of such documents may refuse to produce them to a civil court, provided the duty of confidentiality has not been exempted or waived (Article 220, item 4-c). This means that a civil court cannot issue an Order to Produce Documents (*Bunsho Teishutsu Meirei*) to current or former *Bengoshi* or *Gaikokuho Jimu Bengoshi* concerning documents which contain their client's confidential information, unless such information is no longer confidential.

Japan's Code of Criminal Procedure (Law No. 131 of 1948, as amended) (the "Criminal Procedure Code") provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may forbid the seizure of items containing confidential information of a third party if the lawyer kept or held such items because they were entrusted to the lawyer during the course of the lawyer's business. Exceptions to this rule apply when the third party consents to the seizure, or when the lawyer's refusal to relinquish such items is considered to be an abuse of the attorney's power and made solely in the interest of the accused or the defendant, unless the said third party is the accused or the defendant (Article 105; Article 222, paragraph 1).

The Criminal Procedure Code also provides that current and former *Bengoshi* and *Gaikokuho Jimu Bengoshi* may refuse to testify as a witness in a criminal court concerning confidential

[37] *Re: Duncan* [1986] P 306; *Alfred Crompton Amusement Machines Limited v Customs & Excise Commissioners* [1974] AC 405.
[38] *Blackpool Corporation v Locker* [1948] 1 All ER 85.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

information of a third party which the lawyer obtained because it was entrusted to the lawyer during the course of the lawyer's business. Exceptions to this rule apply when the third party consents to such attorney's testimony, or when the lawyer's refusal to testify is considered to be an abuse of the attorney's power and made solely in the interest of the defendant, unless the said third party is the defendant (Article 149).

However, all the protection described above are limited by its nature, because unlike the attorney-client privilege recognized in the United States, which is essentially the client's privilege, the rationale behind this protection in Japan comes from the need to assist the lawyers to uphold their statutory duty of confidentiality.

Also, all the protection described above can only be applied if the in-house counsel is either a *Bengoshi* or a *Gaikokuho Jimu Bengoshi*. This is important because while the number of in-house counsel in Japan has dramatically increased in recent years, there are still many legal departments in Japanese companies that do not have in-house counsel, and they are usually staffed by employees who have only majored in or studied law as college undergraduates.

Even if the company does not have in-house counsel, there are still other ways to protect confidential corporate information.

For example, the Civil Procedure Code provides that a civil court witness may refuse to testify when questioned regarding matters relating to technical or professional secrets, so long as such matters are still considered confidential (Article 197, paragraph 1, item 3).

In order for such secrets to remain confidential, the Civil Procedure Code also provides that the holder of documents which include matters referred to in Article 197, paragraph 1, item 3 of the Civil Procedure Code may refuse to produce them to a civil court, provided the duty of confidentiality has not been exempted or waived (Article 220, item 4-c). Case law indicates that in order for the holder of documents containing such secrets to successfully refuse their disclosure, the importance of withholding such secret information must be very substantive and important enough to justify the hindrance to the judicial process as a result of excluding such information.

In addition, the Civil Procedure Code provides that the holder of documents which were intended for use strictly by the holder may refuse to produce them to a civil court (Article 220, item 4-d). Case law indicates that in order for a company which holds such documents to successfully refuse their disclosure, the court must determine that such documents were made strictly for the company's internal use, and that no person outside the company had ever seen nor had the opportunity to see such documents.

If a civil court considers it necessary to determine whether a document containing attorney-client communications and other confidential information should be excluded from any motion for an Order to Produce Documents, the court may cause the holder of the document to make the document available for its review. In that case, no one may request disclosure of the document presented to the court (Civil Procedure Code, Article 223). This procedure gives added protection to confidential information by allowing the judge to review the document in private, without having to disclose the document to the petitioner prior to the judge's ruling on the motion.

Finally, a witness may refuse to testify in a civil or criminal court when the testimony relates to matters that could be self-incriminating or incriminate close relatives of the witness if disclosed (Civil Procedure Code, Article 196; Criminal Procedure Code, Articles 146 and 147). A witness

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

may also refuse to testify in a civil court when the testimony relates to matters that would be harmful to the honor of the witness or close relatives of the witness if disclosed (Civil Procedure Code, Article 196). One may also refuse to produce documents it holds to a civil court that (i) could be self-incriminating or would be harmful to the honor of the holder; or (ii) could incriminate, or would be harmful to the honor of, the holder's close relatives (Civil Procedure Code, Article 220, item 4-a).

Jordan
Ali Sharif Zu'bi & Sharif Ali Zu'bi

Attorney-client communications lack legal protection under the Jordanian law. With the absence of such statutory protection, the tendency of the Jordanian courts does not indicate that they are willing to offer such protection to this type of communications.

There is no rule of law that offers protection to attorney-client communications. Although the Evidence Law gives a lawyer, agent and physician the right to abstain from disclosing information relating to his client, the said law is silent as to whether information is privileged information.

As a solution to this intricate legal issue, we suggest that the relevant Jordanian Bar Association Law should be amended to include an Article expressly classifying such communications as privileged communications.

Kazakhstan
McGuire Woods Kazakhstan

Advocates are not allowed to work as in-house counsel. The obligations of in-house lawyers stem from their business ethics and internal policies that a company may have. They have no privileges they can invoke in terms of being called as a witness or being bound not to disclose information obtained from officers, directors, or employees of their company.

Kazakhstan has enacted a law "On Advocacy" (December 5, 1997). This law set forth almost all of the privileges allowable in Kazakhstan that would be categorized as "attorney-client privilege." But this law only applies to licensed advocates (by analogy to barristers in the UK) and not to attorneys in the general sense (solicitors). Advocates are specifically court attorneys and although they have a special license, nothing prevents a non-advocate attorney from representing clients in court - all that is needed is a power of attorney. The result is that advocates have obligations and privileges made available to them because of the above-mentioned law, while a state-licensed attorney (non-advocate) has none.

Due to this lack of regulation, there have been some efforts to impose a code of conduct or law applying to obligations and privileges. One result was a self-adopted code of conduct that applies to judges. Nonetheless, no code of conduct or law exists at the present time that relates to in-house counsel in the Republic of Kazakhstan.

Kenya
Kaplan & Stratton

While the advocate/client communication is respected still in evidence in our Courts, the extent to which it extends to the advocate/client relationship, as far as in-house counsel in concerned, is unclear.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Korea
Hwang Mok Park P.C.

In Korea, there is no such system such as attorney-client privilege.

Kuwait
Abdullah Kh. Al-Ayoub & Associates

Issues addressing attorney-client privilege are dealt with under Law No. 42/1964 organizing the legal profession. These issues are also considered under the Civil Code, Law No. 67/1980, governing the relationship between principal and agent.

The relationship between an attorney and a client enjoys privilege because the parties thereto are independent entities. The same privilege cannot apply to in-house counsel advising officers, directors or employees of the company where they serve; in-house counsel are not independent attorneys. They are also employees of the same company and hence do not enjoy the same privilege accorded to attorneys. To differentiate this point further, we give the following example. Article 25 of Law No. 42/1964 prohibits an attorney from acting as a witness in his own case. However, in-house counsel can appear as a witness in a case involving his company.

Latvia
Klavins, Slaidins & Loze

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. Attorney-client privilege extends only over the members of the Latvian Bar Association - sworn advocates and assistant advocates, a minority of all graduates from law schools in Latvia, who practice independently or collectively in law firms.

To protect communications from the requirement of disclosure, companies can either conclude assistance and service agreements with sworn advocates or law firms where sworn advocates practice in teams, or sign internal confidentiality agreements between the employer and in-house lawyer. 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. Often, in-house lawyers, who are not sworn advocates, 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 protected by a formal client-attorney privilege, but rather a regular employment relationship, where issues above and beyond the competence of employee are traditionally referred to a higher managerial instance.

In-house lawyers in Latvia are particularly vulnerable vis-à-vis the office of prosecutors. In accordance with Article 17(1) of the law "On the Office of Prosecutors" (adopted in 1994), prosecutors 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 faced with a request for information from the office of prosecutor.

Lawyers who are not members of the Latvian Bar Association, such as in-house counsel, employees of legal departments, and legal counselors are not protected by the attorney-client privilege.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Lebanon
Moghaizel Law Offices

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.

Lithuania
Lideika, Petrauskas, Valiunas ir partneriai

Under Lithuanian legislation an attorney-client privilege is granted only in respect to communications among advocates, assistant advocates and clients. In general 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. Notably, advocates and assistant advocates are not entitled to work or on any other basis serve as in-house counsels, 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.

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. However, 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*.).

Luxembourg
Bonn Schmitt Steichen

In Luxembourg, in-house counsels are not bound by any attorney-client privilege. As a result, employees of legal departments can disclose information given by another employee to officers, directors or other employees of the company they serve. The attorney-client privilege is set forth in section 5 of the internal rules of the Luxembourg bar association, which is not applicable to in-house counsels, as the functions of legal advisors for a company and attorney-at-law admitted to the bar are incompatible.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Pursuant to article 458 of the Luxembourg Criminal Code, which is the general provision on professional secrecy, a person who discloses a professional secret must be disclosed to the latter in order to enable him to perform his function (i.e. expert). An in-house counsel may in certain cases be a "necessary" and "obligated" confident and may therefore be bound by this provision with regard to his relations with the officers, directors and employees of the company. His function must consist of giving legal advice to the company itself, as opposed to helping employees, officers and directors in private matters.

In order to clarify the position of the in-house counsel, it may be useful to provide for a specific clause in his employment contract or an addendum to his contract, which would identify the categories of information which are confidential and may not circulate within the personnel of the company.

In general, we might say that every time some information is revealed to the in-house counsel with regard to his function, he is bound by professional secrecy. However, any information that is given to him without regard to his function as in-house counsel to the company is not privileged.

Every employee of a company is prohibited to disclose to third persons any trade secrets and any professional secrets pursuant to article 309 and article 458 of the Criminal Code.

Malta
Ganado & Associates

Generally, the provisions of the Professional Secrecy Act reiterate the basic principle that certain professionals, including advocates, are bound by the duty of confidentiality by reason of their profession. The law goes on to regulate other areas such as when disclosure may be compelled by law or by a Court Order. The Professional Secrecy Act does not address the in-house/ employer relationship and hence one is to assume that an in house lawyer is given similar status to a private practitioner irrespective of the relationship with the client.

Under the Code of Ethics and Conduct for Advocates, it is stated categorically that an advocate in employment is bound by the norms of professional conduct in the same manner as an advocate in private practice. Consequently it follows that communications between in-house lawyers and officers of the company, including directors and/or employees would be protected by professional secrecy as it can normally be expected that in the performance of his duties, the in-house lawyer would ordinarily have various communications with the staff and officers of the Company he serves Certain limitations do exist to the above rule. Thus, the duty to keep a client's matters confidential can be overridden in certain cases, such as when an advocate is required to disclose confidential information in terms of law or if ordered to do so by a Court. Similarly such information may be divulged if it is essential for an advocate to defend himself in proceedings, which are taken against him either by or upon the complaint of the client. In the latter case, the disclosure should be limited to what is absolutely essential and indispensable to the defense.

Mauritius
De Comarmond & Koenig

The situation in Mauritius is the same as that in England. Communications between in-house Law Practitioner and their employer-client are protected by the same privilege as those of any lawyer and client. Therefore as long as the communication is part of Law Practitioner's legal function it is privileged. Furthermore the privilege will also cover any communication by a non-legally qualified person if same is produced by the in-house Law Practitioner.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Communications between lawyer and his client are covered by legal privilege. A Law Practitioner is entitled in the event of an investigation by public authorities or by the court to assert confidentiality over communications, written or verbal between himself and his client. The Law Practitioner can decline to testify on such confidential information. A breach of this obligation of secrecy is deemed as a criminal offense under the Mauritius Criminal Law unless such disclosure is compelled by law. The Money Laundering Act provides for specific circumstances where the Law Practitioner may be compelled to reveal certain information.

Mexico
Goodrich, Riquelme y Asociados

The rendering of professional services within the Mexican framework is defined as an agreement in the professional is obliged to render specific services that require, in most of the cases, a professional degree.

The Law of Professions and the Federal Civil Code govern this agreement, as well as the availability of the attorney-client privilege to protect from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve. The Federal Criminal Code determines the civil liability of the attorney whenever he/she reveals the attorney-client communications to its contrary or if he/she provides documents of information that could harm his/her client.

More over, the Law of Professions establishes that every professional is committed to strictly keep the secret of the cases that the clients entrust, except for the pleadings set up on the law. Accordingly, the general Office of Professions may impose administrative fines when the professional conducts himself/herself in violation of this law. In addition, the Federal Penal Code imposes different criminal sanctions for the violations of the attorney-client privilege.

The applicable laws do not establish exceptions to said privilege. However, federal and local penal codes establish that some conducts may be considered as an act of complicity with the delinquent (see Federal Penal Code, art. 400). In such cases, the general principle has an exception.

Furthermore, professional organizations such as the Mexican Bar Association (see a. 27 – 30) the attorney is allowed to stop the representation of the client if there is a conduct, which should be considered as ethically unacceptable.

The Professional Ethic Code also points out two exceptions for the attorney/client principle:

a) The lawyer who is severely attacked by his client is excused from the obligation of keeping the secret and may reveal it for his defense;

b) When a client acknowledges the attorney his intention of committing a crime, the lawyer may reveal the necessary information in order to prevent a criminal act or a person who may be in danger.

Monaco
Berg and Duffy, LLP

Article 16 of Monaco Law No. 1047 of July 28, 1982, specifically declares that the legal profession is incompatible with holding a salaried position. Thus, members of the Monegasque Bar may nor be employed in any capacity and remain a member of the Monegasque Bar.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Consequently, in-house counsel may not become a member of the Monegasque Bar; nor would his client be protected by the attorney's obligation of professional secrecy. Similarly, if a member of the Monegasque Bar becomes employed as an in-house counsel, he may not remain a member of the Monegasque Bar while so employed, which produces the same consequences.

There are no regulations in Monaco that deal with in-house counsel per se. However, in-house counsel may, nevertheless, be subject to rules governing employees and/or the industry in which he is employed. Thus, an in-house attorney would be subject to any rules applicable to his employer, such as, in the case of banking institutions, regulations requiring banks to hold banking customers' information confidential. This would not necessarily correspond to an attorney's obligation of professional secrecy and may not even be similar in nature or scope, as the purpose of these rules may be different that the purpose for the attorney's obligation of professional secrecy. In many cases, however, the result would be essentially the same, because there would be obligations of secrecy that must be observed formally.

In this connection, Article 308 of the Monegasque Penal Code subjects certain professionals who disclose, except when required by law, confidential information they have gathered or received because of their professional status or their professional activity to penalties ranging from one to six months imprisonment.

In addition, Article 135 of the Penal Procedure Code, which applies to attorneys as well as to certain other categories of independent professionals, states that any such persons who hold "confidential information by reason of their activities" may not give evidence about the same, unless the law explicitly requires disclosure. However, these above mentioned independent professionals may testify and reveal information gathered in their professional capacity when specifically authorized by those who have confided in them.

In-house counsel, similar to any other employee, is therefore ethically obligated to protect and keep confidential communications arising out of his employment with the company, but a Court may oblige in-house counsel to disclose this information when the court considers it necessary. Thus, the standard of protection is considerably less than would apply in the case of an attorney's obligation of professional secrecy.

Netherlands Antilles
Promes Van Doorne

A lawyer must avoid obligations, which can endanger freedom and independence in his or her profession. Attorney-client privilege is available for all confidential information for the benefit of the client.

A lawyer has a right to withhold evidence before a Court because of his occupation but only for the facts which are entrusted to him as a lawyer (this is a statutory regulation, mentioned in Civil Code article 1928 paragraph 2 sub 3). All confidential information between the client and lawyer is protected by attorney-client privilege if the lawyer acts in the capacity of a lawyer and used his expertise for the benefit of the client, and thus the lawyer may claim exemption from giving evidence.

Limitations to this privilege exist. A lawyer has an obligation of secrecy for everything involving the case, including all information pertaining to his or her special function as a lawyer. A client can impose secrecy upon the lawyer, even when it goes against the lawyer's legal interest. The client has to express this emphatically. The obligation of secrecy will continue even after termination of the contract/relation with the client. The lawyer has to impose secrecy on his

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

employees and staff as well. He must separate his own private interests from his client's interests; obtaining financial interest or goods in a case in which the lawyer is advising is not permitted. The lawyer is obligated to obey a summons of the supervisory board and the dean of the national Bar. He cannot invoke privilege when a case is under the competence of the supervisory board or the dean of the national Bar; he is obligated to give all the information they ask for, except in some special cases.

New Zealand
Simpson Grierson

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

The proper approach, where an issue arises as to whether an in-house counsel was acting in their capacity as a lawyer, is for the solicitor to demonstrate affirmatively that he or she was acting as a lawyer and not simply as an employee possessing specialist skills. If, for example, in-house counsel provide business advice then they can not be said to be acting in their capacity as a lawyer.

In the event that communications with in-house counsel 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.

Nicaragua
Alvarado y Asociados

In our country there are not any specific laws or regulations related to the attorney/client privilege. However there are a few disperse dispositions that can be taken into consideration and be applied to the matter in discussion. For instance, in the Manual for the Public Notary in the Section related to the actions that originate Criminal Responsibilities, its subsection *f* "Disclosure or Breach of the Professional Secret" expresses that the Public Notary is a depositary of the trust of its clients, that come to him/her in demand of a consultation and consequently he/she cannot defraud the trust that carries with his/her profession. The Public Notary has access to information

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

and news revealed by the client for necessity reasons, therefore the notary has the obligation to respect all information that has been granted to him/her.

Additionally, our Political Constitution under "individual rights", article 26 (2) provides for the inviolability of correspondence, and all types of communications. An 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 thereinafter.

Norway
Thommessen Krefting Greve Lund AS

The general rule relating to attorney-client privilege is also applicable to in-house attorneys, i.e. such information is privileged. The attorney-client privilege applies to attorneys as well as their juniors. The same principle will apply to in-house legal departments. However, in order to be considered privileged, the information must be entrusted to the in-house counsel in his capacity as an attorney. However, an attorney may testify if the client gives waives the attorney-client privilege – which he is free to do.

Attorney-client information is regarded as privileged regardless of the attorney's nationality. 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 held that sections containing legal considerations and evaluations of the litigation risk were to be considered "attorney-client privileged" – cf. decision by the Selection Committee of the Supreme Court 22 December 2000.

However, if an attorney is sued by his client for alleged malpractice, the attorney must be free to divulge entrusted information to the extent that the rendering of such information is necessary to defend his case. In addition, information received under a specific confidentiality agreement cannot be divulged, and it has been argued if special limitations of the attorney-client privilege will apply in anti-trust or competition cases. (The prevailing theory in Norwegian jurisprudence is that the attorney-client privilege shall prevail over competition rules. In particular a unanimous the jurisprudence does not acknowledge any difference between in-house counsel and independent attorneys[39].) Information received by the in-house counsel from third parties will normally fall within the ambit of the privilege; to the extent such information is received in his capacity as attorney. However, information privately received from an opposing party during a case, will not be covered by the privilege, cf. Rt. 1967, p. 847.

Pakistan
Afridi Angell & Khan

Broadly speaking, Pakistan Law confers attorney-client privilege upon certain communication/information in two situations: communications with an "advocate" and communications with a "legal adviser."

In Pakistan, an "advocate" is defined as a lawyer who is registered with a bar council. The law prevents an advocate from disclosing or stating any communication, document or advice that the former has received from, become acquainted with or given to his client during the course of and

---

[39] Åge Karlsen in *Commentary to the Competiton Act,* p.469; Tore Schei, *Commentary to the Civil Procedure Act,* (1998) II p.692-693; Hans Kristian Bjerke/Erik Keiserud *Commentary to the Penal Procedure Act* (1996) I p. 371–372; Knut Svalheim *The legal privilege of Lawyers* (1996) p. 39-42.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

for the purpose of his employment/engagement as such, unless the client expressly consents otherwise. This obligation continues even after the engagement/employment ceases. However, there are limitations on the extent of this privilege as it does not extend to: (1) any such communications made in furtherance of any illegal purpose, and (2) any fact observed by an advocate, in the course of his employment/engagement as such, showing that any crime or fraud has been committed since the commencement of his employment/engagement, whether his attention was or was not directed to such fraud by or on behalf of his client

The term “legal adviser” is broader than the term “advocate” as it may include any professionally qualified lawyer even if he is not registered with Bar Council. Under Pakistan Law, a client may not be compelled to disclose to the Court or any judicial authority any confidential communication that took place between him and his legal adviser. However, where such a client offers himself as a witness he may be compelled to disclose only such communications as may appear to the court necessary in order to explain any evidence which he has given.

When the in-house counsel is an “advocate,” professional communications between him and his client would be protected under both the above-mentioned types of privileges. In the event that the in-house counsel is not an advocate, then only the second category of the attorney-client privilege, as mentioned above, may be conferred upon communications/information passed between the counsel and his client.

It is necessary that the communications must have been made in the course of and for the purpose of professional engagement/employment. Also, the privilege extends only to those communications which are confidential and circumstances have to be examined in order to see whether the presumption of confidentiality has been raised or not.

Pakistan Law in this area is developing and, therefore, whether attorney-client privilege regarding any connection/information can be invoked requires a contextual examination.

Panama
Arosemena Noriega & Contreras

No rules governing or protecting attorney-client confidentiality exist in Panama. However, these rules are primarily directed towards third parties and not in regard to in-house communications. In Panama there are no specific rules or regulations protecting communications between in-house counsel and officers, directors or employees of the companies they serve. However, a company or institution can adopt internal regulations that specify to whom within the company or institution the in-house counsel can divulge information.

Paraguay
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

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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 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.

Peru
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.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Finally, the Code of Civil Procedure provides that no one could be compelled to declare over facts that he/she knew under professional secret and when by disposition of the law he/she may or must keep the secret.

Philippines
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[40]. An in-house counsel is engaged in the practice of law because he handles the legal affairs of a corporation. He 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[41]. There is professional employment when a client employs a lawyer in his capacity as legal adviser for the purpose of obtaining from him legal advice and opinion concerning his rights and obligations concerning the subject matter of the communication[42]. Hence, communications between the officers, directors and employees of a corporation and its in-house counsel made to seek legal advice are privileged.

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[43].
- When the communication by the client to his lawyer was made for the purpose of its communication to a third person[44].
- When the communication was made by a client to his lawyer in contemplation of a crime he intends to commit[45].

Portugal
Morais Leitao, J. Galvao Teles & Associados

Pursuant to article 81º 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 81º 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.

[40] Section 20(e), Rule 138 of the Rules of Court; Canon 21 of the Code of Professional Responsibility.
[41] Cayetano vs. Monsod, 201 SCRA 210, 212-219.
[42] Francisco, The Revised Rules of Court in the Philippines, Evidence, Vol. VII, Part I, 1997 ed., pp. 272-273.
[43] Rule 21.01 of the Code of Professional Responsibility.
[44] Uy Chico vs. Union Life Assurance Society, Ltd., 29 Phil. 163, 165.
[45] People vs. Sandiganbayan, 275 SCRA 505, 519.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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 81 EOA.

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 81ºEOA. 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 Counselor* 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 here is the situation of calling 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 principal of freedom of contract. The parties are free to contract with no restrictions (freedom of celebration), to select the type of business that best meets their interests (freedom of selection of the type of business), and 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 celebration of a contract that guarantees the protection of information not covered by the client-attorney privilege.

Romania
Nestor Nestor Diculescu Kingston Petersen

Under Romanian law, an attorney who is a member of the Bar may only be "employed" professionally by a law firm. To the extent that a member of the Bar provides services to a commercial company, such services shall be provided pursuant to a legal assistance contract, under the form approved by the Bar association. Such employment can be interpreted as an "independent contractor" status and not an employment relationship.

The attorney-client privilege is provided under Law 51/1995 and is applicable to only those persons licensed to practice by the Bar. An "Attorney," member of the Bar may not be an "employee" of a commercial company, but rather an "independent contractor" equivalent to "outside counsel." A person who is not a member of the Bar does not have such obligations or the right to refuse to divulge information believed to be privileged. A law school graduate, who is not a member of the Bar may be an employee of a commercial company, providing advice on the legal aspects of the company business.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Romanian law does not embrace the concept of "in house counsel," where the attorney is an employee. An attorney may work exclusively for a commercial company under a legal assistance agreement, but the relationship is one of independent contractor and not employee. This, however, is the only manner in which the confidentiality privilege may be maintained.

St. Kitts & Nevis
Kelsick, Wilkin & Ferdinand

Attorney-client professional privilege extends to communications with in-house counsel but only communications made with them in their capacity as legal advisors. If the legal adviser also acts in another capacity, communications relating to that capacity are not privileged.

If there is any doubt as to whether communications with in-house attorney are privileged, the judge or master will himself inspect the documents.

Saudi Arabia
Baker Botts L.L.P.

In the Kingdom of Saudi Arabia ("KSA"), almost all licensed "advocates" (who may appear before the courts of the KSA) are KSA nationals, while legal consultants (largely foreigners) are not extended this privilege. The distinction is somewhat akin to the distinction between "solicitors" and "barristers" under the legal system in England.

The KSA recently promulgated legislation regulating the conduct of lawyers in the KSA. This legislation also covers what is referred to in other jurisdictions as the "attorney-client privilege" in the form of a new law called "Regulation of the Legal Profession" (the "Regulation"). The Regulation was published on 24/08/1422 H. (corresponding to November 9, 2001 in the Gregorian calendar). According to Article 43 of the Regulation it came into effect 90 days after the Regulation was published.

Also, the attorney-client privilege is interpreted in the KSA under Islamic Law, as the fundamental law or constitution of KSA is Islamic Law/*Shari'ah* consisting primarily of the Qur'an and the sayings (*hadith*) of the Prophet Mohammed. The Shari'ah in this respect does note refer to lawyers but refers to one who has been given a power of attorney (*wikalah*).

The Regulation provides for a limited attorney-client privilege between a lawyer and his client. According to Article (1) of the Regulation, the Regulation would be applicable to anyone deemed a "lawyer" which is defined as someone that "defends others before courts, the Bureau of Grievance and the committees formed under regulations, orders and resolutions to hear cases within a particular jurisdiction and those who practice legal and Islamic Shari'ah Consultation". Article (23) of the Regulation prohibits a lawyer from disclosing "any secret entrusted with him or he has become aware of through his profession even after termination of his power of attorney, unless this violates a principle of Islamic Law." Therefore, in the event a lawyer's client violates a "principle of Islamic Law", then no attorney-client privilege would exist and the lawyer would be obligated to report his client's actions to the appropriate local authorities. Since the Regulation is relatively new, it is still difficult to gauge what actions by a lawyer's clients would fall under the category of being a violation of a "principle of Islamic Law". Note it is widely believed that only egregious crimes would be deemed a violation of "a principle of Islamic Law" (e.g., a client who admits to raping a child) warranting a break in the attorney-client privilege and requiring affirmative action on behalf of the lawyer.

The above rules would not necessarily include in-house counsels who are considered to be providing their services on an employment basis. The Saudi Labor and Workmen Regulations, Royal Decree No. M/21 dated 6 Ramadan 1389 H. (the "Labor Regulations"), governs all

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

employment relationships. The Labor Regulations are devoid of any provisions relating to privileges. While the Labor Regulations does provide that an employee has a duty to not reveal the secrets of his employer, this does not amount to a privilege. In any case, note that most in-house counsel in the KSA are foreign legal consultants, and they would accordingly be subject to the professional obligations of their home countries (although it is possible that KSA nationals who are also licensed advocates may fall under the Regulation). Of course, it is not clear whether many of these legal consultants actually keep their home bar memberships active. The labor permit that categorizes one as a "legal consultant" is based on the legal consultant's law diploma, not a certificate of admission, so there are potentially many legal consultants acting in the capacity of in-house counsel here in the KSA who are beyond the scope of the Regulation as well as the professional rules of their putative "home" jurisdictions.

Scotland
Maclay Murray & Spens

In Scotland, at a national level, there is no distinction between the position of a solicitor in private practice and that of an in-house lawyer regarding legal privilege. Privilege stems from the duty of confidentiality owed by the lawyer to his client. Both the solicitor's client and the in-house lawyer's employer are therefore entitled to invoke privilege.

The general position, from which there are a number of exceptions, is that all communications between lawyers and clients that are associated with the giving of advice are subject to legal professional privilege. For example, Scottish litigation procedure allows the parties to recover relevant documents from their opponents and from third parties. It is not the case, as some have suggested, that legal privilege is limited to client-attorney communications in relation to legal proceedings, whether actual or anticipated.

At common law this general rule is only superseded where an illegal activity is alleged against a client and where the lawyer has been directly concerned in the carrying out of such activities. A number of other statutory exceptions also exist. These are, principally, in relation to drug trafficking, money laundering, documents specifically covered by search warrants and court orders, examinations in bankruptcy and corporate insolvency and rules made under statute that govern the conduct of the legal profession. Finally, at a national level, it should be noted that the Courts have a discretionary power to require disclosure of communications overriding privilege.

As a general principle, communications with a Scottish or English lawyer (whether a solicitor or an advocate) for the purpose of obtaining legal advice are privileged. The purpose of the communication is the determining factor, and so a communication does not become privileged simply by being copied to a solicitor if it would not otherwise have attracted privilege. Similarly, documents deposited with a solicitor do not attract any privilege, which they would not otherwise have had. The same privilege attaches to communications with an in-house lawyer working for one of the parties, provided that the communications relate to legal as distinct from administrative matters.

Communications, which do not fall within the strict ambit of solicitor-client confidentiality, will often fall within the related doctrine of communications *post litem motam*. This doctrine confers privilege on any documents prepared for the purposes of or in contemplation of litigation (including internal reports, communications with non-legal advisers etc).

An important limitation of client-attorney privilege exists in relation to investigations undertaken by the European Commission in competition matters. Following a decision of the European Court of Justice, in-house lawyers are unable to claim that privilege attaches to communications

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

between themselves and their employers when faced with a demand for disclosure under Article 14 of Regulation 62/17.

In contrast with the position at EU level, under UK domestic law enacted to mirror European competition provisions, the Competition Act 1998 expressly provides in Section 30 that communications between a professional legal advisor and his client are privileged. Under UK competition law therefore in-house lawyers' communications with their clients attract privilege.

Singapore
Donaldson & Burkinshaw

In Singapore, privilege of communications between a client and his advocate and solicitor is conferred by section 128 of the Evidence Act (Chapter 97) ("Evidence Act"). Section 128 of the Evidence Act states the three (3) categories of privileged communications, as follows: (i) communications made to the advocate and solicitor in the course and for the purpose of his employment as such by or on behalf of the client; (ii) the contents or condition of any document with which the solicitor has become acquainted in the course and for the purpose of his professional employment; and (iii) any advice given by the solicitor in the course and for the purpose of such employment.

Unless an in-house legal counsel satisfies the qualifications specified in the Legal Profession Act (Ch161) ("LP Act"), he/she is not an advocate and solicitor and the legal profession privilege conferred by section 128 of the Evidence Act would not extend to him/her.

The legal profession privilege is also a rule of English common law. The rule provides that confidential communications passing between a client and his legal advisor and made for the purpose of obtaining or giving legal advice are privileged from disclosure. The English case of *Alfred Crompton Amusement Machines Ltd. v Customs and Excise Commissioners (No.2) [1972] 2 QB 102, [1972] 2 All ER 353 at p. 371, CA; affirmed on other grounds [1973] 2 All ER 1169, HL* took the view that salaried in-house legal counsel acting as such are in the same position for the purposes of this rule as independent legal advisors.

To our knowledge, there has been no Singapore reported cases on the issue whether the legal profession privilege extends to salaried in-house legal counsel. English cases are however persuasive on Singapore Courts. In our view, if the communications passing between a client and his salaried in-house legal counsel is for the purpose of obtaining or giving legal advice, or more specifically falls within the three (3) categories of privileged communications under section 128 of the Evidence Act, such communications are likely to be considered by Singapore Courts as privileged from disclosure.

Slovak Republic
echová Rakovsk

The express privilege of confidentiality is provided by the Slovak law only in respect to the attorney-client relationship. 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 the instructions of the employer. The employee shall be liable for any damage caused to the employer by the breach of

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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 with two months' notice period or by immediate termination, depending on the intensity of the breach). Generally, it is recommended for the employer to specifically stipulate such confidentiality amongst the other obligations of the employees in internal rules (work order), including determination, breach of which obligations would be deemed to be a gross violation of work discipline (and thus being a ground for immediate termination).

In respect to the external protection, such communication might be also protected by the provisions of the Commercial Code regulating business secret, which is 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 the damage and may ask for an appropriate satisfaction, which may be granted also in cash. Intentional disclosure of business secrecy could be treated also as a criminal action, which could be punished by an imprisonment or ban of activity.

South Africa
Bowman Gilfillan Inc

The South African High Court has recently affirmed that legal professional privilege can be claimed in respect to confidential communications between private 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 the other party or not. 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.

Spain
Uría & Menéndez

The attorney-client relationship as well as the documents and communications exchanged by them are protected in Spain by the general rule of professional confidentiality or secrecy, established generally in article 437.2 of Organic Law 6/1985, on the Judiciary (the "Judiciary

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Law"), and article 32 of the recently enacted General Regulation of the Law Profession (Royal Decree 658/2001 of 22 June 2001) (the "GRLP"). There are, however, no express regulations in Spanish Law governing "privileged" or "without prejudice" documents or communications, as may be the case in common law or other jurisdictions

The general rule is that professional confidentiality is to be kept with respect to any information received as a consequence of the attorney-client relationship from the client, opposing parties and other attorneys. It is worth pointing out that the attorney is afforded both a privilege and a legal obligation to maintain confidentiality. Indeed any breach of this obligation would leave an attorney open to criminal liability as well as sanctions by the Bar Association. The privilege covers any spoken or written communications, documents or correspondence exchanged by attorney and client.

As to in-house counsel, article 27.4 of the GRLP sets out that the law profession can also be engaged in under a labor relationship governed by an applicable written labor contract. In such a case, internal or in-house counsel enjoys the same rights and obligations as external counsel to carry out their professional tasks according to the general principles of freedom and independence. Accordingly, although there are no specific provisions on this subject, it can be understood that in-house counsel should also bear the same obligation of confidentiality and secrecy.

In fact, article 437. 2 of the Judiciary Law establishes that all attorneys are obliged to keep confidential all the facts or news of which they have knowledge as a result of "*any of the possible ways to carry on their professional activity* and cannot be required to testify with regard to those facts or information". In addition, Article 52 of the Ethical Code approved by the General Council of the Spanish Legal Profession on 30 June 2000 expressly states that "the obligation and right of legal professional confidentiality consists of the confidences and proposals from the client, opposing parties, other attorneys and all facts and documents which have been known or have been received due to *any of the different types of professional activity".* Consequently, these provisions can be interpreted, in the lack of other express provisions, to establish a general rule applicable to all attorneys, irrespective of whether they are external or in- house counsel.

Sweden
Vinge KB, Advokatfirman

Communications between in-house counsels and officers, directors, and employees of the companies they serve are not protected from disclosure by attorney-client privilege according to Swedish law. An alternative method of protecting the information might be to use outside counsel, provided they are members of the Swedish Bar Association, "advokat".

Switzerland
Pestalozzi Lachenal Patry

According to the traditional understanding in Switzerland, the attorney-client privilege is only available to external counsel, but not to an in-house counsel admitted to the bar. The main argument for this differentiation is that the in-house counsel is not independent from his employer. However, information of a confidential nature entrusted to the in-house counsel may be protected by the general business secret of their employer or special business secrets, such as bank and securities dealers' secret. Critics argue that the differentiation between the external counsel and the 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

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

that his or her communication be privileged. Therefore, many legal scholars have a more modern view of the attorney-client privilege and advocate also communications with the 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 the in-house counsel, it is still the prevailing opinion in Switzerland that an 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 an in-house counsel or the testimony of an 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 counsels, 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 Taking Evidence in International Commercial Arbitration (Adopted by the IBA Council on June 1, 1999, hereinafter referred to as "the Rules on Taking Evidence") or takes these rules as a general guideline. Article 9 of the Rules on Taking of Evidence excludes from evidence or production any document or oral testimony 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 counsels, 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 the in-house counsel, it is wise for a company to take the adequate precautionary measures.

Taiwan
Tsar & Tsai Law Firm

In Taiwan, the attorney-client privilege to protect communications from disclosure is available only in civil discovery proceeding. For example, in a criminal investigation proceeding, though an attorney may decline to testify to the court against his client, he is not immune from the compulsory search or raid which the public prosecutor may conduct. To be forced to disclose communications between himself and officers, directors or employees of the company he serves

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

would depend on whether the in-house counsel is an attorney admitted to bar. If not, then such limited attorney-client privilege would not be available.

There appears to be no alternative methods to provide protection for communications between an in-house counsel not admitted to bar and his client.

Thailand
Tilleke & Gibbins International Ltd.

Under the Lawyers Act B.E. 2528 (A.D. 1985), the Law Society of Thailand is authorized to issue Regulations regarding attorney ethics. Under Regulation Number 11 of the Regulations on Attorney Ethics B.E. 2529 (A.D. 1986), it is a breach of attorney ethics to reveal a client's confidential information obtained while representing the client, unless the client or the Court grants permission.

Any licensed, in-house counsel must also comply with the above Regulations. 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. Consequently, there is some question as to whether they or their clients can claim the attorney-client privilege, but we are not aware of any case law involving this situation.

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.

Trinidad & Tobago
M. Hamel-Smith & Co.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

As a matter of public policy, the law of Trinidad and Tobago treats certain communications whether oral or documentary, as privileged. Where this is the case, the general rule is that the client cannot be compelled (either by discovery process, at a trial, or otherwise) to disclose any such communications. It should be noted that there are narrow exceptions to this rule, such as communications made in furtherance of a fraud or crime. Further, the privilege is that of the client who may, either expressly or by its conduct, waive any claim for privilege.

Insofar as communications between an attorney and client are concerned, the privilege again at disclosure is defined in fairly broad terms and the requirements to secure protection from disclosure are relatively easy to satisfy. In essence, all such communications are protected, so long as they are made confidentially and are referable to the lawyer-client relationship.

In Trinidad and Tobago, attorneys are required to obtain a practicing certificate (for which they pay an annual subscription). There might be a tendency among in-house counsel not to pay this annual subscription and therefore, not to hold valid certificates. This may create a lacuna insofar as privilege is concerned as, it may be possible to argue that in-house counsel who do not have such cannot practice as an attorney at law, and accordingly, when giving their advice/counsel they may not be covered by the cloak of privilege.

It may also be important for in-house counsel, when dealing with sensitive matters, to ensure that all documentation is headed/labeled appropriately, for example, by stating that it is a request for legal advice. Lastly, the distribution of sensitive memoranda and other documents should be kept to a minimum of recipients in order to deflect an argument that the privilege has been waived.

Insofar as communications between the attorney and third parties (on behalf of the client) are concerned, the privilege against disclosure is defined in substantially narrower terms. Essentially oral and documentary communications between a lawyer and his third party will only be protected from disclosure as privileged communications where both of the following criteria are satisfied, i.e.:

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

Turkey
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

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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.

The attorney-client privilege with respect to the practice of in-house counsel of banks are additionally governed by the relevant provisions of the Banks Act (Law No. 4389, as amended) and the attorney-client privilege with respect to the practice of in-house counsel of corporations are additionally governed by the relevant provisions of the Penal Code (Law No. 765). Specifically, Article 22.8 of the Banks Act requires in-house counsel and all other employees of banks not to disclose any confidential information about the bank, except as otherwise required under the laws and regulations of the Republic of Turkey. Article 198 of the Penal Code indicates that it is a crime punishable by imprisonment and/or a fine for anyone to disclose confidential information legally harmful to another person and obtained in the course of conducting their business practice, in the event such disclosure is not legally required.

Turks and Caicos Islands
Misick and Stanbrook

In the Turks and Caicos Islands there is no legislation or codes of professional conduct that specifically addresses the disclosure of communications between in-house counsel and officers, directors or employees of the companies that they serve. However under the Code of Professional Conduct, all attorneys are required to hold in strict confidence all information acquired in the course of their professional relationship with their clients. An attorney may not divulge such information unless he is expressly or impliedly authorized by his client to do so or as required by law to do so. "Client" is not defined in the Code of Professional Conduct or the Legal Profession Ordinance. In England "client" is defined as "any person who, as a principal or on behalf of another person, retains or employs a solicitor; and any person who is or may be liable to pay the bill of a solicitor", and the clients of in-house solicitors are their employers. This no doubt would also be the case in the Turks and Caicos Islands.

United Arab Emirates
Afridi & Angell

Law No. 23 of 1991 regarding Regulation of the Advocacy Profession (the "Advocacy Law") provides for attorney-client privilege between an advocate and his client. Article (41) of the Advocacy Law prohibits an advocate from giving testimony in respect of any matters, which come to his knowledge "in the course of practicing his profession without the consent of the person who has supplied the relevant information unless the client intends to commit a crime." Article (42) prohibits an attorney from revealing confidential information unless revealing such information will prohibit commission of a crime, and Article (44) prohibits interrogating an advocate or searching his office without the knowledge of the Public Prosecutor.

Please note that in the U.A.E., licensed "advocates" may appear before the courts of the U.A.E., while legal consultants are not extended this privilege. The distinction is similar to the distinction between "solicitors" and "barristers" under the legal system in England.

The above rules would not necessarily include in-house counsel who is considered to be providing their services on an employment basis. All employment relationships are governed by Law No. 8 of 1980 (the "Labor Law"), which is devoid of any provisions relating to privileges. The implication of Article 120 of the Labor Law is that an employee does have a duty to not reveal the secrets of his employer, but this does not amount to a privilege.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Also, the Advocacy Law, of course, does not apply necessarily to legal consultants or other members of the profession who are not admitted to appear before the courts. Most such persons are foreign attorneys, and they would accordingly be subject to the professional obligations of their home countries. Of course, it is not clear whether many of these legal consultants actually keep their home bar membership active. The labor permit that categorizes one as a "legal consultant" is based on the legal consultant's law diploma, not a certificate of admission, so there are potentially many legal consultants here in the U.A.E. who are beyond the scope of the Advocacy Law as well as the professional rules of their putative "home" jurisdictions.

Uruguay
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.

Venezuela
Hoet Pelaez Castillo & Duque

Under Venezuelan Law the attorney/client privilege covers all communication between an attorney and his client, including the matters the attorney deals with the other party and all conversations to reach to an agreement. The duty to keep the professional secret remains fully in force even after the attorney is no longer assisting the client. The attorney may refuse to testify on matters he has knowledge because of his profession and is released by the Code of Criminal Procedures from the obligation to give notice to the authorities of the knowledge he may have through the explanations of his clients that a crime has been committed.

The legal basis for the attorney client privilege in our legislation is rather a duty and is found in the Code of Professional Ethics approved by the Federation of Bar Associations, which establishes the obligation for the attorney to keep secret of all the matters submitted to him by his clients. The Bar Association may sanction attorneys when they reveal matters that may be considered as professional secret. The Code of Criminal Procedures, the Code of Civil Procedures and other legislation recognize the right and duty of the attorney to keep his professional secret.

The law does not make distinction between in-house counsel and other attorneys, so we believe all attorneys will be covered by the privilege. Nonetheless, with respect to tax matters, the Organic Tax Code expressly excludes from the attorney/client privilege those attorneys who work as employees of the taxpayer.

Vietnam
Tilleke & Gibbins Consultants Ltd.

The common law principal of attorney-client privilege is not known or granted by custom, law, rule or regulation in Vietnam. Generally, the Constitution of Vietnam assures the availability of communication privilege of Vietnamese citizens: "Confidentiality and safety of mails, telephones and communication of citizen is ensured. The opening, control, confiscation of mails and communication of citizen will only be made by authorized persons in accordance with stipulations of laws." Note that authorized persons may obtain access to otherwise confidential communication including telephone conversation.

With respect to in-house counsel, in Vietnam a lawyer may practice law only as a member of a law firm or a law office. A lawyer may not practice law as an employee of a commercial firm. Thus there can be no in-house counsel, as the term is generally known.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Ordinance On Lawyers of 2001 prohibits a lawyer from disclosing any client information whether or not the client communicated that information to him/her. However there is no provision protecting this information from the demands of government or judicial authorities.

A lawyer, who is defending a person on criminal charges or accused under the Criminal Law, may rely on the provisions of the Criminal Procedures Law which specifically prohibit lawyers or defenders from disclosing any confidential information that the lawyers or defenders know or obtain while carrying their defending duties. However, there is no law or rule that specifically allows the lawyer to refuse to divulge information demanded by the court or government entity.

There is no law, rule or regulation that would allow a client to refuse to divulge information to a court just because the client had divulged that information to his lawyer.

United States of America

The prevailing American rule as to the treatment of communications between in-house counsel and corporate employees is as follows:

> *Conversations between a corporation's employees and in-house counsel are protected by the privilege. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which in-house counsel is a participant , as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice. Epstein, The Attorney-Client Privilege and the Work Doctrine (4th ed.), Section of Litigation, American Bar Association.*

In *Upjohn Company v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981), the United States Supreme Court decided that the attorney/client privilege protects communications between a corporation's employees and the corporation's lawyers provided certain criteria are satisfied:

- Corporate employees must have made the communication to corporate counsel acting as such, for the purpose of providing legal advice to the corporation.
- The substance of the communication must involve matters that fall within the scope of the corporate employee's official duties.
- The employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation.
- The communications also must be confidential when made and must be kept confidential by the company[46].

If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys[47].

Two tests have developed in the federal courts to determine if a corporate employee's communications with the corporation's legal counsel are privileged. (*Diversified Industries Inc. v.*

---

[46] *Upjohn*, 449 U.S. at 394.

[47] See also, In re International Systems & Controls Corp. Securities Litigation, 91 F.R.D. 552, 556 (S.D.Tex. 1981); U.S. v. Mobil Corp., 149 F.R.D. 533, 537 (N.D.Tex. 1993)

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Meredith, 572 F.2d 596, 608-609 (8th Cir. 1977).) The first test focuses upon the employee's position and his ability to take action upon advice of the attorney on behalf of the corporation. (*City of Philadelphia v. Westinghouse Electric Corp*., 210 F.Supp. 438 (E.D. Pa. 1962).) The second test focuses upon why an attorney was consulted, rather than with whom the attorney communicated[48].

Because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course, conversations in which an in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice. However, "client communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for legal advice based thereon'[49]." Thus, "if an in-house counsel has other non-legal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversation." *Id.*

The attorney/client privilege, although recognized, is recognized to a very limited extent since it interferes with "the truth-seeking mission of the legal process," and conflicts with the predominant principle of utilizing all rational means for ascertaining truth[50]. As such, it "is in derogation of the public's right to every man's evidence," and therefore, is not favored by federal courts and must be strictly confined within the narrowest possible limits consistent with the logic of its principle[51]. Keeping in mind its very strict construction and narrow application, the party asserting the application of the attorney/client privilege to information, which it seeks to conceal, bears the burden of proving each and every element essential to its application[52].

> The elements essential to the application of the attorney/client privilege are:
> (1) The asserted holder of the privileges is or sought to become a client; (2) the communication is made to an attorney or his subordinate, in his professional capacity; (3) the communication is made outside the presence of strangers; (4) for the purpose of obtaining an opinion on the law or legal services; and (5) the privilege is not waived.[53]

While trying to meet the essential elements of the attorney/client privilege, several problems can be encountered. First of all, a corporation cannot prevent a document or communication from disclosure if that document was prepared in the ordinary course of business, even if an attorney prepared it[54]. Further, attorney/client privilege only protects confidential communications by an employee to an attorney when it includes and/or seeks legal advice and opinions. This privilege is

---

[48] Harper and Row Publishers, Inc. v. Decjer, 423 F2d 487 (7TH Cir. 1970).
[49] *Id.* at 14 citing *Simon v. G.D. Searle & Co*., 816 F.2d 397, 404 (8th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987), quoting from *Jack Winter, Inc. v. Koratron Co*., 54 F.R.D. 44, 46 (N.D. Cal., 1971).
[50] *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *Hawkins v. Stables*, 148, F.3d 379 (4th Cir. 1998); *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986), *cert. den.,* 480 U.S. 938, 107 S.Ct. 1585, 94 L. Ed.2d 775 (1987); *U.S. v. Aramony*, 88 F.3d 1369 (4th Cir. 1996).
[51] *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984).
[52] Hodges, Grant & Kaufmann v. U.S., 768 F.2d 719 (5th Cir. 1985); Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385 (M.D. La. 1992).
[53] *In re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975); *New Orleans Saints v. Griesedieck*, 612 F.Supp. 59, 62 (E.D. La. 1985), *aff'd*, 790 F.2d 1249 (5th Cir. 1986).
[54] *In re Hutchins*, 211 B.R. 330 (Bkrtcy. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrtcy. E.D.Ark. 1997).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

not applied to factual information that is discovered and reported by an attorney[55]. Thus, a document created by corporate counsel and sent to an employee, who does not relay any legal advice but merely discusses factual information is potentially not subject to the attorney/client privilege[56]. Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character[57].

Specific on the State/Territories levels:

Arizona
Snell & Wilmer LLP

Arizona expressly recognizes corporations as clients for purposes of attorney-client privilege protection.[58] 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.[59] Arizona uses a functional approach to determine whether communications are protected between in-house counsel and other corporate employees.[60] This approach focuses on the nature of the communication rather than the status of the communicator.[61] 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.[62]

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, that conduct is within the scope of employment and the inquiry is made to investigate the legal consequences of the employee's conduct for the corporation.[63] If the employee's conduct cannot be imputed to the corporation, 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.[64]

Arkansas
Rose Law Firm, a Professional Association

Rule 502 of the Arkansas Rules of Evidence governs Arkansas law on the attorney-client privilege.[65] Under the rule, a client is defined to include a "corporation, association, or other organization or entity, either public or private."[66]

A corporate attorney will often have to obtain information about the actions and observations that occur within the scope of an employee's corporate duties. Acquiring such information by an attorney is a "necessary part of the corporate attorney's process of advising and protecting the

---

[55] *American Standard, Inc. v. Bendix Corp*., 80 F.R.D. 706 (D.C. Mo. 1978).
[56] *U.S. v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990).
[57] *Cuno, Inc. v. Pall Corp*., 121 F.R.D. 198 (E.D.N.Y 1998); *Union Carbide Corp. v. Dow Chemical Co*., 619 F. Supp. 1036, 1047 (D.Del. 1985).
[58] A.R.S. 12-2234(B).
[59] Id.
[60] Samaraitan Foundation v. Goodfarb, 176 Ariz. 497, 499, 862 P.2d 870, 872 (1993).
[61] Id.
[62] Id.
[63] Id. at 500.
[64] Id. at 504.
[65] ARK. R. EVID. 502.
[66] ARK. R. EVID. 502(a)(1)

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

corporate-employer client and is within the privilege."[67] Thus, statements made by clients, i.e., officers, directors or employees of a corporation, that are made "at the request of and to inform . . . their corporate employer's attorney for the purpose of facilitating her rendition of legal advice" are protected under the attorney-client privilege.[68]

Purely business or transactional advice given by in-house counsel is not protected. Because legal and business considerations may be frequently intertwined, a privilege argument should not be lost if the confidential communication is made for the purpose of facilitating to the client the rendering of professional legal services.

Colorado
Gorsuch Kirgis LLP

In Colorado, the common law attorney-client privilege is codified by Colo. Rev. Stat. § 13-90-107(b) which states, in relevant part, "[a]n attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment..." In Colorado, a corporation may use the protections granted by the attorney-client privilege, and this privilege extends to a corporation's in-house counsel as well as a corporation's outside counsel.[69] However, the Colorado courts have not established a definitive minimum set of factors that will determine if the communications of a corporation's attorney and a corporation's employees are covered by the attorney-client privilege.

Colorado follows Upjohn Co. v. U.S., 449 U.S. 383, 394-95 (1981), and will extend the attorney-client privilege further than a corporation's "control group" to the employees who do not have ultimate decision-making authority.[70] If the four factors outlined by the Court in Upjohn are present in the communications between a corporation's counsel and a corporation's employees, the communications are covered by the attorney-client privilege.[71] The Upjohn factors outlined by the Colorado Supreme Court are as follows: 1) whether the corporate employees, following the directions of supervisors, provided the information to counsel acting as counsel for the corporation; 2) whether the communication's purpose was to enable counsel to provide legal advice to the corporation; 3) whether the employees were cognizant that counsel's questions were for the purpose of securing legal advice for the corporation; and 4) whether the employees were told of the highly confidential nature of the communications.[72] Neither the state nor federal courts of Colorado have directly discussed whether some or all of these factors need to be present for the communication to qualify for the attorney-client privilege.

Colorado case law supports the conclusion that all four of the Upjohn factors need not be present for the attorney-client privilege to exist. The District Court of Colorado has held that the privilege exists when corporate employees communicate to corporate counsel concerning matters within that employee's scope of employment.[73] Additionally, this privilege in not lost when a corporate agent conveys the advice given by corporate counsel to those individuals responsible for acting

---

[67] *Courteau v. St. Paul Fire & Marine Ins. Co.*, 307 Ark. 513, 516; 821 S.W.2d 45, 47 (1991) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981))
[68] *Courteau*, 307 Ark. at 518, 821 S.W.2d at 48.
[69] Shriver v. Baskin-Robbins Ice Cream Company, Inc., 145 F.R.D. 112, 114 (D. Colo. 1992); *In re* Grand Jury 758 F. Supp. 1411-12 (D. Colorado. 1991) applying attorney/client privilege to communications made between president of corporation and outside counsel).
[70] National Farmers Union Property and Casualty Co. v. District Court for the City and County of Denver, 718 P.2d 1044, 1049 (Colo. 1986)(citing Upjohn).
[71] Id.
[72] Id.
[73] Shriver, 145 F.R.D. at 114

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

on the issue at hand.[74] The Colorado courts have also recognized that the attorney-client privilege serves an attorney's need to collect the necessary information to form competent legal opinions.[75] Therefore, it has been held that if an employee makes a communication to convey information needed by corporate counsel to render legal advice, such communication is covered by the attorney client privilege.[76]

The usual limitations accompanying the general attorney-client privilege apply to communications between a corporation and its corporate counsel. To benefit from the attorney-client privilege, the individual claiming the benefit must show the following five elements: 1) that the holder of the privilege is or was seeking to become a client; 2) the person receiving the communication is an attorney or the attorney's subordinate; 3) the communication is made in connection with the individual's role as an attorney; 4) the communication was made not in the presence of strangers for the purpose of securing legal advice or services and not to commit a crime or a tort; and 5) the privilege has not been waived by the privilege holder.[77] Therefore, the Colorado courts extend the attorney-client privilege only when the communication between a corporate attorney and a corporate employee occurred as a result of the corporation seeking professional advice from an attorney acting as a legal advisor at that present time.[78]

Connecticut
Murtha Cullina LLP

While the Connecticut Supreme Court has not squarely confronted the issue, the broad sense of Connecticut law is supportive of the application of the attorney-client privilege to protect communications between employees of a corporation and the corporation's in-house counsel.[79]

To be protected by the attorney-client privilege, communications with in-house counsel must be made in confidence and for the purpose of obtaining legal, and not business, advice.[80] Technical and business information communicated to in-house counsel may also be protected, but only if those communications are for the purpose of seeking legal advice.[81] In addition, a Connecticut Superior Court recently applied the work product doctrine to protect from discovery documents prepared by in-house counsel in anticipation of litigation.[82]

---

74 Id.
75 *In re* M & L Business Machine Co., 161 B.R. 689, 692-93 (D. Colo. 1993).
76 Id.
77 *In re* Grand Jury, 758 F.Supp. 1411, 1413 (D. Colo. 1991)
78 See Kay Laboratories, Inc. v. District Court, 653 P.2d 721, 723 (Colo. 1982)
79 See Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 249 Conn. 36, 42 n. 5 (1999)(reversing trial court's order to disclose numerous documents, including those authored or received by a corporation's in-house legal department); PAS Assoc. v. Twin Lab., Inc., No. CV 990174428S, 2001 Conn. Super. LEXIS 3392, at *9 (Conn. Super. Ct. Dec. 5, 2001)(Mintz, J.)(protecting communications with in-house counsel for the purpose of obtaining legal advice on either corporate or litigation matters); Morganti Nat'l, Inc. v. The Greenwich Hosp. Assoc., No. X06CV0016454S, 2001 Conn. Super. LEXIS 1751, at *1 (Conn. Super. Ct. June 27, 2001)(McWeeny, J.).

80 Morganti National, 2001 Conn. Super. LEXIS 1751, at * legal3 (noting that memoranda and notes authored and received by in-house counsel were "fairly characterized as predominantly."); See also Metropolitan Life Ins., 249 Conn. at 52; Shew v. FOIC, 245 Conn. 149, 157 (1998).
81 See Olson v. Accessory Controls & Equip. Corp., 254 Conn. 145, 159-168 (2000) (protecting communications between outside counsel (not in-house counsel) and an environmental consultant on technical matters because those communications were made for the purpose of defending an environmental claim).
82 See PAS Assoc., 2001 Conn. Super. LEXIS 3392, at *15-20; See also Connecticut Practice Book § 13-3.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Delaware
Richards, Layton & Finger, P.A.

The attorney-client privilege as applied under Delaware law protects the confidentiality of communications made between lawyer and client for the purpose of facilitating the rendition of professional legal advice. These communications are protected regardless of whether the lawyer involved is in-house or outside counsel.

The purpose of the attorney-client privilege is to promote full and frank discussion between clients and their attorneys. 8 Wigmore on Evidence, 2290-2292 (McNaughton ed.). The privilege was recognized at common law in Delaware and is formally codified as Rule 502 of the Delaware Uniform Rules of Evidence. Rule 502 provides:

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client….
>
> (c) Who may claim the privilege? The privilege may be claimed by the client…trustee or similar representative of a corporation, association or other organization, whether or not in existence.

The attorney client privilege finds full application where a corporation is the client seeking professional advice. Zirn v. VLI Corp., Del Supr. 621 A.2d773, 781 (1993) (citing Upjohn Co v. United States, 449 U.S. 383 (1981)). Whether the advice was rendered by outside counsel or in-house counsel is in apposite. Grimes v. LCC International, Inc., Del. Ch., C.A. No. 16957, 1999 WL 252381, Jacobs, V.C. (Apr. 23, 1999); see also Texaco v. Phoenix Steel Corp., Del. Ch., 264 A.2d 523, 525-26 (1970) (assuming without deciding that the attorney-client privilege extends to advice rendered by in-house counsel) (citing American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D.Del. 1962)). The corporation can assert the privilege through its agents, i.e., its officers and directors, who must exercise the privilege in a manner consistent with their fiduciary duties to the corporation and its stockholders. Zirn, 621 A.2d at 781 (citing Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985)).

The attorney-client privilege does not extend to business advice, even if rendered by an attorney. Lee v. Engle, Del. Ch., C.A. Nos. 13323, 13284, 1995 WL 761222, at *2, Steele, V.C. (Sept. 13, 1979). Similarly, a party cannot claim attorney-client privilege to insulate specific documents from discovery merely by asserting that the documents were reviewed by a director who is also an attorney. The director/attorney's review must be shown to have been in his capacity as a lawyer and for the purpose of rendering legal services on behalf of the corporation, rather than in his directorial capacity. See Lee, 1995 WL 761222, at *3.

This limitation on confidentiality can have significant practical consequences where corporations choose to allow their in-house counsel to serve in capacities beyond those related specifically to the legal function. In many instances it may be unclear whether communications with in-house counsel who also serves business-related purpose. Where such ambiguity exists the court may conclude that any doubt should be resolved against application of the privilege, since those asserting the privilege created the ambiguity by placing counsel in multiple roles, and thus should not be permitted to benefit from the ambiguity created.

Other exceptions to application of the attorney-client privilege in the corporate context exist (e.g. one faction of board cannot claim privilege vis-à-vis another faction of board in respect of

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

lawyer-client communications in which the corporation is the client; attorney-client privilege may, in limited cases where particularized good cause is shown, be pierced to allow discovery by a derivative plaintiff of otherwise privileged advice to the corporation). These exceptions are not, however, particular to the in-house/outside counsel distinction and are not further discussed here.

Florida
Steel Hector & Davis LLP

Florida law recognizes the availability of the attorney-client privilege in communications between in-house legal counsel and its employees. In Florida, lawyer-client privilege is regulated by Florida Statutes § 90.502. This regulation states that the "communication between lawyer and client is confidential if it is not intended to be disclosed." A client is defined as any "corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." A lawyer, on the other hand, is "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation."

Florida regulations clearly extend the lawyer-client privilege to in-house counsel:

> *Confidential communications between lawyers and clients are privileged from compelled disclosure to third persons. See section 90.502(2), Florida Statutes (1993). This privilege covers communications on legal matters between corporate counsel and corporate employees.*[83]

Furthermore, the lawyer-client privilege covers any oral statement made by witnesses in an interview, and involves a lawyer's impressions, conclusions, opinions or theories of his or her client's case.[84]

The attorney-client privilege for in-house counsel is based on the following: (i) a communication between attorney and client; (ii) the purpose of the communication is to obtain legal services; and (iii) this communication is intended to be confidential. When applying the lawyer-client privilege, therefore, Florida law makes no distinction between in-house counsel and other attorneys.

The difficulties affecting the applicability of the client-attorney privilege to in-house counsel arises when it is difficult to ascertain in what role the in-house counsel is acting. The in-house counsel may be acting under his or her legal capacity or his or her business capacity. This distinction is essential for understanding when the privilege may be claimed. In order to clarify this issue, the Florida Supreme Court in Sourthern Bell Tel. & Tel., Co. v. Deason has stated the following:

> *The attorney-client privilege applies to confidential communications made in the rendition of legal services to the client.*[85]

---

[83] Shell Oil Company v. Par Four Partnership, 638 So.2d 1050, 1050 (Fla. 5th DCA 1994).
[84] Faith O. Horning-Keating v. State of Florida, 777 So.2d 438 (Fla. 5th DCA 2001).
[85] Sourthern Bell Tel. & Tel., Co. v. Deason, 632 So.2d 1377, 1380 (Fla. 1994).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

The Court, furthermore, is interested in preventing corporations from using in-house counsels as shields to thwart discovery. In order to avoid this threat, the Supreme Court of Florida stated:

> *Thus, to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny"*[86]

The criteria used to determine whether corporate communications are indeed protected by the attorney-client privilege are:

> *1) the communication would not have been made but for the contemplation of legal services;*
> *(2) the employee making the communication did so at the direction of his or her corporate superior;*
> *(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;*
> *(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;*
> *(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents"*[87]

The client-attorney privilege, therefore, is only applicable when the in-house counsel is acting exclusively under his or her legal capacity and the communication meets certain requirements.

Georgia
Alston & Bird LLP

The attorney-client privilege is available in Georgia (and in the U.S. generally) to protect from disclosure communications between in-house counsel and officers, directors or employees of the companies they serve, so long as the communications constituted the seeking or giving of legal advice. Often, disputes arise as to whether such statements constitute the seeking or giving of legal advice or were simply statements made, for example, by in-house counsel in their additional capacity of businessperson.

In addition to the attorney-client privilege, the work product doctrine may protect the work product of in-house counsel, including memoranda made in anticipation of litigation, where the other party cannot show a particularized need for the information.

Guam
Klemm, Blair, Sterling & Johnson, P.C.

Guam law with respect to availability and scope of the attorney-client privilege with respect to communications with in-house counsel is undeveloped. There is no controlling precedent dealing with the matter yet handed down by the Guam Supreme Court.

[86] Id, 1383.
[87] Id, 1383.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

The Guam Rules of Evidence recognize “the attorney-client privilege.” 6 G.C.A. Section 503(c) provides:

> Section 503. Particular Privileges. Except as otherwise required by the Organic Act of Guam [48 U.S.C. 1421 et seq.] or provided by Act of the Guam Legislature, the privileges of a witness, person, government, State or political subdivision thereof shall include: . . . (c) the attorney-client privilege

No definitions are provided, but it may be assumed that a corporation or other business entity would be considered a “person” under the statute. Guam has adopted the American Bar Association’s Model Rules of Professional Conduct to govern the conduct of attorneys admitted to practice law in Guam. Model Rules 1.13 and 1.6, dealing with the Organization as Client and Confidentiality of Information, provide some guidance as to the ethical responsibilities of attorneys, and it is presumed the Guam Supreme Court would recognize those responsibilities in dealing with the attorney-client privilege in matters involving in-house counsel.

In general, Guam follows applicable U.S. federal precedent when interpreting the Guam Rules of Evidence, which where patterned after the Federal Rules of Evidence. Because, however, FRE 503, dealing with the attorney-client privilege, was rejected by the U.S. Congress, there is no applicable precedent. Guam has also historically followed California precedent in matters involving statutes borrowed from California, but there are no Guam equivalents to Cal. Evid. C. Section 950 et seq. Thus, there is no clear body of case authority to which one can confidently turn for guidance in the area.

It is believed the Guam Supreme Court would likely follow the general principles that have developed under California case-law precedent in matters related to the attorney-client privilege in cases involving in-house counsel. Pending development of Guam law on the issues related to the privilege, however, clients would be best advised to take a conservative view on the scope of the protections afforded by it in Guam.

Hawaii
Case Bigelow & Lombardi

Rule 503 of the Hawaii Rules of Evidence provides for the attorney-client privilege under Hawaii law. There is no Hawaii case law addressing the availability and scope of the attorney-client privilege with respect to communications between in-house counsel and officers, directors and employees of the company they serve. In general, the Hawaii Supreme Court will likely follow California case law on the subject. However, due to the lack of reported Hawaii case law on the subject, it would be wise to take a conservative approach to communications between in-house counsel and company officers, directors and employees.

Idaho
Hawley Troxell Ennis & Hawley

Pursuant to Rule 502 of the Idaho Rules of Evidence (“I.R.E.”), a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer, or a representative of a lawyer representing another concerning a matter of common interest, (4) between representatives of the client or between the

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[88]

The communication must be confidential within the meaning of the rule. The communication must be made between persons described in the rule for the purpose of facilitating the rendition of professional legal services to the client.[89]

A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him or her.[90] A "representative of the client" is one having authority to obtain professional legal services, or an employee of the client who is authorized to communicate information obtained in the course of employment to the attorney of the client.[91] A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.[92]

The rule extends the privilege only to confidential communications. It does not apply to articles of evidence and does not permit a client to immunize evidence by delivering it to a lawyer.[93] The privilege belongs to the client, whether or not the client is a party to the proceeding in which the privileged communication is sought. It survives the death of an individual and the dissolution of a corporation.[94] The person claiming the privilege must first show the relation that existed between the attorney and the client at the time of the communication, the circumstances under which the attorney came into possession of the communication or information, and that the same was obtained by the attorney while acting as attorney for the client and in furtherance of the professional engagement.[95] *The exceptions to the rule are: crime or fraud, claims through same deceased client, breach of duty by lawyer or client, attested document,* and common interest or defense of joint clients. If the services of the lawyer were 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.[96] A communication relevant to an issue between parties who claim through the same deceased client, regardless whether the claims are by testate or intestate succession or by inter vivos transaction.[97] There is no privilege under the rule as to a communication relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer.[98] There is no privilege under the rule as to a communication relevant to an issue concerning an attested document in which the lawyer is an attesting witness.[99] There is no privilege under the rule as to a communication relevant to the matter of common interest between or among 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 or among any of the clients.[100]

Unfortunately, we do not have the benefit of any Idaho case law interpreting Rule 502 in relation to in-house counsel and the scope of the attorney-client privilege. Without any cases on point in

---

[88] Rule 502(b), I.R.E.
[89] State v. Allen, 123 Idaho 880, 853 P.2d 625 (Ct. App. 1993), overruled on other grounds, State v. Priest, 128 Idaho 6, 909 P.2d 624 (Ct. App. 1995), rev. den. (1996).
[90] Rule 502(a)(1), I.R.E.
[91] Rule 502(a)(2), I.R.E.
[92] Rule 502(a)(3), I.R.E.
[93] See Comment to Rule 502(b), I.R.E.
[94] Rule 502(c), I.R.E.
[95] See Comment to Rule 502(c), I.R.E.
[96] Rule 502(d)(1), I.R.E.
[97] Rule 502(d)(2), I.R.E.
[98] Rule 502(d)(3), I.R.E.
[99] Rule 502(d)(4), I.R.E.
[100] Rule 502(d)(5), I.R.E.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Idaho or in other federal jurisdictions applying Idaho law, one can only speculate as to the scrutiny with which Idaho courts may review the attorney-client privilege in relation to in-house counsel. Nevertheless, there is guidance within Rule 502, as well as authorities from other jurisdictions.

The United States Supreme Court has held that the attorney-client privilege applies to communications with attorneys, regardless of whether the attorney is outside counsel or corporate staff counsel.[101] Despite this holding, commentators agree that the attorney-client privilege is muddied when examining the role of in-house counsel. "Defining the scope of the privilege for in-house counsel is complicated by the fact that these attorneys frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers. In-house counsel have increased participation in the day-to-day operations of large corporations."[102]

Moreover, it is commonly accepted that "[t] he attorney-client privilege attaches only when the attorney acts in that capacity."[103] It does not apply when in-house counsel is engaged in "nonlegal work."[104] Such "nonlegal work" would include the rendering of business or technical advice unrelated to any legal issues.[105] However, "[c]lient communications intended to keep the attorney apprised of business matters may be privileged if they embody 'an implied request for legal advice based thereon.'"[106] Thus, "if an in-house counsel has other nonlegal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversations."[107]

Courts have held that when in-house counsel acts as a business advisor or addresses business issues, then the attorney-client privilege is not invoked.[108] ("The attorney-client privilege is triggered only by a client's request for legal, as contrasted with business advice, and is 'limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel rendering it.' When the ultimate corporation decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.").[109] Furthermore, the mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure.[110] For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services.[111]

With this precedent in mind, the following observations are made with regard to Idaho law. In-house counsel does fit within the definition of "lawyer" pursuant to Rule 502(a)(3), I.R.E., as "a

---

[101] Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).
[102] U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D. N.Y. 1994).
[103] Borase v. M/A Com, Inc., 171 F.R.D. 10, 13 (D.Mass. 1997) citing Texaco Puerto Rico v. Dept. of Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995).
[104] Id. citing Burlington Indus. v. Exxon Corporation, 65 F.R.D. 26, 33 (D. Md. 1974); Oil Chemical and Atomic Workers International Union v. American Home Products, 790 F. Supp. 39, 41 (D.P.R. 1992).
[105] Id. at 13-14 citing Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 510-511 (D.N.H. 1996).
[106] Id. at 14 citing Simon v. G.D. Searle & Co., 816 F.2d 397, 404 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987), quoting from Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal., 1971).
[107] Id.
[108] Hardy v. New York News, Inc., 114 F.R.D. 633, 643-644 (S.D.N.Y. 1987).
[109] U.S. v. International Business Machines Corp., 66 F.R.D. 206 (S.D.N.Y. 1974). U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156 (E.D. N.Y. 1994).
[110] Neuder v. Battelle Pacific Northwest Natl. Lab, 194 F.R.D. 289, 292 (D.D.C. 2000) citing Great Plains Mutual Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 197 (D. Kan. 1993).
[111] Id. at 292.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation." Thus, the only concern here is that in-house counsel be a member in good standing of a bar of any state or nation.

The greater concern in the in-house counsel situation is with regard to who the client is. The attorney-client relationship exists between house counsel and the business entity with which he or she is employed. It does not extend to communications with employees, officers or directors as individuals in their individual capacities.[112]

The greatest threat to the preservation of the privilege is technology and the ease with which otherwise privileged information may be disseminated beyond the eyes of the client or the client's representatives through e-mail, facsimile or other mass-distribution and electronic means. With relative ease, but diligence, the business entity may limit dissemination only to those parties who have need for such information or advice. Of utmost importance in preserving the attorney-client privilege is to properly ensure and communicate to all persons receiving the information that the communication is privileged and confidential. This is best accomplished through a notation at the top of the document, whether preserved and distributed in hard copy or by electronic means. Moreover, when advice is sought of house counsel, it must be clearly communicated that the advice sought is legal, not business. Normally, such information is sought and the response conveyed in written form. The memorandum may briefly confirm that legal advice was sought and include the notation that the document is an "Attorney-Client Privileged and Confidential Communication."

Furthermore, when house counsel also serves in the capacity of officer or business advisor for the entity, legal and business advice should be given separately, and the capacity with which the advice is given be documented as discussed above.

Illinois
Sonnenschein Nath & Rosenthal

Illinois courts apply the control group test to determine if the attorney client privilege applies to communications between an in-house counsel and officers, directors or employees of the companies they serve.[113] Under Illinois Law, the attorney-client privilege protects an employee's communications with an in house counsel under the umbrella of the "control group" when (1) the employee is in an advisory role to top management such that the top management would normally not make a decision in the employee's particular area of expertise without the employee's advice or opinion; and (2) that opinion does in fact form the basis of the final decision by those with actual authority.[114] Other requirements include a showing that the communications originated in a confidence that it would not be disclosed; was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential. The burden of showing these facts is on the party claiming the exemption.[115]

By adopting the control group test, the Illinois courts try to strike a balance between the need to deter extensive insulation of vast amounts of materials from the discovery process by limiting the

---

[112] "When a corporate employee or agent communicates with corporate counsel to secure or evaluate legal advice for the corporation, that agent or employee is, by definition, acting on behalf of the corporation and not in an individual capacity. These kinds of communications are at the heart of the attorney-client relationship." Samaritan Found. v. Goodfarb, 862 P.2d 870, 876 (Arizona 1993).
[113] Consolidated Coal v. Bucyrus-Erie Co., 89 Ill. 2d 103; 432 N.E.2d 250 (Ill. 1982); Day v. Illinois Power Co., 50 Ill. App. 2d 52; 199 N>E>2d 802 (Ill. App. Ct. 1964).
[114] Consolidated Coal Co., 89 Ill. 2d at 119-20; 432 N.E.2d at 257-58.
[115] Id. At 119l 432 N.E.2d at 257.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

privilege for the corporate client to the extent reasonably necessary and the basic purpose of the privilege.[116] Under the test, an Illinois appellate court has refused to find senior product engineer to be within the control group.[117] The focus of the court for finding the privilege is "on individual people who substantially influenced decisions, not on facts that substantially influenced decisions."[118] Under some circumstances, an in-house counsel's oral statements may be protected by the work product doctrine in Illinois even though the employees might not be within the control group.[119]

Indiana
Baker & Daniels

We have examined Indiana cases, Indiana ethics opinions, and all other materials available to us on this subject, and we have found no discussion of this issue in any Indiana authority. We therefore assume that this is a matter of common law development and that Indiana courts would at least consider the possibility of entertaining the various limitations on the privilege that some jurisdictions have placed on the relationship between in-house counsel and their officers and directors.

Kansas
Foulston Siefkin LLP

Kansas law recognizes the attorney-client privilege.[120] The general rule, set forth in K.S.A. 60-426, is summarized as follows:

> (1) Where legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) communications made in the course of that relationship (4) made in confidence (5) by the client (6) are permanently protected (7) from disclosures by the client, the legal advisor, or any other witnesses (8) unless the privilege is waived. *Maxwell*, 10 Kan. App. 2d at 63.

Kansas state courts have not addressed whether the privilege applies to communications between in-house counsel and the directors, officers, or employees of the company the in-house counsel serves. The federal district courts in Kansas, however, have applied the privilege to protect such communications.[121]

In *Boyer*, the federal district court held that the application of the attorney-privilege in the corporate context "involves not only consideration of the position of the employee with whom the communication is had, but also the context of the communication."[122] "[T]he focus of the inquiry clearly must be whether the communications were made at the request of management in order to

---

[116] Consolidated Coal Co., 89 Ill. 2d at 118-19l 432 N.E.2d at 257.
[117] Archer Daniels Midland Co. v. Koppers Co., Inc., 138 Ill. App. 3d 276; 485 N.E.2d 1301 (Ill. App. Ct. 1985).
[118] Id., 138 Ill. App. 3d at 280; 485 N.E.2d at 1304 (relying on Consolidated Coal Co.)
[119] See, e.g., Consolidated Coal Col, 89 Ill.2d at 108-10; 432 N.E.2d at 252-53.
[120] See K.S.A. 60-426. See also, Cypress Media, Inc. v. City of Overland Park, 268 Kan. 407, 418, 997 P.2d 681, 689 (2000); State of Kansas v. Maxwell, 10 Kan. App. 2d 62, 63, 691 P.2d 1316, 1319 (1984).
[121] See Burton v. R.J. Reynolds Tobacco Co., Inc., 170 F. R. D. 481, 484 (D. Kan. 1997) (citing Upjohn Co. v. United States, 449 U. S. 383, 390, 101 S. Ct. 677, 683, 66 L. Ed.2d 584 (1981)); Boyer v. Board of County Comm'rs, 162 F. R. D. 687, 689-90 (D. Kan. 1995).
[122] Boyer, 162 F. R. D. at 689-90.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

allow the corporation to secure legal advice."[123] The court indicated that, under this test, even communications between in-house counsel and lower-level employees may be protected.[124]

It is likely that the Kansas state courts would follow the federal courts and apply the privilege to protect communications between in-house counsel and company directors, officers, and employees when appropriate. Whether it is appropriate to apply the privilege to protect a communication between in-house counsel and a director, officer, or employee will depend upon the facts of each case.

Kentucky
Wyatt, Tarrant & Combs, LLP

Attorney-client privilege in Kentucky is governed by Rule 503 of the Kentucky Rules of Evidence ("KRE"). This general rule states that [a] client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client: (1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (2) Between the lawyer and a representative of the lawyer; (3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein; (4) Between representatives of the client or between the client and a representative of the client; or (5) Among lawyers and their representatives representing the same client.[125]

KRE 503 does not distinguish between outside and in-house counsel. Moreover, corporations, associations and other organizations are included in the definition of "client." Thus, there is no reason in the rule why in-house and outside counsel should be treated differently in situations involving the attorney-client privilege.

While there are no Kentucky cases directly addressing attorney-client privilege in the context of in-house counsel, in one case the Kentucky Court of Appeals briefly touched on the issue.[126] In *Morton*, decedent's surviving spouse sued the defendant life insurance company claiming improper removal of decedent from the certificate of group credit life insurance.[127] As part of the lawsuit, the plaintiff moved to depose the defendant company's current in-house counsel and its former assistant in-house counsel.[128] The court reversed the trial court's denial of the motion, stating that the attorney-client privilege claimed by the defendant was inapplicable where advice was sought in contemplation of committing a crime or fraud.[129] The court cited as authority *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*,[130] a case that dealt in part with the attorney-client privilege in the context of communications with outside counsel.[131] Given that the court in *Morton* did not distinguish between in-house and outside counsel, it is likely that Kentucky courts will apply the attorney-client privilege rules in situations involving in-house counsel the same way as they will in situations involving outside counsel. This is true especially in light of the

---

[123] Id. at 689.
[124] Id. at 690.
[125] KRE 503(b).
[126] See Morton v. Bank of the Bluegrass and Trust Co., 18 S.W.2d 353, 360-61 (Ky. Ct. App. 2000).
[127] See id. at 355-56.
[128] See id. at 360.
[129] See id.
[130] 807 S.W.2d 476 (Ky. 1991).
[131] See Morton, 18 S.W.3d at 360.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

U.S. Supreme Court's decision in *Upjohn Co. v. United States*,[132] the leading federal case on attorney-client privilege in the corporate context, and state court decisions along the same lines.[133] One must bear in mind that as the law of attorney-client privilege relating to in-house counsel develops in Kentucky it is also possible for Kentucky courts to take a somewhat different position. In order to avoid the use of in-house counsel to shield otherwise discoverable information by asserting the attorney-client privilege, Kentucky courts may, as some other courts have done,[134] require the company asserting the privilege to prove that the communication was for the purpose of obtaining legal advice, or require the company to overcome a presumption that the communication to the in-house counsel was not for some other, non-legal purpose.

Finally, regardless of whether Kentucky courts take the stricter position discussed above, there is no indication that that the rules relating to the exceptions to the privilege will change, i.e. even in the in-house counsel context the privilege will not be allowed in the following cases: (1) Furtherance of crime or fraud. If the services of the lawyer were 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; (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos; (3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer; (4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and (5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) 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 or among any of the clients.[135]

Louisiana
Lemle & Kelleher, LLP

In *Up John Company v. United States*, 101 S.Ct. 677, 449 U.S. 383, 66 L.Ed. 584 (1981), the United States Supreme Court decided that the attorney/client privilege protects communications between a corporation's employees and the corporation's lawyers provided certain criteria are satisfied. The communication must have been made by corporate employees to corporate counsel acting as such, for the purpose of providing legal advice to the corporation. The substance of the communication must involve matters which fall within the scope of the corporate employee's official duties, and the employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation. The communications also must be confidential when made and must be kept confidential by the

---

[132] 449 U.S. 383 (1981).

[133] See JEROME G. SNIDER AND HOWARD A. ELLINS, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 2.05[2][c] (2001) [hereinafter SNIDER AND ELLINS].

[134] See, e.g., Avianca, Inc. v. Corriea, 705 F. Supp. 666 (D.D.C. 1989) (corporation must clearly demonstrate that the communication involved giving advice in a professional legal capacity); Ames v. Black Entertainment Television, 1998 WL 81205, at *8 (S.D.N.Y. Nov. 18, 1998) (stating that "the company bears the burden of 'clearly showing' that the in-house attorney gave advice in her legal capacity"); Rossi v. Blue Cross & Blue Shield of Greater New York, 540 N.E.2d 703 (N.Y. 1989) (in order to avoid sealing off disclosure by the mere participation of the in-house counsel, the need for cautious and narrow application of the attorney-client privilege is heightened). See generally, SNIDER AND ELLINS, supra note 10, § 2.05[2][c] (2001).

[135] KRE 503(d).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

company.[136] If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys.[137]

The attorney/client privilege, although recognized, is recognized to a very limited extent since it interferes with "the truth-seeking mission of the legal process," and conflicts with the predominant principle of utilizing all rational means for ascertaining truth.[138] As such, it "is in derogation of the public's right to every man's evidence," and therefore, is not favored by federal courts and must be strictly confined within the narrowest possible limits consistent with the logic of its principle.[139] Keeping in mind its very strict construction and narrow application, the party asserting the application of the attorney/client privilege to information, which it seeks to conceal, bears the burden of proving each and every element essential to its application.[140]

The elements essential to the application of the attorney/client privilege are:

> (1) The asserted holder of the privileges is or sought to become a client; (2) the communication is made to an attorney or his subordinate, in his professional capacity; (3) the communication is made outside the presence of strangers; (4) for the purpose of obtaining an opinion on the law or legal services; and (5) the privilege is not waived.[141]

While trying to meet the essential elements of the attorney/client privilege, several problems can be encountered. First of all, a corporation cannot prevent a document or communication from disclosure if that document was prepared in the ordinary course of business, even if an attorney prepared it.[142] Further, attorney/client privilege only protects confidential communications by an employee to an attorney when it includes and/or seeks legal advice and opinions. This privilege is not applied to factual information that is discovered and reported by an attorney.[143] Thus, a document created by corporate counsel and sent to an employee, who does not relay any legal advice but merely discusses factual information is potentially not subject to the attorney/client privilege.[144] Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character.[145]

In Louisiana, Article 506 of the Louisiana Code of Evidence provides for the attorney/client privilege against discovery of confidential information. In pertinent part the article states:

> A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral written or otherwise,

[136] Up John, 449 U.S. at 394.
[137] See also, In re International Systems & Controls Corp. Securities Litigation, 91 F.R.D. 552, 556 (S.D.Tex. 1981); U.S. v. Mobil Corp., 149 F.R.D. 533, 537 (N.D.Tex. 1993)
[138] Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906 (1980); Hawkins v. Stables, 148, F.3d 379 (4th Cir. 1998); United States v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986), cert. den., 480 U.S. 938, 107 S.Ct. 1585, 94 L. Ed.2d 775 (1987); U.S. v. Aramony, 88 F.3d 1369 (4th Cir. 1996).
[139] In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984).
[140] Hodges, Grant & Kaufmann v. U.S., 768 F.2d 719 (5th Cir. 1985); Texaco, Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385 (M.D. La. 1992).
[141] In re Grand Jury Proceedings, 517 F.2d 666 (5th Cir. 1975); New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 62 (E.D. La. 1985), aff'd, 790 F.2d 1249 (5th Cir. 1986).
[142] In re Hutchins, 211 B.R. 330 (Bkrtcy. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrtcy. E.D.Ark. 1997).
[143] American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (D.C. Mo. 1978).
[144] U.S. v. Davis, 132 F.R.D. 12 (S.D.N.Y. 1990).
[145] Cuno, Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y 1998); Union Carbide Corp. v. Dow Chemical Co., 619 F. Supp. 1036, 1047 (D.Del. 1985).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

made for the purpose of facilitating the rendition of professional legal services to the client… when the communication is:

(1) Between the client or a representative of the client and the client's lawyer…

(4) Between representatives of the client or between a client and a representative of the client.[146]

The United States District Court for the Eastern District of Louisiana has held that when determining if the attorney/client privilege will protect against the discovery of documents, "[t]he first issue is whether the documents are privileged. (Mere transmittal letters, without more, held not to be confidential communications, and thus, no privilege existed.)[147]

In order for a document to be considered privileged, the information it contains must be confidential. In a recent case, the Eastern District held, "[a] communication is confidential if it is not intended to be disclosed except in furtherance of obtaining or rendering professional legal services for the client."[148]

The second issue to be raised is whether the privilege has been raised. The United States District Court for the Eastern District of Louisiana has discussed two instances when a client can waive the attorney/client privilege and allow production of otherwise protected information.[149] The court in *Landry-Scherer* identified the following as the two means by which the privilege may be waived. "First, a privilege is waived when the person upon whom the privilege is conferred "voluntarily discloses or consents to disclosure of any significant part of the privileged matter."[150]

The second instance a waiver can occur is when "a party places privileged communications at issue".[151] The *Landry-Scherer* court clarified this by stating, "this kind of waiver occurs only when the party waiving the privilege has committed himself to a course of action that will require the disclosure of a privileged communication."[152]

In *Landry-Scherer*, the defendant claimed that the plaintiff had placed privileged communications at issue by naming her attorney as a witness to the transaction, which was the subject of the underlying controversy.[153] The court rejected this contention by relying on the fact that although the plaintiff listed her attorney as a witness to the transaction in question, she did not list him as a witness to be called at trial.[154] The court held, "*Scherer* (plaintiff) has specifically avoided naming LaNasa (attorney) as a trial witness and she has not indicated in any way that she intends to rely on his advice, opinions or testimony to prove any element of her claim."[155]

Maine
Bernstein Shur Sawyer & Nelson

There is no case law in Maine on the subject of the attorney-client privilege with regard to

---

[146] LSA-C.E. §506
[147] Exxon Corporation v. St. Paul Fire & Marine Insurance, 903 F.Supp. 1007 (E.D.La. 1995), see also, Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc., 1998 WL 310779 (E.D.La. 1998).
[148] LGS Natural Gas Co. v. Latter, 1998 WL 205417.
[149] See, Landry-Scherer v. Latter, 1998 WL 205417 (E.D.La. 1998).
[150] Landry-Scherer, 1998 WL 205417.
[151] Landry-Scherer, 1998 WL 205417, *3.
[152] Landry-Scherer, 1998 WL 205417, *3.
[153] Landry-Scherer, 1998 WL 205417, *4.
[154] Landry-Scherer, 1998 WL 205417, *5.
[155] Landry-Scherer 1998 WL 205417, *5.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

communications with in-house counsel.

Maryland
Piper Rudnick LLP

The law in Maryland is somewhat unsettled regarding the availability of the attorney-client privilege to protect communications between in-house counsel and officers, directors, and employees of the companies the in-house counsel serve. The Maryland Court of Appeals — Maryland's highest court — addressed this issue about three years ago in *E.I. duPont deNemours & Co. v. Forma-Pack, Inc*., 718 A.2d 1129 (Md. 1998), a case involving communications between in-house counsel and an outside debt collection agency. After reviewing the criteria for invocation of the attorney-client privilege in a corporate setting articulated by courts from other jurisdictions, including by the Supreme Court in its *Upjohn v. United States*, 449 U.S. 383 (1981) decision, the Maryland Court of Appeals concluded:

> Thus, it is clear that a corporation can be a client for purposes of the attorney-client privilege; what is unclear is exactly how far this protection extends regarding the corporation's employees and agents. While we decline to adopt a particular set of criteria for the application of the privilege in the corporate context until we are required to do so, the communications in the instant case are not protected under any of the tests.[156]

No subsequent decision by the Maryland appellate courts has addressed the issue.
Although the question is thus somewhat unsettled, it is noteworthy that the Court of Appeals in *Forma-Pack* discussed in considerable detail the criteria articulated by the Florida Supreme Court in *Southern Bell Telephone & Telegraph Company v. Deason*[157] namely: (1) [T] he communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services; (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; [and] (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[158] It is, accordingly, a fair inference that the Maryland Court of Appeals is favorably inclined toward the criteria articulated in *Deason*, and is awaiting a case in which it would be appropriate for the court to adopt them as the law of Maryland.

Massachusetts
Foley Hoag

The treatment of communications between in-house counsel and corporate employees in Massachusetts is in accord with the prevailing American rule, as follows:

> Conversations between a corporation's employees and in-house counsel are protected by the privilege. Nonetheless, because in-house counsel may be involved in giving advice on many issues that are more business, rather than legal, in nature or may be involved in such discussions as a matter of course,

[156] 718 A.2d at 1141.
[157] 632 So. 1377 (Fla. 1994)
[158] *Forma-Pack*, 718 A.2d at 1141.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> conversations in which in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on the ground that it is business advice that is being given and not legal advice.[159]

Michigan
Butzel Long

In Michigan, the attorney-client privilege has largely developed through case law. With some small variations, the Michigan courts have adopted this definition of the privilege:

> The attorney-client privilege attaches to communications made [in confidence] by a client to his or her attorney acting as a legal advisor and made for the purpose of obtaining legal advice on some right or obligation.[160]

The attorney-client privilege applies to both written and oral communications.[161] The privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[162]

The privilege attaches only to confidential communications.[163] It attaches to communications that have been expressly made confidential, as well as to those reasonably understood to be so intended.

The communication must be with the client. As a general proposition, the attorney-client privilege does not extend to information received by the attorney from third parties, such as potential witnesses.[164] An exception to this principle applies where the third party is an agent of the client,[165] and the courts have recognized that "[c]ommunications made through a client's agent are privileged."[166]

These issues become more complex when the client is a corporation. On one hand, a corporation is a legal entity separate and distinct from its officers, directors, and employees. On the other

---

[159] Epstein, The Attorney-Client Privilege and the Work-Product Doctrine (4th ed.), Section of Litigation, American Bar Association.

[160] See, e.g., Alderman v The People, 4 Mich 414, 422 (1857); Ravary v Reed, 163 Mich App 447, 453; 415 NW2d 240 (1987); Kubiak v Hurr, 143 Mich App 465, 472-473; 372 NW2d 341 (1985); Grubbs v K Mart Corp, 161 Mich App 584, 589; 411 NW2d 477 (1987); Taylor v BCBSM, 205 Mich App 644, 654; 517 NW2d 864 (1994).

[161] In re Bathwick's Estate, 241 Mich 156, 158-159; 216 NW 420 (1927).

[162] Upjohn Co v United States, 449 US 383, 395 (1981); Fruehauf Trailer v Hagelthorn, 208 Mich App 447, 452; 528 NW2d 778 (1995); (technical facts underlying communications were not protected just because they were communicated to attorney); Hubka v Pennfield Twp, 197 Mich App 117, 121; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993); In re Grand Jury subpoena, 1991 US App LEXIS 26484, *7 (6th Cir Sept 5, 1991) (records and ledger sheets in the possession of attorney pertaining to disbursements from client's escrow account were not themselves communications relating to legal advice).

[163] Cady v Walker, 62 Mich 157, 158; 28 NW 805 (1886); People v Andre, 153 Mich 531, 540; 117 NW 55 (1908); Schenet v Anderson, 678 F Supp 1280, 1282 (ED Mich 1988); Fruehauf Trailer v Hagelthorn, 208 Mich App 447, 452; 528 NW2d 778 (1995); Hubka v Pennfield Twp, 197 Mich App 117, 122; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993).

[164] In re Dalton Estate, 346 Mich 613, 619; 78 NW2d 266 (1956).

[165] Id. Cf Parker v Associates Discount Corp, 44 Mich App 302, 306; 205 NW2d 300 (1973) ("Attempting to claim the attorney-client privilege for a communication made by a party's agent after that agent has been in contact with an attorney is getting rather far afield").

[166] Grubbs v K Mart Corp, 161 Mich App 584, 589; 411 NW2d 477 (1987). See also People v Bland, 52 Mich App 649, 653; 218 NW2d 56 (1974).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

hand, a corporation cannot communicate except through its officers, directors, and employees. For many years, a large number of courts held that the privilege attached only to communications between the attorney and the "control group" of the corporation.[167] Such a group would include (but would not necessarily be limited to) members of controlling administrative bodies, such as the corporate board of directors.

In the 1981 case of *Upjohn v United States*,[168] however, the United States Supreme Court rejected the "control group" test. It did so because (1) middle and lower level employees, who were not within the corporate control group, could "embroil the corporation in serious legal difficulties" and might "have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to actual or potential difficulties;" (2) "the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy;" and (3) the control group test "is difficult to apply in practice" and is "unpredictab[le]" in application. *Upjohn* applied a "subject matter" test to determine whether privilege applied to the communications, listing several factors:

> (1) the communications were made by Upjohn employees at the direction of corporate superiors, (2) so that Upjohn could receive legal advice from counsel; (3) the communications concerned matters within the scope of the employees' duties, (4) which were not available from upper-level directors; (5) the employees were told the purpose of the communications; and (6) the communications were considered confidential when made and were not disseminated outside the corporation.

In the *Fassihi* case, the Michigan Court of Appeals held that "the attorney-client privilege belongs to the [corporate] control group."[169] This case probably should not be read to indicate, however, that *Fassihi* deliberately ignored *Upjohn* and consciously retained the "control group" test. This is so for several reasons. First, *Upjohn* was decided less than a month before *Fassihi* was submitted and, therefore, the Court of Appeals may simply have been unaware of the *Upjohn* decision. Second, *Fassihi* does not discuss *Upjohn* or state that it is rejecting the *Upjohn* analysis. And, finally, there may be nothing technically inconsistent between *Fassihi* and *Upjohn*; after all, even under the "case-by-case" analysis employed by the Supreme Court, communications with the corporate "control group" will often be privileged.

In 1988, the Michigan Supreme Court adopted new professional ethics rules which included Rule 4.2, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The legislative history of the rule makes it clear that the drafters had *Upjohn* in mind. The Comment to the Rule addresses the Rule's application for corporate entities as follows:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by separate counsel, the

[167] See, eg, United States v Upjohn Co, 600 F2d 1223 (6th Cir 1979).
[168] 449 US 383 (1981).
[169] Fassihi v Sommers, Schwartz, 107 Mich App 509, 518; 309 NW2d 645 (1981).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> consent by that counsel to a communication will be sufficient for purposes of this rule.

More recently, in *Hubka v Pennfield Twp*, a case interpreting the Michigan Freedom of Information Act, the Michigan Court of Appeals held that "where the attorney's client is the organization, the privilege extends to those communications between attorneys and all agents or employees of the organization *who are authorized to act or speak for the organization in relation to the subject matter* of the communication."[170]

Thus, under both the ethics rules and *Hubka*, it appears that Michigan follows the *Upjohn* formulation with regard to privilege and entity clients.

One additional point of clarification is in order. A lawyer who is employed or retained to represent a corporation represents the corporation as distinct from its directors, officers, employees, members, shareholders, or other constituents.[171] Thus, when a representative of a corporation confers with the attorney for the corporation, the privilege attaches because the corporation is the client and not because the representative is the client.

Minnesota
Briggs and Morgan, P.A.

Minnesota courts have only peripherally addressed the issue of the attorney-client privilege as applied to in-house counsel. In a footnote to the Minnesota Supreme Court's opinion in Kahl v. Minnesota Wood Specialty, Inc., the Minnesota Supreme Court states, "the privilege may be claimed in connection with communications to 'house counsel'."[172] In Kahn, the court held that certain provisions of the Minnesota workers' compensation laws did not abrogate the attorney-client privilege. Subsequent to the Kahn case, the United States Supreme Court held that the attorney-client applies to certain communications to and from in-house counsel.[173]

Because the 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, the above statement should not be read to imply that Minnesota has broadly adopted the attorney-client privilege in the context of in-house counsel.

Mississippi
Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Mississippi Rule of Evidence 502 addresses the issue of whether the attorney-client privilege applies to communications between in-house counsel and the officers, directors, or employees of the company.

Rule 502 protects certain confidential communications made by the client or the client's representative to the lawyer or the lawyer's representative "for the purpose of facilitating the

---

[170] hubka v Pennfield Twp, 197 Mich App 117, 121; 494 NW2d 800 (1992); rev'd in part on other grounds, 443 Mich 864; 504 NW2d 183 (1993) (quoting Mead Data Central, Inc v United States Dep't of Air Force, 566 F2d 242, 361 n 24 (CA DC 1977)).
[171] See Michigan Rule of Professional Conduct 1.13(a).
[172] See Kahl v. Minnesota Wood Specialty, Inc. 277 N.W. 2d 395 (Minn. 1979), footnote 5 (citing United States v. United Shoe Machinery Corp., 89 F.Supp. 357 (D.Mass.1950).
[173] See Upjohn Co. v. United States, 449 U.S. 383 (1981) (setting forth a multi-factor test for determining when the attorney-client privilege applies to in-house counsel). Minnesota courts have not addressed the issue since the Upjohn decision.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

rendition of professional legal services to the client."[174] Under Rule 502, person or corporation, whether public or private, "rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from" the lawyer is a "client" entitled to claim the protection of the privilege.[175] A "representative" of the client is "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or an employee of the client having information needed to enable the lawyer to render legal services to the client."[176] An attorney must not reveal the confidences of the client.[177] The privilege does not attach to any communication (1) made in the furtherance of a crime or fraud; (2) relevant to an issue between parties who claim through the same deceased client; (3) relevant to a claim of breach of duty by the lawyer or client; (4) relevant to a matter of common interests among two or more clients when offered in an action between or among any of the clients.[178]

Based on the foregoing authorities and subject to the exceptions noted, privilege may attach to certain types of confidential communications between corporate in-house counsel and a corporate officer, director, or employee when the communication is related to furthering the rendition of professional legal services on behalf of the corporation and is solely of a personal or a business nature.[179]

Missouri
Armstrong Teasdale LLP

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.[180] 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 means which, so far as the 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 transmitted.[181] All four of the above elements must be present for the privilege to apply.[182] 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.[183]

Additionally, it is by now well established that the attorney-client privilege applies to corporations as well as to individuals.[184] 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.[185] The first test is referred to as the "control group" test, and focuses upon the employee's position and his ability to take action upon the advice of the attorney on behalf of the corporation.[186] The second test,

---

[174] Miss. R. Evid. 502(b).
[175] Miss. R. Evid. 502(a)(1) & (c).
[176] Miss. R. Evid. (a)(3).
[177] Miss. R. Evid. 502cmt.; Mississippi Rules of Prof'l Conduct R.1.6; and Miss. Code73-3-37(4) (1972).
[178] Miss.R. Evid. 502(d).
[179] Miss.R. Evid. 502 & cmt.
[180] State ex rel. Great American Insurance Co. v. Smith, 574 S.W.2d 379, 382 (Mo. Banc 1978).
[181] State v. Longo, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990).
[182] Id.
[183] Id.
[184] Upjohn Co. v. United States, 449 U.S. 383 (1981).
[185] Diversified Industries Inc. v. Meredith, 572 F.2d 596, 608 (8th Cir. 1977).
[186] Id. (citing City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D. Pa. 1962), *criticized in* Upjohn Co. v. United States, 449 U.S. 383 (1981), *and* Diversified Industries Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

formulated in *Harper and Row Publishers, Inc. v. Decker,* focuses upon why an attorney was consulted, rather than with whom the attorney communicated.[187]

Missouri law applies a modified version of the second, or Harper and Row test, to determine whether an employee's communications are privileged.[188] 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: 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.[189] Under this modified Harper and Row test, it is the corporation that has the burden of showing that the communication in issue meets all of the above requirements.[190]

Finally, in Missouri, the attorney-client privilege is not without limitation. 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.[191] 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.[192] This limitation is commonly referred to as the "crime-fraud exception" to the attorney-client privilege.[193]

Montana
Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P.

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 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:

---

[187] Id. (citing Harper and Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) *aff'd by a divided court*, 400 U.S. 348 (1971), *criticized in* U.S. v. Lipshy, 492 F.Supp. 35, (N.D. Tex. 1979), *and* Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, (D.Colo. 1979)).
[188] Id. at 609.
[189] Id.
[190] Id.
[191] In Re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8th Cir. 2001).
[192] Id.
[193] Id.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

(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.

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

Nebraska
Baird, Holm, McEachen, Pedersen, Hamann & Strasheim LLP

There is little Nebraska 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. 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 1997) and Neb. Rev. Stat. § 27-503 (Reissue 1995). 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."

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 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 by the trial court was the admission into evidence of certain communications between the director-president of the mutual company, who had acquired a

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

substantial equity interest in the stock company and other benefits in exchange for the payment of a nominal consideration, and counsel for the mutual company. 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 as the facts clearly demonstrated that 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 a plan to commit what the client knew, or reasonably should have known, to be a fraud.

Two of the seven judges[171] 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 stockholders, the fiduciary obligations owed to stockholders 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.

In their view, notwithstanding the specific language of § 27-503, a 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, "is far too broad." No other published Nebraska appellate case dealing with the crime-fraud exception was found[172].

The Nebraska Supreme Court has 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 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 the state of his knowledge and at the same time use the attorney-client privilege to frustrate proof of that state.[173]

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

---

[171] The Nebraska Supreme Court consists of seven members; of the seven judges who sat and decided this case, two_including one of the dissenting judges_was a trial court judge sitting by invitation.

[172] In an unpublished opinion, and thus an opinion which cannot be cited as precedent, Neb. Ct. of Prac. 2E(4) (Rev. 1999), 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. The appellate court, however, rested its affirmance on the attestation exception. Smith v. Smith, 2000 WL 228651 (Neb. App. Feb. 29, 2000).

[173] League v. Vanice 221 Neb. 34, 44-45, 374 N.W.2d 849, 855-856 (1985).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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 Canon 5 of the Nebraska Code of Professional Responsibility (Rev. 1996) which requires that an attorney "exercise independent professional judgment on behalf of a client," Ethical Consideration 5-18, providing that an attorney employed by a corporation owes allegiance to the corporation and must exercise professional judgment uninfluenced by the desires of others, and Ethical Consideration 5-14, which prohibits the acceptance of employment where two or more clients have differing interests[174].

In *Centra Inc. v. Chandler Insurance Co. Ltd.*, 248 Neb. 844, 540 N.W.2d 318 (1995), the Nebraska's Department of Insurance denied the applicant corporations' effort to acquire an 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 they 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 sat on their rights with the result that any facts found by virtue of any breach of client confidences would remain facts available as evidence on remand. 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 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.

New Hampshire
Sheehan Phinney Bass + Green, P.A.

The attorney-client privilege is available in New Hampshire to protect from disclosure communications between in-house counsel and the company for which such counsel is employed.

---

174 Ethical Consideration 5-18 reads:

> A lawyer employed or retained by a corporation or similar entity owes his or her allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Ethical Consideration 5-14 reads:

> Maintaining the independence of professional judgment required of a lawyer precludes the lawyer's acceptance or continuation of employment that will adversely affect his or her judgment on behalf of or dilute loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

The communications in and of themselves are privileged and cannot be waived either by error (i.e. information disclosed by court order later found improper) or inadvertently (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, Effective July 1, 1985 ("Rules"). The rule at issue is Rule 502. LAWYER-CLIENT PRIVILEGE ("the rule"). By its terms the rule protects confidential communications made between client and lawyer made for the purpose of facilitating the rendition of professional legal services to the client. The rule protects all such communications except for certain exceptions such as those involving crime or fraud, for example. There is no corresponding federal rule so that a practioner should assume that the federal court in New Hampshire would look to state law and rules in matters of privilege except in a case where a specific federal statute applies.

In-house counsel should note when looking at the rule that there are definitions of a number of terms which can be used as a guide in determining what is privileged and what is not. For instance 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 that certain communications with officers, directors and employees who need to know and act on behalf of the client will be protected in New Hampshire.

What follows are some guidelines for these types of communications. In New Hampshire the privilege extends to certain representatives of the client. In the case of in-house counsel all of the representatives may be employed by the same entity, namely, the client. The client is broadly defined by the rule as any conceivable entity that might seek to obtain legal services. Legal services are necessarily delivered by communications which are not intended to be disclosed to third parties who are not involved on one side or another of the delivery of the legal services. The entire in-house legal staff is covered by the privilege to the benefit of the client. Those who are receiving the 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[195].

The Reporter's notes to the Rules state that the definition of the term "representative of the client" as provided in section 502(a)(2) as one authorized to obtain legal services or act upon it, is the adoption by this state of the so-called "control group" test. The significance of this is discussed at length at Comment b. (Rationale) to Restatement Section 73. The difference between a narrow standard and a broad standard, sometimes referred to as "control-group" versus "subject-matter" tests exists because of the view that the broader the standard the easier it is to abuse the privilege. This argument is countered by the argument that those within the "control-group" often do not know the relevant facts and those who do often cooperate with the organization's lawyer separate and apart from the decision makers. Including such lower-level employees within the privilege so long as the communication relates to the legal matter at hand is essentially what the drafters intended in the case of Restatement Section 73. Including such lower-level employees who have the authority to obtain legal services or act on the advice rendered is consistent with the Rules.[196]

The last requirement to be discussed in this Note is the universal requirement that the communication is intended to be "confidential" from its inception. Rule 502 is identical to

---

[195] (see Restatement of the Law Governing Lawyers, 3d Edition, 1998, Section 73 (Restatement Section 73)).
[196] (see Rule 502(a) Definitions, 55 (2) "representative of a client").

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

revised Uniform Rule 502. Under either rule the communication must not be intended to be disclosed to third persons unless to do so would be in furtherance of the stated purpose of rendering legal services to the organization.

New Hampshire has appeared to follow the national trend by following 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. The Supreme Court also recognized and held 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, and this part of the decision may not be good law today in light of the subsequent adoption of Superior Court Rule 35. The idea that New Hampshire is a "control group" state was apparently not adopted by the drafters of Superior Court Rule 35. This rule sets out the ultimate question for in-house counsel, which is what must in-house counsel produce and what may such counsel protect when a when an opposing party to a litigation makes a request for documents and tangible things under Superior Court Rule 35? The Rule, at Section b, defines the scope of discovery and at Section (b)(1) provides that the party-seeking discovery may not obtain discovery regarding matters which are privileged. With the Lawyer-Client Privilege expressly provided for in Rule 502 this should give in-house counsel comfort that so long as the requirements of this rule are satisfied the documents and tangible things will be protected. This conclusion is subject to the provisions of Section (b)(2) relating to certain documents and things prepared in anticipation of litigation.

New Jersey
Pitney, Hardin, Kipp & Szuch 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."[197]

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.[198] 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. Therefore, the nature of the relationship and the communication involved are relevant in determining whether a protectable relationship of attorney and client exists.[199]

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*

[197] New Jersey Rules of Professional Conduct 1.13.
[198] See, e.g., United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562 (App. Div. 1984).
[199] Id.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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."[200]

A communication also will not receive the protection of the attorney-client privilege where such "grave circumstances" exist that public policy concerns compel disclosure.[201] 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.[202]

New York
Pitney, Hardin, Kipp & Szuch, LLP

Corporations, as clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys that relate to their legal matters.[203] The attorney-client privilege applies to communications with attorneys, whether those attorneys are corporate staff counsel or outside counsel.[204]

The inquiry as to whether a communication between staff counsel and a corporation's employees is privileged is fact-specific.[205] 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."[206]

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.[207] 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.[208]
Although a "confidence" or "secret" between a company and its staff counsel is generally privileged, an attorney "may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them; (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order; (3) The intention of a client to commit a crime and the information necessary to prevent the crime; (4) Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct; (5) Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and 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

---

[200] N.J.S.A. 2A:84A-20.
[201] See Dontzin v. Myer, 301 N.J. Super. 501, 508 (App. Div. 1997).
[202] See In re Kozlov, 79 N.J. 232, 243-44 (1979).
[203] See Rossi v. Blue Cross & Blue Shield of Greater N.Y., 542 N.Y.S.2d 508, 509 (N.Y. 1989).
[204] Id.; C.P.L.R. 4503.
[205] Id. at 510.
[206] Id. at 511.
[207] Id.
[208] Id.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

being used to further a crime or fraud."[209] Additionally, the attorney-client privilege may yield where "where strong public policy requires disclosure."[210]

North Carolina
Womble Carlyle Sandridge & Rice, PLLC

Under North Carolina law, the attorney-client privilege functions as an absolute shield to protect from disclosure communications between attorneys and their clients. *Evans v. United Serv. Auto. Ass'n*, 541 S.E.2d 782, 790 (N.C. App. 2001), *cert. denied*, 547 S.E.2d 810 (N.C. 2001); *Willis v. Duke Power Co.*, 229 S.E.2d 191, 201 (N.C. 1976). Since this privilege may exclude relevant evidence, North Carolina courts limit application of the privilege strictly to those situations in which it is necessary to promote "'full and frank'" discussions between attorneys and clients. *Evans*, 541 S.E.2d at 790; *State v. Smith*, 50 S.E. 859, 860 (N.C. 1905) (specifically stating that the privilege only extends to "such confidential communications as are made to the attorney by virtue of his professional relation to the client").

North Carolina courts apply the protection of the attorney-client privilege to in-house counsel in the same way that they do to other attorneys. *Evans*, 541 S.E.2d at 791. The party seeking to claim the privilege has the burden of establishing the existence of it. *Id.* The privilege exists if "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated and (5) the client has not waived the privilege." *State v. McIntosh*, 444 S.E.2d 438, 442 (N.C. 1994).

A company and its in-house counsel may only benefit from the protection of the attorney-client privilege if the attorney is functioning as a legal advisor when the communication occurs. *See Evans*, 541 S.E.2d at 791. For example, the North Carolina Court of Appeals held that an insurance company's claim diary entries that contained either requests for advice from in-house counsel or counsel's responses to such requests were protected from disclosure by the attorney-client privilege. *Id.*

If the requirements for the attorney-client privilege are not met, the communications may still be protected by the work-product immunity if the document was generated in anticipation of litigation and if the party seeking discovery can show a "substantial need" for the information and "undue hardship" in otherwise obtaining the substantial equivalent. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2001).

North Dakota
Nilles, Hansen & Davies, Ltd.

In North Dakota, the common law attorney-client privilege is provided for in the Rules of Evidence. Rule 502 provides that under certain enumerated circumstances, "a client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for purpose of facilitating the rendition of professional legal services to the client."[211] The privilege only protects confidential communications, which are defined as those made in furtherance of the rendition of professional legal services and not intended to be

[209] New York Disciplinary Rule 4-101.
[210] See Priest v. Hennessy, 431 N.Y.S.2d 511 (N.Y. 1980).
[211] See N.D. R. Evid. 502(b).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

disclosed to third persons.[212] Generally, the client may claim the privilege or the client's representative, including the client's attorney asserting the privilege on behalf of the client. North Dakota courts narrowly construe the attorney-client privilege because, by its nature, the privilege is in derogation of the truth.[213]

There currently are no North Dakota cases interpreting Rule 502 in the context of its availability to protect from disclosure communications between in-house counsel and officers, directors, or employees of the companies they serve. Nevertheless, the plain text of the Rule does provide for such protection.

The rule broadly defines the terms "client" and "lawyer." First, a corporation, association or other organization are included within the definition of "client."[214] Next, a "lawyer" includes a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.[215] This definition encompasses in-house counsel who meet the definition. Thus, a corporate client may assert that attorney-client privilege in connection with confidential communications to in-house counsel. The rule also extends the attorney-client privilege to confidential communications made by a "representative of the client." A "representative of the client" is not limited to the "control group," i.e., people who have authority to obtain professional legal services, or to act on the advice rendered on behalf of the client. Rather, a "representative of the client" also extends to people who are specifically authorized to provide the client's lawyer with information or receive information relating to the legal services being rendered.[216] However, in order to come within the privilege, the information revealed by the "representative of the client" must be that which was acquired either during the course of, or as a result of, his or her relationship with the client as a principle, employee, officer or director and must be provided to the lawyer for purposes of obtaining legal advice or services for the client.

In sum, subject to waiver and certain exceptions, those communications which fall within the scope of the privileged and are made between in-house counsel and the corporate client, or those that meet the definition or "representative of the client," are protected by Rule 502.

Northern Mariana Islands
White Pierce Mailman & Nutting

No specific statutory or case decision controls the issue. Pursuant to Commonwealth Rules of Evidence 501, except as otherwise required by law or rule, "the privilege of a witness, person, government or political subdivision thereof shall be governed by the principle of the common law as they may be interpreted by the courts of the United States and of the Commonwealth in the light of reason and experience." The rule is primarily a mirror image of Rule 501, Fed. R. Evid., and should therefore be applied by reference to the common law as developed in the fifty USA states and the USA federal judicial system.

In general, the attorney-client privilege in the CNMI will apply to confidential communications concerning legal matters made between a corporation and its in-house counsel. The extent of the privilege's attachment to any particular communication depends upon the circumstances of the communication. The attorney-client privilege may be invoked by the corporation, generally,

---

[212] N.D. R. Evid. 502(a)(5).
[213] See Knoff v. American Crystal Sugar, Co., 380 N.W.2d 313, 319 (N.D. 1986). It is recognized that the privilege is subject to waiver and certain exceptions, for example, the crime or fraud exception. See N.D. R. Evid. 502(d).
[214] N.D. R. Evid. 502(a)(1).
[215] N.D. R. Evid. 502(a)(3).
[216] See N.D. R. Evid. 502(a)(2)(B).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

when the communication was made for the purpose of securing legal advice for the corporation, the employee made the communication at the direction of a corporate superior, the subject matter of the communication is within the scope of the employee's corporate duties, and the dissemination of the communication within the corporation shows an intent to maintain confidentiality.

Ohio
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 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 2151.421[217] of the Revised Code to have waived testimonial privilege under this division, the attorney may be compelled to testify on the 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 of

[217] Ohio Revised Code § 2151.421 deals with duties to report child abuse or neglect.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

advice."[218] As such, communications between an in-house counsel and an employee fall within the statutory attorney-client privilege.[219]

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.[220]

Ohio courts follow the United States Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1979), recognizing that the common-law attorney-client privilege extends to communications between a corporate counsel and its employees under certain circumstances.[221] 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 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). **[222]**

Oklahoma
Crowe & Dunlevy

12 Okla. Stat. § 2502(B) provides, in relevant part, that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . Between himself or his representative and his attorney or his attorney's representative." The statute defines "attorney" as "a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation," and defines "client" as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney." 12 Okla. Stat. § 2502(A)(1) and (2).

The law in Oklahoma is not well developed on the attorney-client privilege generally, much less on the specific nuances presumably created in the context of in-house counsel. Federal courts within Oklahoma have recognized that the "privilege applies where the client is a corporation and the attorney is in-house counsel," *LSB Industries, Inc. v. Commissioner of Internal Revenue,*

---

[218] See id..
[219] See also State v. Today's Bookstore, Inc., 86 Ohio App. 3d 810, 817 (Montgomery Cty. 1993) (finding that the communications between the City of Dayton and its Law Director fell within the statutory definition of attorney-client communications under Ohio Rev. Code. § 2317.02 and § 2317.021).
[220] State v. McDermott, 72 Ohio St. 3d 570, 574 (1995).
[221] See Baxter Travenol Labs. v. Lemay, 89 F.R.D. 410, 413 (S. D. Ohio 1981); Bennett v. Roadway Express, Inc., 2001 Ohio App. LEXIS 3394 (Summit Cty. 2001).
[222] (For further information, please contact Mark I. Wallach, Esq. or Caroline A. Saylor, Esq. at Calfee, Halter & Griswold LLP, 1800 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114, (216) 622-8200)

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Internal Revenue Service, 556 F. Supp. 40, 42 (W.D. Okla. 1982), and the language in 12 Okla. Stat. § 2502(A)(1) and (2) defining "attorney" and "client" supports that conclusion. One federal court within Oklahoma held, without significant discussion, that a memorandum from a non-lawyer employee of the defendant corporation to another non-lawyer employee of the corporation, which was carbon copied to two in-house lawyers but did not invite the in-house lawyers to make any response, "was not generated for the primary purpose of obtaining legal advice, but rather was generated in the course of making a business decision . . . As such, it does not come within the gambit of the attorney-client privilege." *Samson Resources Co. v. Internorth, Inc.*, 1986 U.S. Dist. LEXIS 30971, * 2 (N.D. Okla. 1986). This decision would suggest that Oklahoma courts, like courts from other jurisdictions, will closely scrutinize communications involving in-house counsel to ensure that the communication in question was made for the primary purpose of "facilitating the rendition of professional legal services," and thus to prevent corporations from shielding from discovery ordinary business transactions merely by funneling their communications through an attorney. Unfortunately, no Oklahoma case law expounds this issue.

Likewise, no Oklahoma law discusses how far down the corporate ladder the cloak of the attorney-client privilege extends, *i.e.*, when the client is a corporation, which corporate employees' communications with counsel will be privileged. However, Oklahoma law regarding *ex parte* communications may provide a useful analogy. The Oklahoma Rules of Professional Conduct prohibit a lawyer from communicating *ex parte* with a "party" the lawyer knows to be represented by counsel without the consent of the opposing attorney. *See* 5 Okla. Stat. Ch. 1, App. 3-A. Thus, in the context of ethical rules governing *ex parte* communications, Oklahoma courts have considered the parameters of an organizational "party."

Rule 4.2 of the Oklahoma Rules of Professional Conduct, in the case of an organizational client, "prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Official Comment to Oklahoma Rule of Professional Conduct 4.2.

In *Fulton v. Lane*, 829 P.2d 959, 960 (Okla. 1992), the plaintiff's attorney conducted *ex parte* interviews with employees of the defendant nursing home. In determining whether these interviews were prohibited under Rule 4.2, the *Fulton* court noted that

> Rule 4.2 does not prohibit communications with all of [defendant's] employees and former employees. However, its application may extend beyond those employees controlling the corporation. In litigation involving corporations, Rule 4.2 applies to only those employees who have the legal authority to bind a corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation.

Fulton, 829 P.2d at 860 (*citations omitted*). The court concluded that the plaintiff's attorney "is prohibited from conducting *ex parte* interviews with [defendant's] employees if they have managing authority sufficient to give them the right to speak for, and bind, the corporation." *Id. See also Weeks v. Independent School District No. I-89*, 230 F.3d 1201, 1208-1209 (10th Cir. 2000) (finding that Rule 4.2 "includes employees below the level of corporate management," and affirming district court's interpretation of Rule 4.2 to apply to organizational employees who had "speaking authority" such that they could bind the organization in a legal evidentiary sense).

It is possible, based on the foregoing authority, that Oklahoma courts would consider privileged communications between in-house counsel and employees with "speaking authority" for the

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

company, as long as the communications were made for the primary purpose of obtaining legal advice.

Oregon
Davis Wright Tremaine LLP

Under Oregon law, the rules governing the attorney-client privilege between in-house counsel and employees of their company are the same as those that apply to outside counsel and their corporate clients. Under Oregon Evidence Code Rule 503(2), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client [b]etween the client or the client's representative and the client's lawyer or a representative of the lawyer." The three key aspects of this rule are that the communication must be confidential, it must be made for the purpose of facilitating the rendition of legal services to the client, and the communication must be between the proper individuals listed in the Rule. State ex rel. Oregon Health Sciences Univ. v. Haas, 325 Or. 492, 501 (1997). The main area where Oregon law differs from federal law involves who may be a "representative of the client." Under Oregon law, "'Representative of the client' means a principal, an employee, an officer or a director of the client: (A) Who provides the client's lawyer with information that was acquired during the course of, or as a result of, such person's relationship with the client as principal, employee, officer or director, and is provided to the lawyer for the purpose of obtaining for the client legal advice or other legal services of the lawyer; or (B) Who, as part of such person's relationship with the client as principal, employee, officer or director, seeks, receives or applies legal advice from the client's lawyer." Or. Ev. Code 503(1)(d). "[A]ny employee of a client may be a representative of the client and . . . interaction with the client's lawyer need not be a regular part of the employee's job for the employee to qualify as a representative of the client." Haas, 325 Or. at 509.

Pennsylvania
Eckert Seamans Cherin & Mellott, LLC

In Pennsylvania, the attorney-client privilege has been codified at 42 PA. CON. STAT. § 598 (West 2001), which provides that "[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."[223] Because in-house counsel can play many roles within a corporation such as corporate secretary, business negotiator, or vice president, application of the privilege becomes complicated when the client is a corporation and the attorney is in-house counsel. Courts are often faced with two issues involving employee communications with in-house counsel: Is a corporation, which can act only through its employees and agents, entitled to claim privilege whenever any corporate employee, regardless of rank, communicates with counsel for the purpose of securing legal advice for the corporation, or whether the communicating employee has to be in a position of control within the organization?[224]

Pennsylvania courts have traditionally followed the "control group test" approach since its adoption in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962). However, the United States Supreme Court sharply criticized the "control group test" approach in *Upjohn Company v. United States*, 449 U.S. 383 (1981), for its narrow interpretation.

---

[223] Id.
[224] An employee in a position of control within the organization is referred to as a member of the "control group," which has been defined by one court as "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

Since *Upjohn*, Pennsylvania courts have been reluctant to endorse a single test to determine where the privilege applies. Nonetheless, corporations continue to successfully claim attorney-client privilege under Pennsylvania law for communications between its in-house counsel and its employees who have authority to act on its behalf.[225]

Under Pennsylvania Corporation Law, the authority to act on behalf of a corporation rests with its officers and directors. 15 PA. CON. STAT. § 1721 (West 2001). As such, communications by corporate employees to corporate counsel are privileged as to the corporation[226], but not necessarily to employees who qualify as corporate representatives individually.[227]

Pennsylvania courts will not protect communications unless they are made for the purpose of obtaining legal advice.[228] Additionally, Pennsylvania recognizes several exceptions to the attorney-client privilege. The following are applicable in the context of in-house counsel. A communication between an attorney and his or her client is not privilege: if it occurs in the presence of a non-privileged third party or of the adverse party, *In re Beisgen's Estate*, 128 A.2d 52 (Pa. 1956); where the client challenges the attorney's professional conduct or competence, *Commonwealth v. Warren,* 399 A.2d 773 (Pa. Super. 1979); or where the client's rights will not be adversely effected by revealing a communication, but justice will be furthered with its disclosure, *Cohen v. Jenkintown Cab Co.,* 357 A.2d 689 (Pa. Super. 1976); *see also* Charles B. Gibbons, *Privileges* in PENNSYLVANIA EVIDENCE § III. B. (Pennsylvania Bar Institute 1998).

Puerto Rico
McConnell Valdés

Corporate clients in Puerto Rico may invoke the attorney-client privilege to protect confidential communications between their in-house counsel and the officers, directors, or employees of the companies they serve. Although there are no Puerto Rico Supreme Court decisions specifically addressing whether or not the attorney client privilege applies to in-house counsel, certain local case law on the attorney client privilege and persuasive United States federal authority help support the conclusion that in-house attorney-client communications should be privileged.

Moreover, Rule 25 of the Rules of Evidence of Puerto Rico, which defines the attorney-client privilege, provides a very broad definition of attorney. According to this rule, an attorney is any "person authorized or reasonably believed by the client to be authorized to practice law. This includes such person and his partners, aids and office employees." It can be reasonably argued that in-house counsel fall under this definition.

Finally, in applying Rule 25 to in-house counsel, the United States District Court in Puerto Rico has applied the privilege rule to only those communications between in-house counsel and corporate client related to the legal advice being sought by the corporate client. Is has not applied the attorney-client privilege to business documents and agendas, interoffice business memos,

[225] In re Ford Motor Co., 110 F.3d 954 (3rd Cir.); Maleski by Chronister v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Cmwlth. 1994).
[226] Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D. Pa. 1979),
[227] Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985); cf. Maleski, 641 A.2d 1 (Pa. Cmwlth.1994) (Former directors and officers held attorney-client privilege separate and distinct from corporation's privilege).
[228] Maleski by Chronister v. Corporate Life Ins. Co., 641 A.2d 1 (Pa. Cmwlth. 1994); Yi v. Commonwealth, 646 A.2d 603 (Pa. Cmwlth. 1994) (attorney was asked to translate, not to provide legal advice); Okum v. Commonwealth, 465 A.2d 1324 (Pa. Cmwlth. 1983) (attorney was asked by administrator to clarify his administrative authority, not for legal advice); Leonard Packel & Anne Bowen Poulin, PENNSYLVANIA EVIDENCE § 521-1(c), at 391.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

memos between in-house counsel and the corporate client that do not include legal advice, and business communications with third parties. Factors used by federal district court in considering whether documents fall under privilege are: whether the communication was offered by in-house counsel in his/her professional capacity as lawyer and whether the tasks performed by in-house counsel could be readily performed by non-lawyer. Other factors considered are whether the communication was addressed to the client's attorney or in-house counsel, whether the purpose of communication was to obtain legal advice, and whether the communication renders a legal opinion.

Rhode Island
Tillinghast Licht Perkins Smith & Cohen, LLP

There is no reported Rhode Island federal or state court decision that addresses the specific circumstances in which a corporation may invoke the attorney-client privilege regarding communications with its in-house counsel.

The Rhode Island Supreme Court has adopted the Rules of Professional Conduct. Rule 1.13 prescribes that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The commentary to Rule 1.13 states as follows:

> When one of the constituents of an organizational client communicates with organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 [confidentiality of information]. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Under Rhode Island case law, "[t}he general rule is that communications made by a client to [an] attorney seeking professional advice, as well as the response by the attorney to such inquiries, are privileged communications not subject to disclosure."[229] Only communications between a client and an attorney that are executed for the purpose of securing legal service, opinions of law, or assistance with some legal proceeding, are considered privileged.[230] Thus the "mere existence of a relationship between an attorney and client does not raise the presumption of confidentiality."[231] Further, any information given by the client to an attorney in the presence of a third person who is not an agent of either the client or the attorney is not considered privileged.[232] However, an inquiry may be made to determine whether the client reasonably understood the communication to be confidential, even though third parties were present.

Based on our reading of Rhode Island law on attorney-client privilege issues, a Rhode Island court would likely hold that a corporation's communications with its in-house attorney are privileged only if they were made for the purpose of obtaining legal advice. Thus, if an in-house counsel also serves as a business advisor, any communications made to the attorney while acting in that role are likely not privileged. Further, routine, non-privileged communications between corporate officers or employees do not become privileged by sharing them with in-house counsel.

---

[229] Callahan v. Nvstedt, 641 A.2d 58, 61 (1994) (citations omitted).
[230] Id.
[231] Id.
[232] State v. Driscoll, 360 A.2d 857, 861 (1976).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

South Carolina
Wyche, Burgess, Freeman & Parham, 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.

South Dakota
Lynn, Jackson, Shultz & Lebrun, P.A.

Neither the Legislature nor the Supreme Court in South Dakota has specifically addresses the issue of the attorney-client privilege in the context of communications between an in-house lawyer and a corporate client. The statutory lawyer-client privilege SDCL 19-13-2 through 19-13-4 makes to distinction between communications between outside counsel and in-house counsel. The issue would revolve on the question of the "communication" is confidential. It is if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communications. The statutory relationships in which such confidential legal service communications are covered by the privilege are: between the client or his representative and his lawyer or the lawyers' representative; between the client's lawyer and the lawyer's representative; by the client or his representative or the lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client, or among lawyers and their representatives representing the same client.

There is no reason to believe the these criteria would be applied differently or not at all in the case of an in-house lawyer's legal services confidential communication to the employer corporate client. Communications of the in-house lawyer that do not constitute professional legal services that may be made by or in the presence of the same individual when such individual may be acting in some non-lawyer capacity, such as a vice president or member of a board of directors, would not be a privileged attorney-client communication.

The "work product" of an in-house lawyer would be subject to the same tests of discoverability as the "work product" of outside counsel or other employees of the client.

Tennessee
Bass, Berry & Sims, PLC

The attorney-client privilege in Tennessee has been codified in Section 23-3-150.[233] Requirements for Tennessee's attorney-client privilege to apply are:

[233] See Tenn. Code. Ann. § 23-3-150 (West 2001).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

As with most jurisdictions, communications between in-house counsel and officers, directors or employees are protected by the attorney-client privilege when the purpose of communications is to secure legal advice from counsel.[234]

In the in-house context, courts will pay special attention to the requirement that the communication be for the purpose of securing legal advice.[235] This analysis recognizes that in-house counsel may perform multiple roles. Heightened scrutiny will be paid to in-house communications with corporate employees to ensure that a legal role, as opposed to a business role, was being assumed when the communication was made.

If the communication is not privileged in and of itself, it is possible to argue that the communications are "confidential." By classifying the communicated information as "confidential" one could prevent disclosure by seeking a protective order or injunction.[236]

Utah
Van Cott, Bagley, Cornwall & McCarty

The attorney-client privilege is established in Utah according to rule, specifically Rule 504 of the Rules of Evidence. The corporate attorney-client privilege is not restricted to "control" groups. The corporate attorney-client privilege applies to communications where legal advice is sought and the communications take place between the lawyer and an authorized employee.

The attorney-client privilege attaches to communications between counsel and any officers, directors, employees, or others acting on behalf of and authorized to act on behalf of the corporate entity. The privilege can attach to communications with virtually any employee of the corporate entity as long as that employee either by position or special authorization is communicating with

---

[234] See Miller v. Federal Express Corp., 186 F.R.D. 376, 388 (W.D. Tenn. 1999) (applying Tennessee's statute on attorney-client privilege and holding that attorney-client privilege would apply to communications between defendant and in-house counsel if the defendant had explained how including the attorney in communication was for the purpose of securing legal advice); see also Royal Surplus Lines Ins., Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 463, 474-75 (W.D. Tenn. 1999) (applying Tennessee's statute on attorney-client privilege and holding that communications between senior-vice president of company, and company's in-house counsel were protected by the attorney-client privilege); Marine Midland Bank, N.A. v. General Motors acceptance Corp., 1995 WL 417047 (Tenn. Ct. App. July 17, 1995) (providing no discussion or distinction in application of attorney-client privilege to in-house counsel).

[235] See Miller, 186 F.R.D. at 388; see also Royal Surplus Lines, 190 F.R.D. at 475 (stating that "simply sending a carbon copy [of a memorandum] to in-house counsel does not cloak a business communication with [the] attorney-client privilege).

[236] See Loveall v. American Honda Motor Corp., 694 S.W.2d 937, 939-40 (Tenn. 1985) (granting a protective order where the information sought by plaintiff, confidential business information, would have caused the defendant irreparable harm and competitive disadvantage).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

the lawyer on behalf of the corporation. The privilege may also attach where the authorized corporate representative is not actually an employee of the corporation.

The privilege also attaches to communications with lawyers representing other parties "in matters of common interest."

Nothing in the rule suggests any particular restriction on the privilege because the communications are with in-house counsel. Sections 5 and 6 of Rule 504(a) make clear that a confidential communication is protected if it meets the requirements of those two sections; the communication must concern the rendering of professional legal services by a lawyer and the communication must be intended to be confidential.

The rule also attaches the privilege to communications not with the lawyer, but with the "lawyer's representative." In the in-house context, this language extends the privilege at least to communications with paralegals.

Utah recognizes a work-product privilege. This privilege applies to documents prepared by lawyers and other corporate representatives in anticipation of litigation. The Utah privilege also protects lawyer opinion work product, whether in written form or not.

The work product rule is more a limitation on discovery rather than a rule of evidence. If the other side gets the information, presumably it will be admitted into evidence. Work product can also be obtained in the other side makes sufficiently strong showing that it needs the work product information.

Vermont
Downs Rachlin Martin PLLC

In Vermont, the attorney-client privilege extends to corporations and other organizations.[237] While the Vermont Supreme Court has never addressed whether in-house lawyers can assert the privilege, the Reporters Notes to Vermont Rule of Evidence 502 make clear that "lawyer employees of a corporation" may assert "the privilege if they provide legal services similar to those that would be rendered by outside counsel."
The general rule in Vermont is that

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of legal services to the client (1) between himself or his representative and his lawyer and the lawyer's representative. . . .

V.R.E. 502(b). As originally enacted, Rule 502 did not define who was considered a representative of a corporate client for purposes of the privilege. By omitting this essential definition, the rule adopted the approach of *Upjohn Co. v. United States*,[238] leaving the issue to case law development.

Effective January 1, 1994, the Vermont Legislature enacted an attorney-client privilege statute, which restricts the privilege to communications with a "representative of a client" to two categories: (a) communications with a member of the corporate "control group" acting in his or her official capacity; and (b) communications with a person who is not a member of the "control

[237] Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473 (1998).
[238] 449 U.S. 383 (1981).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

group" to the extent necessary to effectuate legal representation of the corporation. The "control group" includes (1) officers and directors of a corporation, and (2) persons who (a) have the direct authority to control or substantially participate in a decision to be taken on the advice of a lawyer, or (b) have the authority to obtain legal services or act on the legal advice rendered, on behalf of the corporation. 12 V.S.A. § 1613. Rule 502 of the Vermont Rules of Evidence was amended in 1995 to correspond with this statute.[239]

One final consideration is that the Vermont Rules of Professional Conduct depart significantly from the Model Rules. Rules 1.6(b)(1) and (2) require a lawyer to disclose information (a) when necessary to prevent a crime that involves the risk of death or substantial bodily harm, and (b) when the lawyer reasonably believes that failure to disclose a material fact to a third person will assist a criminal or fraudulent act by a client.

Virgin Islands
Dudley, Topper and Feuerzeig, LLP

In the absence of 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. The U.S. Virgin Islands has no statutory law specifically addressing the applicability of the attorney-client privilege to communications with in-house counsel, therefore, a Virgin Islands court would likely 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 in-house 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 in house counsel to assess an employee's performance, this communication is not privileged. If the officer asks her in house counsel about the corporation's potential liability if the employee is terminated, that communication is privileged, provided it is made in confidence.

Virginia
McGuireWoods LLP

The Virginia Supreme Court has recognized that in-house lawyers can have privileged conversations with employees of companies they represent.[240] A Virginia Circuit Court has also confirmed this principle.[241] Both Federal District Courts in Virginia have also recognized that in-house lawyers may have privileged communications. [242]

[239] See Reporter's Notes to V.R.E. 502(a)(2).
[240] Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992).
[241] Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("[t]hat such [attorney-client] privilege does apply to in-house counsel is clear"); *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." (citation omitted))
[242] *Henson v. Wyeth Lab., Inc.,* 118 F.R.D. 584, 587-88 (W.D. Va. 1987) (recognizing that Wyeth's in-house lawyer may have privileged communications with corporate employees); *Jonathan Corp. v. Prime Computer, Inc.,* 114 F.R.D. 693, 696 (E.D. Va. 1987) ("It is well-settled that the attorney-client privilege does attach to corporations as well as to individuals. Furthermore, communications between a corporation's in-house counsel and employees of that corporation may be protected by the attorney-client privilege.")

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

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.[243] The Virginia State Bar has carried this odd definition to its logical conclusion, holding in one unauthorized practice of law opinion that someone who did not have a law degree could nevertheless give legal advice to his or her employer, and even use the term "general counsel" when doing so.[244] One Virginia Circuit Court cited this strange rule in holding that the attorney-client privilege did not protect communications between in-house lawyers and their clients.[245] However, that decision seems to have been an aberration, and no other courts have taken the same approach.

Washington
Davis Wright Tremaine LLP

Washington law does not make a distinction between in-house counsel and other attorneys for purposes of the attorney-client privilege. Washington's statutory enactment of the attorney-client privilege states, "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."[246] The two key components of this provision are that there must be an attorney-client relationship and the communication must be given in the course of legal representation. "'An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists.' However, the belief of the client will control only if it 'is reasonably formed based on the attending circumstances, including the attorney's words or actions.'"[247] Once an attorney-client relationship has been established, in order for the communication to be protected it must be legal in nature, and cannot be simply business or financial advice.[248]

West Virginia
Jackson & Kelly PLLC

To assert the attorney-client privilege in West Virginia: (1) Both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in their capacity as a legal advisor; and (3) the communication between the attorney and client must be identified to be confidential. Syl. pt. 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).[249] Whether communications between a company's in-house lawyer(s) and its officers, directors, or employees are subject to the privilege depends upon whether the three minimum requirements of *Burton* can be established. *See, e.g., State ex rel. Westbrook Health Services, Inc.*, 209 W.Va. 668, 672, 550 S.E.2d 646, 650 (2001); *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W.Va. 316, 326, 484 S.E.2d 199, 209 (1997). The protection of the attorney-client privilege is not automatically extended to any corporate employee or agent, even

[243] Va. R., pt. 6, § I(B).
[244] Virginia UPL Op. 178 (August 12, 1994).
[245] Belvin V. H.K. Porter Co., 17 Va. Cir. 303, 307-08 (Norfolk 1989).
[246] Wash. Rev. Code 5.60.050(2)(a).
[247] Dietz v. Doe, 131 Wn.2d 835, 843-44 (1997) (internal citations omitted).
[248] Karl B. Tegland, Courtroom Handbook on Washington Evidence 254 (2001 ed.) (citing Kammerer v. Western Gear Corp., 96 Wn.2d 416 (1981)). In addition, the communication must have been intended to be confidential. Seattle Northwest Sec. Corp. v. SDG Holding Co., Inc., 61 Wn. App. 725, 742 (1991).
[249] Whether the communication arises from the attorney or the client is not important, as long as the communication is intended to be confidential and is made for the purpose of securing legal advice. State ex rel. United States Fidelity and Guaranty Co. v. Canady, 194 W.Va. 431, 441 n.13, 460 S.E.2d 677, 687 n.13 (1995).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

management, where the requirements of *Burton* are not met. *See, e.g., Westbrook Health Services, In*c. at 672, 550 S.E.2d at 650. In-house counsel cannot invoke the privilege simply by asserting that the employee "'is' [the entity]" for purposes of a deposition or by stating that the employee is "part of management of [the entity]." *See Westbrook, id.* The privilege does not even extend to conversations specific to the entity's defense of a particular case where the corporate officer, director, or employee and in-house counsel did not contemplate that the attorney-client relationship existed between them and the officer, director, or employee did not seek advice from in-house counsel in counsel's capacity as a legal advisor. *See Westbrook* at 670-72, 550 S.E.2d at 648-50.

A corporation's internal documents, kept "as a matter of course" and forwarded to management per corporate policy, do not become privileged communications simply because they end up in the hands of in-house counsel. *See Bedell* at 326 & 330, 484 S.E.2d at 209 & 213. An investigative report prepared by in-house counsel containing documentation of conversations with employees about an incident to which liability may attach is not protected by the attorney-client privilege where the entity asserting the privilege cannot demonstrate that (1) the employee(s) contemplated the existence of an attorney-client relationship between the employee and in-house counsel and (2) the employee(s) sought legal advice from in-house counsel. *Bedell* at 326, 484 S.E.2d at 209.[250]

When a business organization makes its attorney the corporate designee for purposes of responding to matters set forth in a notice of deposition, the attorney-client privilege is waived with regard to matters about which the attorney is designated to testify. *Bedell* at 333, 484 S.E.2d at 217.

Related to the evidentiary attorney-client privilege is a lawyer's ethical duty of confidentiality. *See Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 797, 461 S.E.2d 850, 859 (1995). While the evidentiary privilege "exists apart from, and is not co-extensive with, the ethical confidentiality precepts," *McGraw* at 797, 461 S.E.2d at 859 (citing *United States v. Ballard*, 779 F.2d 287, 293 (5th Cir. 1986)); *see also State ex rel. Charleston Area Medical Ctr. v. Zakaib*, 190 W.Va. 186, 437 S.E.2d 759 (1993), the definition of "party" in the corporate setting, as it pertains to communications with opposing counsel, is, along with the requirements of *Burton*, practically relevant.

According to the West Virginia Rules of Professional Conduct, a lawyer may not communicate about the subject matter of representation with a party the lawyer knows to be represented by another lawyer in the matter, without the consent of the other lawyer or legal authorization. *See* W.Va. R.P.C. 4.2. For purposes of Rule 4.2, a corporate "party" includes:

1. Officials of the organization (those having a managerial responsibility);

2. Other persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability (those who have the legal power to bind the organization in the matter);

3. Those who are responsible for implementing the advice of the organization's lawyers;

---

[250] The same report may qualify for protection under the work product doctrine if the "primary motivating purpose" behind the attorney's creation of the investigative report was to assist in "probable future litigation." See Bedell at 330-31 & 334, 484 S.E.2d at 213-14 & 217.

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

4. Any members of the organization whose own interests are directly at stake in a representation (i.e., any person who is independently represented by counsel directly or indirectly by membership in a class, partnership, joint venture, or trust); and

5. An agent or servant whose statement concerns a matter within the scope of the agency or employment, which statement was made during the existence of the relationship and which is offered against the organization as an admission.

Cole v. Appalachian Power Co., 903 F.Supp. 975, 979 (1995); *Dent v. Kaufman*, 185 W.Va. 171, 174-75, 406 S.E.2d 68, 71-72 (1991) (adopting the rule of *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030 (1990)). All other employees, characterized as mere witnesses or "holders of factual information" with regard to the event for which the organization is sued, are not "parties." *See Cole*, 903 F.Supp. at 979; *Dent*, 185 W.Va. at 176, 406 S.E.2d at 73.

Wisconsin
Michael Best & Friedrich LLP.

In Wisconsin, the lawyer-client privilege is largely governed by statute. Section 905.03 *Wis. Stats.* reads as follows:

(1) DEFINITIONS. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd 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.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. There is no privilege under this rule:

(a) *Furtherance of crime or fraud*. If the services of the lawyer were 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; or

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients*. As to a communication relevant to a matter of common interest between 2 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.

Wyoming
Brown, Drew & Massey, LLP

Upjohn Co. v. U.S., 101 S.Ct. 677 (1981), established the existence of the attorney client privilege with respect to communications between in-house counsel and individuals within the organization for which they serve.[251] In determining specifically which employees could speak on behalf of the organization to the lawyer so that the privilege would apply to their communication, the court in *Upjohn* rejected the "control group" test as being too limited. *See id.* (Approach in which only the communications between counsel and senior management are privileged because these are the only individuals which can be said to possess identity analogous to corporation as a whole). Instead, the *Upjohn* court adopted the subject matter approach. *See id.* at 631-632 (attorney client privilege applicable to communications not available from upper-echelon management that are necessary to provide basis for legal advice "concerning matters within the scope of the employees' corporate duties"). However, the Supreme Court declined to establish "a broad rule or series of rules to govern all conceivable future questions in this area." *Id.* (quoting *Upjohn*, 101 S.Ct. at 677).

In *Strawser v. Exxon Co., U.S.A., a Div. Of Exxon Corp.*, 843 P.2d 613 (Wyo. 1992), the Wyoming Supreme Court addressed the issue of who is a party in the corporate context and thus able to benefit from the attorney client privilege and not be subject to ex parte interviews with opposing counsel. The court in *Strawser* similarly rejected the above-mentioned "control group" test. *See id.* at 620-621. The test adopted by the Wyoming Supreme Court, however, was the

[251] See Newport Pacific Inc. v. County of San Diego, 200 F.R.D. 628, 631 (S.D. Cal. 2001).

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).

"alter ego" or "binding admission" approach. *See id.* at 621. This approach "defines 'party' to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Id.*

This material is protected by copyright. Copyright © 2002 various authors and the American Corporate Counsel Association (ACCA).