



# In-House Counsel and the Attorney-Client Privilege

**A Lex Mundi Multi-Jurisdictional Survey prepared by the  
Lex Mundi Dispute Resolution Practice Group**

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### About This Survey

This 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 communications?

The descriptions set forth below are intended only as a general overview of the law as of January 1, 2007. No summary can be complete, and the following is not intended to constitute legal advice as to any specific case or factual circumstance. Readers requiring legal advice on any specific case or circumstance should consult with counsel admitted in the relevant jurisdiction.

The editor-in-chief for this survey is Samuel Nolen, a member of Lex Mundi's Board of Directors and a member of Richards, Layton & Finger, P.A., Wilmington, Delaware. The survey's coordinator is Jami de Lou, Lex Mundi's Practice Group Coordinator.



### About Lex Mundi

Lex Mundi is the world's leading association of independent law firms. Lex Mundi facilitates the exchange of information regarding the local and global practice and development of law and improves the ability of its members to serve their respective clients. Lex Mundi has member law firms in 99 countries. Lex Mundi firms have adopted uniform standards of client service and are comprehensively and periodically reviewed to ensure continued adherence to Lex Mundi's standards of excellence.

The worldwide coverage of Lex Mundi's membership provides Lex Mundi the unique ability to conduct and facilitate surveys of local law and procedure on a global scale. Lex Mundi member firms have produced global surveys on a number of topics in addition to this survey on the attorney-client privilege, including: Pre-merger Notification Survey, Labor and Employment Desk Book, European Union: Accessions State Tax Guide, Bank Finance and Regulation Survey, Telecommunications Regulation Matrix and Real Estate Survey Part I: Issues in Real Estate Investment and Finance. Lex Mundi member firms have also cooperated with the World Bank, Harvard University and Yale University to complete the most comprehensive comparative studies of litigation ever undertaken.



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## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### ANGUILLA, BRITISH WEST INDIES Webster Dyrud Mitchell

#### CONTACT INFORMATION:

**Pam Webster**

Webster Dyrud Mitchell

Victoria House, P.O. Box 58

The Valley, Anguilla

British West Indies

Tel: 264.497.2060/ Fax: 264.497.3096

Email: [pwebster@websterdyrud.com](mailto:pwebster@websterdyrud.com)

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.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **ARGENTINA Marval, O'Farrell & Mairal**

**CONTACT INFORMATION:**

**Alfredo M. O'Farrell**

Marval, O'Farrell & Mairal

Av. Leandro N. Alem 928

1001 Buenos Aires, Argentina

Tel: 54.11.4310.0100/ Fax: 54.11.4310.0200

Email: [amof@marval.com.ar](mailto:amof@marval.com.ar)

Under Argentine legislation all attorney-client communications and documentation are protected from disclosure. Attorneys have both the right and the obligation not to disclose these communications. The lawyer's right not to disclose privileged matters exists notwithstanding the authorization to disclose granted by the client.

The protection includes the communications between in-house counsel and management provided that: i) the in-house counsel has been appointed as such and publicly holds that position; ii) the in-house counsel is admitted to the bar, at least in the jurisdiction of the domicile of the employer; iii) the communications with management and all other documents in the possession of the lawyer relate and have been issued in connection with the rendering of legal advice.

The protection includes also the office of the in-house counsel and all documents within. It is good practice to provide to the in house lawyers with an office duly identified as the "legal office" or "in house lawyer's office" secluded or easily distinguishable from the rest of the administrative offices in the premises of the employer. The same applies to the files, if located outside the lawyer's office.

Searches and seizures can only take place under a warrant issued by a competent Court in the course of a criminal investigation and specifically directed to certain documentation or elements. Prior to issuing the warrant, the Court must state formally for the record the reasons and evidence or circumstantial evidence that justify the issuance of the search and seizure order in a lawyer's office. The search and seizure procedure cannot take place without the presence of a representative of the Bar Association duly summoned by the Court to that effect.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### AUSTRALIA Clayton Utz

#### CONTACT INFORMATION:

**Colin Loveday**

Clayton Utz

Levels 23-35

No. 1 O'Connell Street

Sydney NSW 2000 Australia

Tel: 61.2.9353.4193/ Fax: 61.2.8220.6700

Email: [cloveday@claytonutz.com](mailto:cloveday@claytonutz.com)

In Australia there are established principles by reference to which certain communications involving attorneys are protected from disclosure in the course of both discovery processes and as evidence in a trial. Such protection, known as 'legal professional privilege' or 'client legal privilege', has been recognized by Australia's highest appellate court as a doctrine of substantive law, not easily dislodged except by clear legislative intent<sup>198</sup>. The precise scope of such privilege varies slightly from state to state within Australia (some jurisdictions have enacted statutes governing privilege, in other places the privilege is a principle of common law). However, in broad terms the privilege extends to confidential communications passing between a client and a legal adviser:

- a. to enable the client to obtain, or the adviser to give, legal advice; or
- b. with reference to litigation that is actually taking place or within the contemplation of the client.<sup>199</sup>

Documents prepared by, or communications passing between, the legal adviser or client and third parties also attract privilege if they come within (b) above<sup>200</sup>. Until recently, the orthodox view was that privilege could only apply to communications between the legal adviser or client and third parties falling within (a) above if the third party could be characterized as the client's "agent" in the sense of alter ego for the purpose of making or receiving the communications<sup>201</sup>. However, in cases falling within the jurisdiction of the Australian Federal Court, there is now appellate authority to the effect that privilege may attach to such communications even if the third party cannot be characterized as the client's "agent"<sup>202</sup>.

<sup>198</sup> Daniels Corp International v ACCC (2002) 213 CLR 543

<sup>199</sup> Cross, Byrne & Heydon, Cross on Evidence, Loose Leaf Service 1991 -, Butterworths (2000) at [25210]

<sup>200</sup> Ibid

<sup>201</sup> Wheeler v Le Marchant (1881) 17 Ch D 675

<sup>202</sup> Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122

In either case, Australian courts apply a "dominant purpose" test to determine whether a particular document or communication falls within one of these criteria<sup>203</sup>. The privilege in question vests in the "client".

The role of the lawyer is crucial to the existence of privilege. Where the lawyer in question is an "in-house" counsel employed by the "client" who is seeking to maintain a claim for privilege, the general principle is that the law in relation to privilege applies in the same way as for external lawyers. The mere fact that a lawyer is a salaried employee of the client is not sufficient to deny to communications between them and that company, or other officers within it, legal professional privilege if such privilege would otherwise be attracted<sup>204</sup>.

However, because of the closer connection between the lawyer and the client, such claims for privilege usually attract closer scrutiny than claims involving external lawyers. In particular, it may be more difficult to establish that the lawyer in question is acting in his or her capacity as a lawyer or that the dominant purpose of a particular communication was one of the protected purposes outlined above.

It is important to note that the 'in house' lawyer must demonstrate that he or she is acting both independently and competently as a lawyer. It has been suggested that an in-house lawyer who is also a director of a company may be incapable of giving independent (and therefore privileged) legal advice to the company<sup>205</sup>. More recently, a judge has held that advice from in-house government lawyers who did not hold current practicing certificates could not be privileged<sup>206</sup>.

The scope of legal professional privilege has been the subject of considerable scrutiny in recent times, both in England<sup>207</sup> and Australia<sup>208</sup>. The tendency in the English cases has been to restrict the scope of such privilege, although that tendency may have been reversed by the decision of the House of Lords on 29 July 2004 in the *Three Rivers* litigation<sup>209</sup>. The Australian courts do not seem to be following this trend. However, it is an area of the law which is still not entirely well settled, particularly in the area of communications by in-house lawyers. The recent English decisions are a timely reminder that caution needs to be exercised if proper privilege claims are to be successfully maintained.

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

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<sup>203</sup> *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)

<sup>204</sup> *Ritz Hotel Ltd v Charles of the Ritz Ltd and anor* (1987) 14 NSWLR 100

<sup>205</sup> *Southern Equities Corp v Arthur Andersen* (No 6) [2001] SASC 398

<sup>206</sup> *Vance v McCormack* [2004] ACTSC 78

<sup>207</sup> In the context of the *Three Rivers* litigation. See, for example, *Three Rivers DC v Bank of England* [2004] EWCA Civ 218

<sup>208</sup> See, for example, *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217

<sup>209</sup> At the time of writing the House of Lords had not published its reasons.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### AUSTRIA

#### **Cerha Hempel Spiegelfeld Hlawati**

**CONTACT INFORMATION:**

**Dr. Benedikt Spiegelfeld**

Cerha Hempel Spiegelfeld Hlawati

Partnerschaft von Rechtsanwälten

Parkring 2, A-1010 Vienna, Austria

Tel: 43.1.514.35-111/ Fax: 43.1.514.35-235

Email : [Benedikt.Spiegelfeld@chsh.at](mailto:Benedikt.Spiegelfeld@chsh.at)

The attorney-client privilege protects all information confided in course of the mandate and facts learned in course of the professional activities as attorney in case it is in the interest of the client that these facts are kept confidential. It grants the right and establishes the duty to refuse to testify in courts as to all of these facts, unless the client gives the attorney the permission to do so (but even then the attorney has to prove whether this is in the client's interest or not and has to refuse to testify despite the client's permission when he believes that this is not in his interest) The attorney-client privilege is applicable only to independent lawyers (Rechtsanwälte) and includes employees of the independent lawyer too. An exception of the attorney-client privilege applies for cases of money-laundering: if an attorney has a strong suspicion that his client is doing "money-laundering tended" transactions he is obliged to inform the Austrian Federal Office of Criminal Investigation about his suspicion. (Though this obligation to inform does not apply for court proceedings to secure the mutual trust between the attorney and his client).

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 the Austrian bar association and therefore 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 or her 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.

There are no explicit stipulations protecting communication 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 statutes (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 statutory 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### AZERBAIJAN

#### **Baker Botts L.L.P.**

*(Lex Mundi Member Firm for Texas, USA)*

#### CONTACT INFORMATION:

##### **Bakhtiyar Mammadov**

Baker Botts L.L.P.

6-10 Vagif Mustafa-zadeh Street

3<sup>rd</sup> Floor, Icheri Sheher

Baku, Azerbaijan AZ1000

Tel: 994.12.497.6.3.88/ Fax: 994.12.497.6.3.91

Email: [Bakhtiyar.Mammadov@bakerbotts.com](mailto:Bakhtiyar.Mammadov@bakerbotts.com)

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).



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **BAHAMAS**

#### **McKinney, Bancroft & Hughes**

**CONTACT INFORMATION:**

**Michael F.L. Allen**

McKinney Bancroft & Hughes

Mareva House, 4 George Street

P.O. Box N-3937

Nassau, Bahamas

Tel: 242.322.4195/ Fax: 242.328.2520

Email: [MFAllen@mckinney.com.bs](mailto:MFAllen@mckinney.com.bs)

Provided they are acting in their capacity as legal advisers and are professionally qualified Communication (both oral and written statements) between in-house counsel and officers, directors, servants and agents of their employer for the broad purpose of giving and or receiving legal advice attract the same legal/professional privilege as communications between attorneys and their clients. The privilege extends to communications between in-house counsel 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 counsel, which are prepared, sent or received confidentially as part of the process of giving or receiving legal advice will be privileged. The privilege does not extend to casual conversations with in-house counsel or communications outside the scope of securing advice or anticipated litigation or for the purpose of enabling either party to commit a crime or a fraud.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### BAHRAIN

#### Hassan Radhi & Associates

##### CONTACT INFORMATION:

**Jalila Sayed Ahmed**

Hassan Radhi & Associates

Suite 605, Diplomat Tower

Diplomatic Area, P.O. Box 5366

Manama, Bahrain

Tel: 973.535252/ Fax: 973.533358

Email: [radhilaw@batelco.com.bh](mailto:radhilaw@batelco.com.bh)

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. This provision is applicable to both in-house counsel who is non-Bahraini and Bahraini not on the Rolls.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **BANGLADESH** **The Law Associates**

**CONTACT INFORMATION:**

**M. Amir-Ul Islam**

The Law Associates

203 Concord Tower, 2<sup>nd</sup> Floor

113 Kazi Nazrul Islam Ave.

Dhaka 1000, Bangladesh

Tel: (880)2933-0877/ Fax: (880)2933-7746

Email: [amir@bdmail.net](mailto:amir@bdmail.net)

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 cannot 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:

- 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.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **BARBADOS Clarke Gittens & Farmer**

**CONTACT INFORMATION:**

**Rosalind Bynoe**

Clarke Gittens & Farmer

Parker House, Wildey Business Park

Wildey Road, St. Michael

Barbados

Tel: 246-436-6287/ Fax: 246-436-9812

Email: [rlcb@clarkes.com.bb](mailto:rlcb@clarkes.com.bb)

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 are under a duty to report to the anti-money laundering authority any business transactions where the identity of the person involved, the transaction or any circumstance concerning that business transaction gives the attorney reasonable grounds to suspect that the transaction involves the proceeds of a crime, the financing of terrorism or is of an unusual nature.

Attorneys are required to report to the Anti-Money Laundering Authority all currency exchanges of US\$5,000.00 or more and all instructions for transfers of international funds of US\$5,000.00 or more, whether by telegraph or wire into and out of Barbados where the transaction appears to be an unusual nature.

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### BELGIUM

#### Liedekerke Wolters Waelbroeck Kirkpatrick

##### CONTACT INFORMATION:

**Aimery de Schoutheete**

Liedekerke Wolters Waelbroeck Kirkpatrick

Boulevard de l'Empereur 3

B-1000 Brussels, Belgium

Tel: 32.2.551.15.15/ Fax: 32.2.551.14.14

Email: [a.deschoutheete@liedekerke-law.be](mailto:a.deschoutheete@liedekerke-law.be)

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

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

##### Professional Secrecy

Professional secrecy is an obligation imposed to all persons, which obtained secret information because of their position or profession. The source of this obligation varies from one profession to another. Violation of this obligation is punishable by law (art. 458 Criminal Code).

##### Confidentiality

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

##### Legal Privilege

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

##### 1.1 Organization of the profession

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

These “in-house counsels are the only ones entitled to bear the title of “*Juriste d’entreprise / Bedrijfsjurist*”<sup>210</sup>.

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

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<sup>210</sup> Article 6 of the Law of March 1, 2000

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

As required by law<sup>211</sup>, the *Institut / Instituut* issues ethical rules, sets up a disciplinary regime to be approved by Royal decree and exercises effective disciplinary power through specific bodies, namely the *commission de discipline / tuchtcommissie* and the *commission d'appel / beroepscommissie*, both chaired by magistrates appointed by the King. The *Juristes d'entreprise / Bedrijfsjuristen* must abide by these rules and they are sanctioned in case of infringement.

### 1.2 Legal Privilege

Article 5 of the law of March 1, 2000, as commented by the ethical rules issued by the Institute, provides that all correspondence between a client and a *Juriste d'entreprise / Bedrijfsjurist* containing or seeking legal opinion is confidential<sup>212</sup>. Therefore, if a manager asks his/her *Juriste d'entreprise / Bedrijfsjurist* a legal opinion, both the correspondence seeking and containing the legal opinion will be confidential.

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

Article 5 of the law of March 1, 2000, does not expressly refer to article 458 of the Criminal Code. Yet, although the matter remains controversial, article 458 of Criminal Code also applies, according to eminent authors to the *Juriste d'entreprise / Bedrijfsjurist* where he/she gives a legal opinion so that any infringement to his/her duty not to reveal what is confidential will give rise to criminal sanctions in the same way as for external lawyers<sup>213</sup> (Annex B).

### 1.3 Protection and seizure of documents

According to the same authors, the principles applicable in case of civil or criminal enquiry at an *Advocat's / Advocaat's* office are applicable *mutatis mutandis* in case of enquiry at a *Juriste d'entreprise's / Bedrijfsjurist's* office as far as his/her legal opinions are concerned<sup>214</sup>.

As to the rules governing civil or criminal enquiries at the office of a *Juriste d'entreprise / Bedrijfsjurist*, there is no law or regulation on the subject.

However, the *Institut / Instituut* has issued guidelines describing the role of the President of the *Institut / Instituut* in case of enquiries. Proposals of agreements and memoranda are currently under discussion with the local Public Ministry containing some practices already sanctioned by use.

It is worth mentioning some of these practices:

- The examining magistrate must personally lead the enquiry;
- The examining magistrate must warn the President of the *Institut / Instituut* in advance and ask him to be present or represented during the enquiry;
- The examining magistrate is not allowed to seize confidential documents;

<sup>211</sup> Article 2 of the Law of March 1, 2000

<sup>212</sup> Article 5 of the Law of March 1, 2000

<sup>213</sup> A Benoit-Moury et N. Thirion, « Secret professionnel, confidentialité et juriste d'entreprise : la nouvelle donne », *Journal des Tribunaux*, Bruxelles, Larcier, 2001, n°33.

<sup>214</sup> A Benoit-Moury et N. Thirion, « Secret professionnel, confidentialité et juriste d'entreprise : la nouvelle donne », *Journal des Tribunaux*, Bruxelles, Larcier, 2001, n° 6029, p. 791, n°30.

- In order to figure out whether a document is confidential, the President of the *Institut / Instituut* of his/her delegates should be the only one looking at the content of the document and making the selection;
- In case of disagreement regarding the confidentiality of a document, the document has to be stored in an envelope to be addressed later on by the President of the *Institut / Instituut* and the examining magistrate.

### **Annex**

#### Article 458 of the Belgian Criminal Code

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

(Translated from French to English)

«Doctors, surgeons, health officers, pharmacists, mid-wives and all other persons who, either by profession or otherwise, have knowledge of confidential information, will be punished by eight days of imprisonment and 500 Francs if they reveal the confidential information, except in instances when they are called to testify in court and when they are obliged by law.»

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

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

(Translated from French to English)

Opinions given by company lawyers to the benefit of their employers and within the framework of their activity as legal counsel are confidential.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**BELIZE**

**Barrow & Williams Attorneys-at-Law**

**CONTACT INFORMATION:**

**Rodwell Williams**

Barrow & Williams

P.O. Box 617

99 Albert Street

Belize City, Belize

Tel: 501.2.75280/ Fax: 501.2.75278

Email: [rodwell@btl.net](mailto:rodwell@btl.net)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### BERMUDA

#### Conyers Dill & Pearman

**CONTACT INFORMATION:**

**Narinder Hargun**

**Ben Adamson**

Conyers Dill & Pearman

Clarendon House, 2 Church Street

Hamilton HM 11, Bermuda

Tel: 441.295.1422/ Fax: 441.292.4720

Email: [nkhargun@cdp.bm](mailto:nkhargun@cdp.bm)

The rules on attorney – client privilege in Bermuda are based on English common law principles. Any communication verbal or written passing between a party and his attorney or other legal professional adviser is privileged from disclosure if the following circumstances exist:

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

Such legal professional is not absolute and will be lost if:

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

These common law rules can be displaced by statute. In Bermuda, the statutory regime respects the rules of privilege and in general specifically provides that an attorney cannot be forced to disclose privileged information to the authorities (see for example the USA-Bermuda Tax Convention Act 1986, the Proceeds of Crime Act 1997, the Banks and Deposit Companies Act 1999, and the Investment Business Act 2003, and the Exchange Control Regulations 1973).

The Proceeds of Crime Act does however allow attorneys to choose to inform the authorities if they suspect that the client is involved in money laundering. If they do so, the Act provides that such report will not be treated as a breach of confidence or give rise to any civil liability. Attorneys may feel obliged to make such reports if they are, or suspect they are, (1) assisting or facilitating someone to carry out money laundering or (2) are themselves acquiring property or funds which they believe are the proceeds of criminal activity. Both these activities are criminal offences, to which a report provides a defense.

The above is naturally an overview. Each case should be considered on its own merits and advice taken from Bermudian attorneys.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **BOLIVIA**

#### **C.R.& F. Rojas, Abogados**

**CONTACT INFORMATION:**

**Maria del Carmen Ballivian**

C.R.& F. Rojas, Abogados

Federico Zuazo 1598, Edif. Park Inn, Piso 11

P.O. Box 662

La Paz, Bolivia

Tel: 591.2.231.3737/ Fax: 591.2.211.2775

Email: [mariac@rojas-lawfirm.com](mailto:mariac@rojas-lawfirm.com)

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:

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### BRAZIL Demarest e Almeida

**CONTACT INFORMATION:**

**Roberto Pasqualin.**  
Demarest e Almeida  
Avenida Pedroso de Moraes 1201  
Centro Cultural Ohtake  
05419-001 Sao Paulo, SP Brazil  
Tel: 55.11.3888.1800  
Fax: 55.11.3888.1700  
Email: [rpasqualin@demarest.com.br](mailto:rpasqualin@demarest.com.br)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### BRITISH VIRGIN ISLANDS O'Neal Webster

#### CONTACT INFORMATION:

**Kerry Anderson**  
O'Neal Webster  
Simmonds Building  
Wickham's Cay 1  
P.O. Box 961  
Road Town, Tortola  
British Virgin Islands  
Tel: 284.494.5808/ Fax: 284.494.5811  
Email: [kanderson@owomfg.com](mailto:kanderson@owomfg.com)

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

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

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

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

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

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

However, the common law position must be viewed against the background of the statutory regime in the British Virgin Islands, which is aimed at preventing and detecting money

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

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

One obvious in-road into the attorney-client privilege is contained in the provisions of the Financial Services (International Co-operation) Act. Under this Act an attorney may be required, in order to assist a foreign regulatory body within the meaning of the Act, to disclose the name and address of his client, though he cannot be required to produce any other privileged information.

Finally, it must be emphasized that the foregoing is intended only as a general overview of the law in the British Virgin Islands. Each case should be considered on its own merits. Any person who requires advice on his/her own legal position should seek the opinion of a British Virgin Islands attorney.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **BULGARIA** **LIC – Penkov, Markov & Partners**

#### **CONTACT INFORMATION:**

**Vladimir Penkov**

Lega InterConsult Penkov, Markov and Partners

22-A Iztok Dstr.

1113 Sofia, Bulgaria

Tel: 359.2.732.936/ Fax: 359.2.722.452

Email: [lega@bulnet.bg](mailto:lega@bulnet.bg)

The attorney-client privilege is regulated in Bulgarian legislation by article 33 of the new Law on Advocacy (in force from July 1, 2004), which contains the regime of attorneys-at-law (advocates). This provision states that the files, the documentation, the electronic documents, PC equipment and other information carriers, as well as the client-attorney correspondence, are inviolable. They cannot be reviewed, copied, examined or forfeited and cannot be used as evidence either.

The conversations between the attorney-at-law and his client cannot be eavesdropped. Records of conversations eventually made cannot be used as evidence and must be immediately destroyed.

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

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 counsels and the other officers and employees of the company. The in-house counsel in principle is treated as a regular employee of the respective company and the information he keeps as well as his correspondence within the company is subject to the general regime of internal company information, except as where the company has elaborated a special regime.

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

General protection of correspondence – pursuant to Article 34 of the Constitution stating that the freedom and privilege of correspondence are inviolable, except where otherwise is necessary for revealing and preventing a grave crime and permission is obtained by the judicial authorities; Special protection, provided by various laws of the so called state secret, official secret, commercial secret and banking secret – such provisions are spread over a number of acts, but the common feature is that all of them (with certain exclusions of state secret) are to one or another extent protected, except for where the state through its authorities requires this information for taxation, crime prevention, dispute resolution and some other purposes, which makes such secrets protected against third parties but not that much against the state, which could hardly qualify as client-attorney privilege as regulated in the Law of 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- FEDERAL

Privilege attaches to communications between a solicitor and client or their agents/employees made in order to obtain professional legal advice<sup>215</sup>. Privilege also attaches in a number of other circumstances, including to certain communications made to non-clients in contemplation of litigation<sup>216</sup>. 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<sup>217</sup>. However, privilege does not attach to portions of communications made in another capacity, which the in-house counsel holds, such as executive or director<sup>218</sup>. 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.

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<sup>215</sup> R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* [Toronto: Butterworths, 1993] at 7-8.

<sup>216</sup> Manes & Silver, *supra* at 8-9.

<sup>217</sup> Manes & Silver, *supra* at 53-55

<sup>218</sup> 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



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- ALBERTA

#### Blake, Cassels & Graydon LLP

##### CONTACT INFORMATION:

**Kristi D. Lalach**

**Ken Mills**

Blake, Cassels & Graydon LLP

#3500, 855 Second Street S.W.

Calgary, AB T2P 4J8

Tel: 403.260.9736/ Fax: 403.269.9700

Email: [Kristi.lalach@blakes.com](mailto:Kristi.lalach@blakes.com)

Email: [Ken.mills@blakes.com](mailto:Ken.mills@blakes.com)

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 and Excise (No. 2)*<sup>219</sup>. 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)<sup>220</sup>. 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<sup>221</sup>. In determining whether or not privilege is applicable, the character of the work performed will be examined on a case-by-case basis<sup>222</sup>. Generally speaking, privilege does not extend to communications with in-house counsel where legal advice is not sought or offered, where it is not intended to be confidential or where the communication has the purpose of furthering unlawful conduct<sup>223</sup>.

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 providing or receiving legal advice, the communications will be privileged. However, a lawyer employed in a non-legal capacity (e.g. a manager) may not have communications protected by privilege, even if that person is providing legal advice<sup>224</sup>.

<sup>219</sup> [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

<sup>220</sup> *Gainers Inc. v. Canadian Pacific Ltd.*, [1993] 4 W.W.R. 609 (Alta. Q.B.).

<sup>221</sup> *Klemke Mining Corp. v. Shell Canada* (2002), 332 A.R. 154 (Alta. Q.B.)

<sup>222</sup> *Pritchard v. Ontario (Human Rights Commission)* (2004), 238 D.L.R. (4<sup>th</sup>) 1 (S.C.C.)

<sup>223</sup> *Solosky v. The Queen*, [1980] 1 S.C.R. 821, cited with approval in *Pritchard v. Ontario (Human Rights Commission)* (2004), 238 D.L.R. (4<sup>th</sup>) 1 (S.C.C.)

<sup>224</sup> *Husky Oil Operations Ltd. et al v. MacKimmie Matthews et al* (1999), 241 A.R. 115 (Alta. Q.B.).



In Alberta, in-house counsel is 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 counsels 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- BRITISH COLUMBIA Farris, Vaughan, Wills & Murphy LLP

#### CONTACT INFORMATION:

**Ludmila B. Herbst**

Farris, Vaughan, Wills & Murphy LLP  
2600-700 West Georgia Street  
Vancouver, British Columbia V7Y 1B3  
Tel: 604.661.1722/ Fax: 604.684.9151  
Email: [lherbst@farris.com](mailto:lherbst@farris.com)

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

Whether or not solicitor-client privilege attaches . . . depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that [counsel] is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges.<sup>225</sup>

Later, in *Pritchard v. Ontario (Human Rights Commission)*, it was held that the mere fact the lawyer is “in house” does not remove the privilege that might attach to the communication or otherwise change its nature.<sup>226</sup> The court did caution, this time through the words of Justice Major, that:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose.<sup>227</sup>

Particularly as in-house counsel may perform a variety of non-legal functions for their employers, not every communication will be privileged. A central issue is whether a given communication is made by or to in-house counsel in his/her role as “lawyer”.

In a recent case, the Supreme Court of British Columbia noted that solicitor-client privilege may protect not only “legal advice relating to interpretations of the law”, but also “advice as to the appropriate conduct to take in a given legal context”.<sup>228</sup> In that case, the plaintiff sought disclosure of a document received by the defendant from its in-house counsel on the basis that it contained advice solely relating to policy. It was found that, while such a reading of the

<sup>225</sup> [1999] 1 S.C.R. 565 at 602, citing, in part, *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise* (No. 2), [1972] 2 All E.R. 353 (C.A.) at 376, per Lord Denning M.R.

<sup>226</sup> [2004] 1 S.C.R. 809 at 819.

<sup>227</sup> *Ibid.* at 818.

<sup>228</sup> *Reid v. British Columbia (Egg Marketing Board)*, 2006 BCSC 346 at para. 12 (CanLII).

document was “semantically available”; it could also be interpreted as providing advice on the “legal ramifications of a certain course of action” and was privileged.<sup>229</sup>

More generally, solicitor-client privilege does not protect communications (including by and to in-house counsel) in the following circumstances:

- (I) Where legal advice is not sought or offered;<sup>230</sup>
- (II) Where the communication is not intended to be confidential;<sup>231</sup>
- (III) Where the communication is itself criminal or is intended to obtain legal advice to facilitate the commission of a crime;<sup>232</sup>
- (IV) Where it is absolutely necessary that the privilege be set aside (most notably where “innocence is at stake”);<sup>233</sup>
- (V) Where the privilege is waived, either expressly or impliedly, by the client.<sup>234</sup>

While solicitor-client privilege does not protect communications in the above situations, there may be alternative methods of protecting information from disclosure. One is for a different form of privilege, such as litigation privilege, to attach. Litigation privilege “arises and operates *even in the absence of a solicitor-client relationship*, and it applies indiscriminately to all litigants, whether or not they are represented by counsel”.<sup>235</sup> Its purpose is “to create a ‘zone of privacy’ in relation to pending or apprehended litigation”; although in so doing it is limited in both scope and duration.<sup>236</sup> While the full parameters of the privilege have not been determined, notably subject to this privilege may be documents created for the dominant purpose of litigation.<sup>237</sup>

Depending on the client involved, another means of avoiding public disclosure of certain documents may be by statutory authority. In British Columbia the *Freedom of Information and Protection of Privacy Act* exempts public bodies from disclosing information in certain situations. In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* disclosure was sought of certain documents obtained by in-house counsel during the course of an investigation. The court held that although the documents were not protected by either solicitor-client or litigation privilege, they were nevertheless exempt from disclosure pursuant to section 13(1) of the Act, which allows a public body to refuse to disclose information that would “reveal advice or recommendations developed by or for a public body or minister”.<sup>238</sup>

Note as well that in-house counsels in British Columbia are bound by confidentiality obligations reflected in The Law Society of British Columbia’s *Professional Conduct Handbook*. Chapter 5, Rule 1 provides:

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<sup>229</sup> Ibid., at paras. 13-14.

<sup>230</sup> Pritchard, *supra* note 2, at 817.

<sup>231</sup> Ibid.

<sup>232</sup> Campbell, *supra* note 1, at 605.

<sup>233</sup> Lavallee, Rackel & Heintz v. Canada (Attorney General) [2002] 3 S.C.R. 209 at 232; Goodis v. Ontario (Ministry of Correctional Services), [2006] 2 S.C.R. 32 at para. 20.

<sup>234</sup> Campbell, *supra* note 1, at 613.

<sup>235</sup> Blank v. Canada (Minister of Justice), [2006] 2 S.C.R. 319 at para. 32, per Fish J.

<sup>236</sup> Ibid. at para. 34; R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 90.

<sup>237</sup> Blank, *supra* note 12, at para. 59.

<sup>238</sup> (2002), 9 B.C.L.R. (4th) 1 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 83.

A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- MANITOBA Thompson Dorfman Sweatman LLP

#### CONTACT INFORMATION:

**Michael Sinclair**

Thompson Dorfman Sweatman LLP  
Toronto Dominion Centre  
2200-201 Portage Avenue  
Winnipeg, Manitoba R3B 3L3, Canada  
Tel: 204.934.2493/ Fax: 204.934.0513  
Email: [pms@tdslaw.com](mailto:pms@tdslaw.com)

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;
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. 6<sup>th</sup> 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- NEWFOUNDLAND AND NOVA SCOTIA McInnes Cooper

#### CONTACT INFORMATION:

**John D. Bonn**

McInnes Cooper

1601 Lower Water Street

Halifax, Nova Scotia B3J 2V1

Tel: 902.424.1380/ Fax: 902.425.6350

Email: [john.bonn@mcinnescooper.com](mailto:john.bonn@mcinnescooper.com)

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 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:

*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.*





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **CANADA- ONTARIO Blake, Cassels & Graydon LLP**

#### **CONTACT INFORMATION:**

**Paul Schabas**

Blake, Cassels & Graydon LLP  
Box 25, Commerce Court West  
199 Bay Street

Toronto, Ontario M5L 1A9

Tel: 416.863.4247/ Fax: 416.863.2653

Email: [paul.schabas@blakes.com](mailto:paul.schabas@blakes.com)

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

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

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

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

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

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

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



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CANADA- SASKATCHEWAN MacPherson Leslie & Tyerman LLP

#### CONTACT INFORMATION:

**Leonard D. Andrychuk**

MacPherson Leslie & Tyerman LLP

1500 Hill Centre I

1874 Scarth Street

Regina Saskatchewan S4P 4E9

Tel: (306) 347-8440/ Fax: (306) 352-5250

Email: [landrychuk@mlt.com](mailto:landrychuk@mlt.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CAYMAN ISLANDS Walkers

#### CONTACT INFORMATION:

**Sara Collins-Francis**

Walkers

Walker House, Mary Street

P.O. Box 265GT

Grand Cayman Islands

Tel: 345.914.4204/ Fax: 345.945.6544

Email: [Scollins@walkers.com.ky](mailto:Scollins@walkers.com.ky)

To date, there has been no reported Cayman Islands case considering in any detail the concept of attorney-client privilege in the context of in-house counsel; however, the courts of the Cayman Islands would be more than likely to follow English common law authorities. Until recently, this was reflected by the decision of Lord Denning M.R. in *Alfred Crompton 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. found that salaried legal advisors are regarded by the law as in every respect in the same position as those who practise on their own account and that they and their clients have the same privileges. However, in *Three Rivers District Council and others v. Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474, the definition of the "client" where legal advice privilege is concerned was construed very narrowly and now, as a result, may not encompass certain third parties. For instance, although communications between in-house counsel and external lawyers will usually be privileged, it is now unclear as to whether communications between in-house counsel and other members of staff within the same organisation will be treated with the same privilege.

It is therefore recommended that where legal advice is being given by in-house counsel, they should ensure that there is a clear line of communication between them and those within the organisation to whom they are giving advice as well as take the added precaution of documenting who the "client" is in each case i.e. who is giving them instructions/being advised.

Additionally, 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.) In addition, 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 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 Crompton*).

It is also important to note that in-house counsel in the Cayman Islands (as all other professionals) are subject to statutory requirements<sup>239</sup> 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.

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<sup>239</sup> The Proceeds of Criminal Conduct Law (2005 Revision) and the Money Laundering Regulations (2006 Revision)



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **CHANNEL ISLANDS- JERSEY Mourant du Feu & Jeune**

**CONTACT INFORMATION:**

**Jonathan Speck**

P.O. Box 87

22 Grenville Street

St. Helier, Jersey JE4 8PX

Channel Islands

Tel: 44.1534.609000/ Fax: 44.1534.609333

Email: [Jonathan.Speck@mourant.com](mailto:Jonathan.Speck@mourant.com)

The situation in Jersey is likely to be 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 legal advice or litigation privilege as those in any lawyer/client relationship. Therefore, as long as the communication is part of the giving or obtaining of legal advice (i.e. the in-house Counsel's legal role, rather than any executive 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 and if it otherwise satisfies the requirements for legal professional privilege. It should be noted however that legal professional privilege is subject to certain limitations as it is in England, but it would be inappropriate to endeavor to provide an exhaustive list, and we suggest that specific enquiry be made if circumstances so require. A full briefing note for clients is available upon request.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CHILE

#### Claro & Cía., Abogados

**CONTACT INFORMATION:**

**Dr. Christian Eyzaguirre**

Claro & Cía., Abogados

Apoquindo 3721, piso 13

Casilla 1867

Las Condes

Santiago, Chile

Tel: 56.2.367.3000/ Fax: 56.2.367.3003

Email: [ceyzaguirre@claro.cl](mailto:ceyzaguirre@claro.cl)

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.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **CHINA**

#### **Jun He Law Offices**

**CONTACT INFORMATION:**

**Rebecca Chao**

Jun He Law Offices

China Resources Building, 20<sup>th</sup> Floor

8 Jianguomenbi Avenue

Beijing 100005

People's Republic of China

Tel: 86.10.8519.1300/ Fax: 86.10.8519.1350

Email: [chaoyh@junhe.com](mailto:chaoyh@junhe.com)

Attorney-client privilege is not a well-established principle under the laws of the People's Republic of China. The Law of Attorneys of the People's Republic of China ("PRC") and the PRC Code of Ethics for Attorneys both only provide that attorneys shall keep confidential trade secrets obtained from their clients and privacy of their clients. However, the law is silent on whether communications between attorneys and their clients shall be kept confidential as an attorney-client privilege.

In the PRC the law does not differentiate between in-house counsel and external attorneys. Therefore, it is understood that the same rule also applies to in-house counsel on this matter.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **COLUMBIA Brigard & Urrutia**

#### **CONTACT INFORMATION:**

**Carlos Umana**  
Brigard & Urrutia  
Calle 70 No 4-60  
Bogota, Colombia  
Tel: 57.1.3462011/ Fax: 57.1.3100609  
Email: [cumana@brigardurrutia.com.co](mailto:cumana@brigardurrutia.com.co)

Article 47 of Decree No. 196 of 1971 imposes on all lawyers the duty of keeping and safeguarding attorney-client privilege. This regulation does not make a distinction between in-house counselors and external lawyers; thus, by virtue of their status as lawyers, in-house counsels are also bound to maintain and respect professional secrecy.

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

As regards legal practitioners, the duty to respect attorney-client privilege (regardless of the type of counseling that they carry out) has certain legal consequences, especially in connection to criminal matters. Article 68 of the new Criminal Procedure Code (recently enacted by Congress by virtue of Law 906 of August 31, 2004) exonerates persons who are bound to keep professional secrecy from the duty to inform judicial authorities of criminal conducts that they have known by reason of the exercise of their profession. Accordingly, article 358 of the above mentioned Code establishes that lawyers are not bound to declare before judicial authorities on matters of which they have knowledge by virtue of the exercise of their profession. Moreover, article 258 of the Criminal Code (Law 599 of 2000) qualifies as a criminal offense punishable by a fine, the act of using, in an undue manner and with the purpose of obtaining benefits, non-public information that has been known by the employees of private entities by reason of their functions, a figure that would be relevant for in-house counsels who unduly disclose protected information with a view to obtaining benefits from it.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **COSTA RICA Facio & Cañas**

#### **CONTACT INFORMATION:**

#### **Rodrigo Oreamuno B.**

Facio & Canas

Barrio Tournon

Apartado 5173

San Jose 1000, Costa Rica

Tel: 506.256.5555/ Fax: 506.257.1753

Email: [roreamuno@fayca.com](mailto:roreamuno@fayca.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CYPRUS

#### **Dr. K. Chrysostomides & Co.**

**CONTACT INFORMATION:**

**Chryso Pitsilli-Dekartis**

Dr. K. Chrysostomides & Co.

1, Lmbousa Street, P.O. Box 22119

Nicosia 1095, Cyprus

Tel: 357.2.77.70.00/ Fax: 357.2.77.35.66

Email: [kchrysos@logos.cy.net](mailto:kchrysos@logos.cy.net)

In Cyprus, unlike England, the distinction between solicitors and barristers does not exist. All persons that are admitted to the Bar are considered to be advocates and are regulated by the Advocates Law (Cap. 2) and the Advocates Professional Etiquette Regulations of 2002 (“the Regulations”). The Regulations provide that the advocate – client privilege applies to, inter alia, the dealings of all the advocates with their clients. However, the extent to which the relevant provisions of the Regulations apply to in-house lawyers is questionable, in so far as the in-house lawyers do not have “clients”. Having said that, and in the absence of a clear regulation of the issue, we will hereby provide a summary of the provisions of the Regulations regarding the issue of privilege.

The strict adherence to the confidentiality of a case is sought through the advocate – client privilege because it creates the important prerequisite to the attainment of trust between an advocate and his client. In this regard, an advocate is regarded as a custodian of the confidential information and of the secrets that have been entrusted to him by his client.

A fundamental right and duty that an advocate 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 advocate – client privilege can generally be invoked by an advocate whenever he is dealing with a judicial or any other authority. However, if a client wishes to raise any charges against his advocate, or if an advocate 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 advocate 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 advocate 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 failed to materialize.

Disclosure of communications between an in-house lawyer and the company he serves may, in the alternative, be protected by the inclusion of confidentiality clauses in the employment contract of the in-house lawyer. In the case that these clauses go further than the Regulations, they might add further protection to the confidentiality of the communications between the in-house lawyer and the company. However, in the absence of any case law on this subject, it is doubtful whether such a clause would stand in court.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### CZECH REPUBLIC **Prochazka Randl Kubr**

#### CONTACT INFORMATION:

**Martin Kriz**

Prochazka Randl Kubr

Jachymova 2

110 00 Prague 1, Czech Republic

Tel: 420.221.430.111/ Fax: 420.224.235.450

Email: [mkriz@prkadvo.cz](mailto:mkriz@prkadvo.cz)

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

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

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



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### DENMARK

#### **Kromann Reumert**

**CONTACT INFORMATION:**

**Jorgen Kjergaard Madsen**

Kromann Reumert

Sundkrogsgade 5

Copenhagen, Denmark DK 2100

Tel: 45.70.12.12.11/ Fax: 45.70.12.13.11

Email: [jkm@kromannreumert.com](mailto:jkm@kromannreumert.com)

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.

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 2006, the Danish Parliament introduced the Act on Measures to Prevent Money Laundering and Financing of Terrorism (Act. no 117/2006 the "Money Laundering Act"), under which members of the Danish Bar and Law Society, which in practice means all attorneys with a practising certificate, may report suspicious transactions. The attorney, however, is not obligated to report suspicious transactions.

The Money Laundering Act describes suspicious transactions as activities, which because of their specific character, is believed to have a potential connection to money laundering or financing of terrorism. This specifically applies to complex transactions, transactions that are unusually large and all patterns of transactions, which in relation to the specific client seems to be unusual.

When receiving a report from an attorney, the Secretariat of the Danish Bar and Law Society assesses whether the transaction may involve laundering of money or financing of terrorism. If so, the Danish Bar and Law Society will immediately notify the Public Prosecutor.

An attorneys report to the Danish Bar and Law Society is not considered a breach of the attorney-client privilege.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **DOMINICAN REPUBLIC Pellerano & Herrera**

**CONTACT INFORMATION:**

**Annie Luna**

Pellerano & Herrera

Av. John F. Kennedy #10

Santa Domingo, Dominican Republic

Tel: 809.541.5200/ Fax: 809.567.0773

Email: [a.luna@phlaw.com](mailto:a.luna@phlaw.com)

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.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **ECUADOR**

#### **Pérez Bustamante y Ponce**

##### **CONTACT INFORMATION:**

**Jose M. Perez**

Perez Bustamante & Ponce Abogados  
Avenida Republica de El Savlador 1082  
P.O. Box 17-1-3188  
Quito, Ecuador  
Tel: 593.2.226.0666/ Fax: 593.2.225.8038  
Email: [jperez@pbplaw.com](mailto:jperez@pbplaw.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### EGYPT

#### Shalakany Law Office

**CONTACT INFORMATION:**

**Rafiah Ragheb**

**Malack El Masry**

Shalakany Law Office

12, El Marashly Street

Cairo, Egypt

Tel: 202.735.3331/ Fax: 202.737.0661

Email: [mail@slo.com.eg](mailto:mail@slo.com.eg)

Email: [malack.elmasry@slo.com.eg](mailto:malack.elmasry@slo.com.eg)

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

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

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

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **EL SALVADOR Romero Pineda & Asociados**

**CONTACT INFORMATION:**

**Jose Roberto Romero**  
Romero Pineda & Asociados  
Final 67 Avenida Sur, Pasaje A #11-C  
Colonia Roma  
San Salvador, El Salvador  
Tel: 503.298.3100/ Fax: 503.298.6389  
Email: [jose@romeropineda.com](mailto:jose@romeropineda.com)

In El Salvador, attorney/client privilege covers all confidential communications between attorneys and clients. This communications must be protected from disclosure, so attorneys may not disclose information given to them in confidence by a client.

Article 187 of the Criminal Code provides 6 months to 2 years imprisonment as penalty for a person who provides, reveals or releases confidential information of which he/ she is privy by reason of his/her profession (professional secrets). Additionally, he/she can be sanctioned by not permitting the exercise of his/her profession for a period of one to two years.

Legal counsel are entitled and have full right to maintain and protect their confidential information and professional secrets before courts and judges, when they are called to depose in any legal proceedings that may expose them to reveal or disclose confidential information or professional secrets. The Code of Criminal Proceedings provides that lawyers may not depose or testify regarding facts or confidential information of which they are privy by reason of their profession, in accordance with the definition of “confidential information”. However, they cannot refuse to provide testimony if they have been released by the interested party/client from revealing the confidential information.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### ESTONIA Lepik & Luhaäär- LAWIN

**CONTACT INFORMATION:**

**Peeter Lepik**

**Viive Naslund**

Lepik & Luhaäär- LAWIN

Dunkri Street 7

Tallinn 10123, Estonia

Tel: 372.630.6460/ Fax: 372.630.6463

Email: [lepik@all.ee](mailto:lepik@all.ee)

Email: [viive.naslund@lawin.ee](mailto:viive.naslund@lawin.ee)

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

Therefore the communication between in-house counsel 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### EUROPEAN UNION

#### CONTACT INFORMATION:

Author for Germany : **Dr. Christian Pelz**

Also see authors for: Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Scotland, Slovak Republic, Spain and Sweden

Obligations and sanctions for the enforcement of the European prohibition of cartels and prevention of dominant market positions are provided for by Arts. 81 ff. EC and Regulation (EC) No. 1/2003 of the Council of 16.12.2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (OJ L1 04.01.2003). In competition law proceedings, the European Commission investigates and penalizes offences (in particular, by imposing fines as administrative penalties) on the basis of powers which are akin to those of a prosecution authority, although competition offences are not crimes in the real sense.

Since the judgment of the European Court of Justice of 18.05.1982 in the case of AM & S (Rs. 155/79, Slg. 1982, 1575), it has been acknowledged that lawyers' privilege applies only to the correspondence and communication between companies and their external legal advisors. Privilege does not extend to in-house lawyers, because of the lack of independence and their subjection to the instructions and interests of the company. In-house lawyers, therefore, were not entitled either to refuse to give information or to resist seizure of correspondence sent or received by them.

The Court of First Instance on 04.04.1999 in the Hilti case (Rs. T-30/89, Slg. 1990, II-163) decided that lawyers' privilege also covered communications and internal documents from in-house lawyers in which only communications from external lawyers were summarized and repeated.

In the case of Akzo Nobel Chemicals and Akcros Chemicals (Rs. T-125/03 and T-253/03 – accessible under <http://curia.europa.eu/jurisp>), the Court of First Instance by decision of 17 September 2007 held, with reference to the AM&S case but deviating from doubts expressed in an decision for injunctive relief in the same matter, that communication between companies and in-house counsel in no case is privileged as an in-house counsel, even if he is admitted to the Bar or Law Society, is not an independent lawyer but structurally, hierarchically and functionally related to the company.

Further, the Court of First Instance more clearly defined the scope of legal privilege in competition cases. Privileged is communication between company or in-house lawyer and external counsel as well as all internal preparatory documents drawn up exclusively (!) for the purpose and with the sole aim of seeking legal advice. The fact that a document was discussed with an outside counsel does not suffice if the before mentioned requirements are not met.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **FINLAND**

#### **Roschier, Attorneys Ltd.**

##### **CONTACT INFORMATION:**

**Bernt Juthström**

Roschier, Attorneys Ltd.

Keskuskata 7 A

00100 Helsinki, Finland

Tel: 358.0.20.506.6000/ Fax: 358.0.20.506.6100

Email: [Bernt.Juthstrom@roschier.com](mailto:Bernt.Juthstrom@roschier.com)

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

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



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### FRANCE

#### Gide Loyrette Nouel

**CONTACT INFORMATION:**

**Philippe Xavier-Bender**

Gide Loyrette Nouel  
26, Cours Albert 1er  
75008 Paris, France

Tel: 33.0.1.40.75.61.27/ Fax: 33.0.1.40.75.37.07

Email: [xavierbender@gide.com](mailto:xavierbender@gide.com)

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 either her/his client's secret information, or the legal opinions she/he expresses to the client. A breach of such a duty by lawyers constitutes a professional misconduct that gives rise to disciplinary punishments 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.

Since the Decree of 27 June 2006, lawyers are required to declare to the Public Prosecutor any transaction they have knowledge of which involves sums which they know to be the proceeds of an offence (drug trafficking, fraud against the financial interests of the European Communities, corruption or organised crime, financing of terrorism) and when they execute for and on behalf of their clients any financial or real-property transaction or when they participate by assisting their clients with the preparation or execution of transactions relating to: 1) the buying and selling of real property or business concerns; 2) the management of funds, securities or other assets belonging to the client; 3) the opening of bank current accounts, savings accounts or securities accounts; 4) organisation of the contributions required to create companies; 5) the formation, administration or management of companies; 6) the formation, administration or management of foreign-law trusts or any similar structure. Nevertheless, the president of the Bar of Paris has



claimed that professional secrecy is the main principle while the obligation to declare certain sums or transactions remains the exception.

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.

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 counsel.

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 counsel. A remedy may consist for in-house counsel in avoiding giving written advice especially on competition law. Furthermore, legal advice of major importance should be provided by outside counsel 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### GERMANY

#### **Noerr Stiefenhofer Lutz**

##### **CONTACT INFORMATION:**

**Dr. Christian Pelz**

Noerr Stiefenhofer Lutz

Brienner Str. 28

80333 Munchen

Tel: 49.89.28.628.179/ Fax: 49.89.280.110

Email: [Christian.Pelz@noerr.de](mailto:Christian.Pelz@noerr.de)

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 practice 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 practice 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) (3) 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-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, 2<sup>nd</sup> 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 practice 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 (§ 385 (2) ZPO, § 53 (2) StPO).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### GHANA

#### **Bentsi-Enchill, Letsa & Ankomah**

##### CONTACT INFORMATION:

##### **Kojo Bentsi-Enchill**

Bentsi-Enchill, Letsa & Ankomah  
1<sup>st</sup> Floor, West Wing, Teachers Hall Complex  
4 Barnes Close, Off Barnes Road  
Adabraka, P.O. Box 1632  
Accra, Ghana  
Tel: 233.21.221171/ Fax: 233.21.226129  
Email: [Kojo.bentsi-enchill@belmonline.org](mailto:Kojo.bentsi-enchill@belmonline.org)

In Ghana all Attorney-Client or Lawyer-Client communications are protected from disclosure; no distinction is made between inside counsel and outside counsel.

*The privilege protects the communication between a lawyer and his client as well as the work done for the client as a result of that communication, in the course of rendering a professional service.*

*The relationship-giving rise to the privilege is that relationship between a lawyer and his representatives on the one hand and the client and his representatives on the other. The communication between a lawyer and his client, which will be protected as privileged, is a confidential communication.*

The lawyer-client privilege may arise

1. In relation to lawyer-client communication
2. In relation to professional work done

Are there limitations on the privilege?

The privilege is not absolute and there are limitations. No protection will apply to situation where communication is made under the following circumstances:

- (a) Where there is sufficient evidence to establish that the services of a lawyer were sought or obtained to enable, or aid, any person, including the client, to commit a crime or intentional tort.
- (b) Where the communication is related to a claim between parties disputing an interest through the same deceased client of the lawyer.
- (c) Where the communication is relevant to a breach of duty by a lawyer to his client or vice versa

- (d) When the communication is relevant to the formalities of the execution of a document of a client, where the lawyer is an attesting witness to the execution of the document.
- (e) Where the communication is related to a matter of common interest between two or more clients, and that communication was made by any of them to a lawyer engaged by them in common, when such communication is offered in any proceedings between any of the clients it cannot be claimed as privileged.<sup>240</sup>

It may be observed here that to avoid the abuse of privileges, various discretions have been given the courts to compel disclosure where appropriate.

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<sup>240</sup> Evidence Decree, 1975 (NRCD 323) section 101.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **GREECE**

#### **Zepos & Yannopoulos**

**CONTACT INFORMATION:**

**Dimitris Zepos**

**Ilias Koimtzoglou**

Zepos & Yannopoulos

120, Vas. Sophias Ave.

Athens 115 26, Greece

Tel: 3.010.775.45.71/ Fax: 3.010.770.28.25

Email: [d.zepos@zeya.com](mailto:d.zepos@zeya.com)

Email: [i.koimtzoglou@zeya.com](mailto:i.koimtzoglou@zeya.com)

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.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **GUATEMALA Mayora & Mayora, S.C.**

**CONTACT INFORMATION:**

**Eduardo Mayora**  
Mayora & Mayora, S.C.  
15 Calle 1-04 Zona 10  
Edificio Plaza Céntrica, 3 er. Nivel, Oficina 301  
Guatemala City 01010  
Guatemala  
Tel: 502.366.2531/ Fax: 502.366.2540  
Email: [mayorae@intelnet.gt](mailto:mayorae@intelnet.gt)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### HONDURAS Bufete Gutierrez Falla

**CONTACT INFORMATION:**

**Bradford K. O'Neill**  
Bufete Gutierrez Falla  
Avenida La Paz, No. 2702  
P.O. Box 3175  
Tegucigalpa, Honduras  
Tel: 504236.5455/ Fax: 504.236.6149  
Email: [gufa@cablecolor.hn](mailto:gufa@cablecolor.hn)

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 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, 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.





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### HONG KONG Johnson Stokes & Master

#### CONTACT INFORMATION:

**N.D. Hunsworth**

Johnson Stokes & Master  
16<sup>th</sup>-19<sup>th</sup> Floors, Prince's Building  
10 Charter Road, Hong Kong  
Tel: 852.2834.4417/ Fax: 852.2103.5036  
Email: [Nicholas.hunsworth@jms.com](mailto:Nicholas.hunsworth@jms.com)

In Hong Kong, legal professional privilege may be divided into two types: “legal advice privilege” and “litigation privilege”. Whether or not a document is covered by one of these types of privilege is determined by the purpose for, and circumstances in which, the document is created.

“Legal advice privilege” protects communications made confidentially between a client and its lawyer (but not third parties) in a relevant legal context. Therefore, this privilege protects from disclosure any documents created in order to obtain general legal advice, without any dispute having arisen. Legal advice is any advice which explicitly or implicitly requires a lawyer to put on “legal spectacles”. Conversely, legal advice privilege will likely not attach where a lawyer provides general business advice without a legal context, e.g. advice on investment or finance policy or other business matters.

“Litigation privilege” covers confidential communications with respect to existing, or made in reasonable contemplation of future, adversarial litigation. The communications may be between a lawyer and client or a lawyer and third parties, so long as the dominant purpose is regarding litigation.

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 certain employees of the company they serve enjoy the same privileges. Although the matter has been debated in other common law jurisdictions, we are not aware of any Hong Kong decision on the relevance of a practising certificate to the foregoing. Two areas where in-house counsel must be cautious are:

- the very nature of an in-house counsel's role means that it can be harder to distinguish between “legal advice” and “general business advice”. In-house counsel should always have in mind the nature of their communications and ensure that the distinction between “legal advice” and “general business advice” is not lost, eg. by marking document when appropriate that they are confidential and legally privileged; and

- it will not be the case that every employee of the in-house counsel's employer will be deemed to be a “client” for the purpose of the communications between them being privileged. Unfortunately, it is not possible to state with any certainty which employees will be considered a “client”, but we suggest they would include the key individuals who have instructed the in-house counsel upon the issues about which the advice is sought and/or who require the advice.

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 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### HUNGARY

#### Nagy és Trócsányi

##### CONTACT INFORMATION:

**Dr. Peter Berethalmi**

Nagy és Trócsányi

H – 1126 Budapest, Ugocsa Street 4/B

Tel: 36.1.4878700/ Fax : 36.1.4878701

Email: [Berethalmi.peter@nagyestrocsanyi.hu](mailto:Berethalmi.peter@nagyestrocsanyi.hu)

The issue to make available attorney-client privilege for in-house counsel is still under discussion both in Hungary and throughout the European Union. In some countries in-house counsel are members of a bar or law society and so are bound by codes of ethics and subject to disciplinary arrangements.

However, in Hungary such professional organization for in-house counsel was not established. Further, under the effect of Act on the Prevention and Combating of Money Laundering, in-house counsel offices were demanded to suspend their activities and transform into private law firms or function as independent attorneys. In the light of the changes mentioned, it seems unlikely to pass an act by the Hungarian Parliament regulating the privilege provided for in-house counsel.

Neither Act on Attorneys at Law nor Law Decree on Legal Counseling has provisions on protection of communication between in-house counsel and their employers. The attorney-client privilege could be applied only for Bar-member lawyers acting as outside counsels with no employment relationship involved.

In general, the Hungarian in-house counsel are employees with professional legal qualification working solely in a company's legal department. The national regulation is based on the principle that an in-house counsel is employed by the company, thus a participant in company decision making and unable to offer independent advice. Nevertheless, the importance and significance of confidential information are widely recognized in Hungarian legislation.

Civil Code defines business secret and legal consequences of unauthorized publishing or releasing any confidential facts, information, conclusions or data to economic activities. Both Act on Credit Institutions and Financial Enterprises and Act on the Capital Market disclose important rules of confidential information including bank secrets and security secrets.

However, the protection of business secrets provided by foregoing Acts could be only applied with respect to third independent parties with no authorization to force the secret's owner to reveal it. In general, state authorities are entitled to divulge any confidential information concerning their investigation in progress (e.g.: State Audit Office, Office of Economic Competition). In certain cases, e.g. if an in-house employed by state organization and state- or

service secrets involved, the presentation of confidential documents or the testimony at court might be declined, or closed trial might be ordered.

Finally, Labor Code must be mentioned as being cornerstone of the Hungarian legal regulation concerning in-house counsel - employer relationship. As clarified earlier, in-house counsel is regarded to be an employee subordinated to employer. Unless otherwise provided by law, Section 3 of Labor Code defines that employees cannot jeopardize the rightful economic interests of the employer either before or following the termination of the employment relationship. Section 103 regulates the protection of business secret and confidential information as a basic duty the employee must meet.

Summing up the foregoing, it might be stated that no in-house counsel-client privilege is established by Hungarian legislation; however, confidential information is protected by the above-mentioned acts regulating the business-, state- and service secrets.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **ICELAND Logos Legal Services**

**CONTACT INFORMATION:**

**Erlendur Gislason**

Logos Legal Services

Efstaleiti 5

IS-103 Reykjavik, Iceland

Tel: 354.5400.300/ Fax: 354.5400.301

Email : [erlendur@logos.is](mailto:erlendur@logos.is)

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 him in the course of his professional activity, if, following an evaluation of 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 be deemed not to have obtained the information in an attorney-client relationship, but in a different capacity within the company he serves.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### INDIA

#### **Amarchand & Mangaldas & Suresh A. Shroff & Co.**

##### CONTACT INFORMATION:

**Shardul S. Shroff**

Amarchand & Mangaldas & Suresh A. Shroff & Co.

Amarchand Towers

216 Okhla Industrial Estate, Phase – III

New Dehli, 110 020, India

Tel : 91.11.26920500/ Fax : 91.11.26924900

Email : [Shardul.shroff@amarchand.com](mailto:Shardul.shroff@amarchand.com)

In India, professional communications between attorneys and clients are protected as ‘privileged communications’ under the Indian Evidence Act, 1972 (the “Evidence Act”). This attorney-client privilege as stated in the Evidence Act provides that no attorney shall be permitted to:

- (i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client;
- (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or
- (iii) disclose any advice given by him to his client in the course and for the purpose of such employment.

This attorney-client privilege continues even after the employment has ceased. However, there are certain limitations to the aforesaid privilege and the law does not protect the following from disclosure:

- (i) disclosures made with the client’s express consent;
- (ii) any such communication made in furtherance of any illegal purpose; or
- (iii) any fact observed by any attorney in the course of his employment, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of the attorney was or was not directed to such fact by or on behalf of his client.

An in-house counsel, being in the full-time employment of a person, is not recognized as an ‘attorney’ under Indian Law. Thus, professional communications between an in-house counsel and officers, directors and employees of a company are not protected as privileged communications between an attorney and his client, as stated above. In other words, to invoke the privilege, the communications must necessarily be made or received by an ‘attorney’. However, in practice the employment contract of an in-house counsel usually contains a confidentiality clause protecting any information disclosed to such counsel during the course of his employment. Though this confidentiality clause is not similar in nature to a ‘privileged communication’, subject to certain contractual exceptions, a client will be entitled to claim damages from the in-house counsel in the event of breach of such a confidentiality clause.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### INDONESIA

#### **Ali Budiardjo, Nugroho, Reksodiputro**

##### CONTACT INFORMATION:

##### **Ernst G. Tehuteru**

Ali Budiardjo, Nugroho, Reksodiputro

Graha Niaga Tower, 24<sup>th</sup> Floor

Jalan Jenderal Sudirman Kav. 58

Jakarta 12190, Indonesia

Tel: 62.21.250.5125/ Fax: 62.21.250.5001

Email : [etehuteru@abnrlaw.com](mailto:etehuteru@abnrlaw.com)

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

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

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **IRELAND Arthur Cox**

#### **CONTACT INFORMATION:**

**Melissa Jennings**

Arthur Cox

Earlsfort Centre

Earlsfort Terrace

Dublin 2, Ireland

Tel: 353.1.618.0000/ Fax: 353.1.618.0618

Email : [melissa.jennings@arthurcox.com](mailto:melissa.jennings@arthurcox.com)

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 Justice ruled that legal privilege applies to correspondence between an undertaking and its external lawyer entitled to practice 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### ISLE OF MAN Cains

#### CONTACT INFORMATION:

**Simon Harding**

Cains

15-19 Athol Street

Douglas, Isle of Man

Tel: 44.16.2463.8300/ Fax: 44.16.2463.8333

Email : [sjh@cains.co.im](mailto:sjh@cains.co.im)

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **ISRAEL S. Horowitz & Co.**

**CONTACT INFORMATION:**

**Michelle Liberman**

S. Horowitz & Co. House

31 Ahad Haam Street

Tel Aviv 65202, Israel

Tel: 972.3.567.0666/ Fax: 972.3.566.0974

Email : [michellel@s-horowitz.co.il](mailto:michellel@s-horowitz.co.il)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### JAMAICA Myers, Fletcher & Gordon

#### CONTACT INFORMATION:

**Andrea Scarlett**

Myers, Fletcher & Gordon  
21 East Street, P.O. Box 162  
Kingston, Jamaica

Tel: 876.922.5860/ Fax: 876.922.4811

Email : [Andrea.scarlet@mfg.com.jm](mailto:Andrea.scarlet@mfg.com.jm)

Attorney – client privilege protects from inspection<sup>241</sup> communications made between an attorney-at-law and his/her client.<sup>242</sup> In order for the privilege to apply the following pre-requisites must be satisfied:

1. the communication must be passed within the course of an attorney and client relationship. The mere fact that one of the parties to the communication is an attorney does not satisfy the requirement. For example, communications to and from a person who is an attorney will not be privileged where the attorney is giving business advice, doing personal business or acting in an executive and not a professional capacity;<sup>243</sup>
2. the communication must be passed between the attorney and client : (i) for the purpose of the attorney giving legal advice or, (ii) for the purpose of the client seeking legal advice or, (iii) as part of a continuum so that legal advice may later be given by the attorney to the client.

The attorney – client privilege also extends to communications between an in-house counsel and his/her client.<sup>244</sup> For these purposes, the company to which the in-house counsel is employed is his/her client. Therefore, communications from the management and employees, acting as agents of the company, to in-house counsel and vice versa may be protected from inspection by the doctrine of attorney-client privilege. Similarly, privilege may be attached to communications between in-house counsel, acting as an agent of his/her employer's company, and other attorneys retained by the company.

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<sup>241</sup> In the recent case of *Jamaican Bar Association et al v D.P.P., et al* (2003), HCV 207/03, HCV 238/03, HCV 213/03, unreported, the Supreme Court of Jamaica held that privileged documents are protected from disclosure to the other party but not from seizure in accordance with a search warrant. The scope of this case is arguably restricted to cases involving the particular statute that was being construed by the Supreme Court in *Jamaican Bar Association v D.P.P.*, namely, the Mutual Assistance (Criminal Matters) Act.

<sup>242</sup> *Anderson v Bank of British Columbia* [1876] 2 Ch.D 644, *Balabel v Air India* [1988] 2 WLR 1036.

<sup>243</sup> *Blackpool Corporation v Locker* [1948] 1 All ER 85

<sup>244</sup> *Alfred Crompton Amusement Machines Limited v Customs & Excise Commissioners* [1974] AC 405.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### JAPAN

#### Nishimura & Asahi

##### CONTACT INFORMATION:

**Alvin Hiromasa**

Nishimura & Asahi

Marunouchi MY PLAZA

1-1, Marunouchi 2-chome

Chiyoda-ku, Tokyo 100-8385, Japan

Tel: 81.3.3505.0297/ Fax: 81.3.3505.7720

Email : [hms@alo.jp](mailto:hms@alo.jp)

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 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, paragraph 6). 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 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).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### JORDAN

### Ali Sharif Zu'bi Advocates & Legal Consultants

#### CONTACT INFORMATION:

**Shereen Okkeh**

Ali Sharif Zu'bi Advocates & Legal Consultants

Astra Building

First Circle, Jebel Amman

P.O. Box 35267

Amman, Jordan 11180

Tel: 962.6.464.2908/ Fax: 962.6.463.4277

Email : [Shereen.okkeh@zubilaw.com](mailto:Shereen.okkeh@zubilaw.com)

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.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **KAZAKHSTAN McGuire Woods LLP**

#### **CONTACT INFORMATION:**

**Alexander V. Barsukov**  
McGuireWoods LLP  
41B Kazibek Bi Street, 5<sup>th</sup> Floor  
100 Almaty, 480100  
Republic of Kazakhstan  
Tel: 7.3272.596.100/ Fax: 7.3272.596.116  
Email : [mwk@mcguirewoods.com](mailto:mwk@mcguirewoods.com)

As a matter of law, advocates are not allowed to be employed as in-house counsel. They may only render legal services to a company as independent service providers. In house counsel are not obliged to pass state exam, to obtain a license, and to become members of the Bar in order to be admitted to practice law, whereas advocates are required to do so in order to obtain status of an advocate and represent clients in a court on criminal matters. The only requirement for admission to practice as in-house counsel is to be educationally qualified as a lawyer.

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.

On December 5, 1997 Kazakhstan enacted a law "On Advocacy". 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 (i.e., solicitors).

Advocates are specifically court attorneys and although they have a special license, nothing prevents a non-advocate attorney from representing clients in court on civil and administrative matters - all that is needed is a power of attorney. At the same time, only advocates are allowed to represent clients in criminal cases.

The result is that - advocates have obligations and privileges made available to them because of the above-mentioned law, while a non-advocate attorney 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. The only result was a self-adopted code of conduct that applies to judges and a code of conduct of public prosecutions officers. Nonetheless, no code of conduct or law exists at the present time that relates to in-house counsels in the Republic of Kazakhstan.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### KOREA

#### Hwang Mok Park P.C.

##### CONTACT INFORMATION:

**Chi-Hyoung Cho**

Hwang Mok Park

9<sup>th</sup> Floor, Daekyung Building

120, 2-ka, Taepyung-ro

Chung-ku, Seoul, Korea 100-724

Tel: 82.2.772.2700/ Fax: 82.2.772.2800

Email: [jmh@hmpj.com](mailto:jmh@hmpj.com)

In Korea, there is no such concept of an attorney-client privilege. Under the Attorneys Act, however, an attorney or anyone who was attorney shall not disclose any secret information obtained in the course of their professional duties, unless any statute provides otherwise. Such obligation is imposed on attorneys on the one hand, and in civil and criminal procedures, on the other hand, an attorney or an ex-attorney is entitled to refuse to testify on any confidential information obtained in the course of his or her professional duties.

Unlike the ‘attorney-client privilege’ in common law, which is basically the client’s privilege, the said rights to refuse to give testimony in Korea are considered being granted to attorneys and ex-attorneys in order to assist attorneys and ex-attorneys to faithfully perform the said statutory obligation. In civil procedures, therefore, the above attorneys’ rights shall not be recognized when their obligation to keep confidential are waived. In criminal procedures, a slightly different rule comes into play; namely, attorneys’ right to refuse to give testimony shall not be recognized when the client’s consent or ‘significant public necessity’ exists. The above rules as to testimony are also applicable in the same manner with respect to production of documents to civil court or search and seizure in criminal investigation.

In light of the above principles, certain protection will be given to communications between in-house counsel serving in a company and officers, directors and other employees of the same company. Generally it is construed that, in order for in-house counsel to exercise the rights to refuse to give testimony, concerned communication needs to have been obtained by the attorney in the course of professional duties as an attorney, not in the course of performing other functions, such as mere administration. In connection with communication concerning non-legal matters, in-house counsel therefore will not have “attorneys’ rights” to refuse to testify; however, in the event that the matter is related to ‘technical or occupational secrets,’ in-house counsel may have separate rights to refuse to give testimony pursuant to civil procedure law.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **KUWAIT**

#### **Abdullah Kh. Al-Ayoub & Associates**

**CONTACT INFORMATION:**

**Abdullah Kh. Al-Ayoub**

Abdullah Kh. Al-Ayoub & Associates  
Souk Al Kabir Building Block “B”, 9<sup>th</sup> Floor  
Fahad Al-Salem Street  
P.O. Box 1714, 13018 Safat Kuwait  
Tel: 965.2464321/2/3/ Fax: 965.2434711  
Email: [ayoubakh@kems.net](mailto:ayoubakh@kems.net)

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 is 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### LATVIA Klavins & Slaidins LAWIN

#### CONTACT INFORMATION:

**Inese Lazdupe**

Klavins & Slaidins LAWIN

Elizabetes Street 15

Riga LV 1010, Latvia

Tel: 371.7814848/ Fax: 371.7814849

Email: [Inese.lazdupe@klavinslaidins.lv](mailto:Inese.lazdupe@klavinslaidins.lv)

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

To protect communications from 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, when faced with a request for sensitive or potentially detrimental information for the company may refer the request to their employer. However, even in this case they are not protected by a formal client-attorney privilege, but rather a regular employment relationship, where issues above and beyond the competence of the employee are traditionally referred to a higher managerial level.

In-house lawyers in Latvia are particularly vulnerable vis-à-vis investigative officers and other authorities entitled to perform operational activities, e.g, public prosecutors, Corruption Prevention and Combating Bureau, police etc. In accordance with Article 17(1) of the law "On the Office of Prosecutors" (adopted in 1994) and Article 45 (1) of the Criminal Procedure Code (adopted in 1961), prosecutors and other officers entitled to perform operational activities have broad legal powers to request and obtain legal acts, documents and other information from state administrative institutions, banks, State Controller, municipal governments, enterprises, organizations, and other institutions as well as gain uninhibited entry in the facilities of these institutions. In theory and practice, in-house lawyers cannot maintain the confidentiality of in-house communications when faced with a request for information from the authorities noted above.

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. However, pursuant to the Advocacy Act, any illegal activity by the advocate in the

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **LEBANON Moghaizel Law Offices**

**CONTACT INFORMATION:**

**Fadi Moghaizel**

Moghaizel Law Offices

145 Tabaris Square

P.O. Box 16-6742

Beirut, Lebanon

Tel: 961.1.333753/ Fax: 961.1.201354

Email: [mlo@mlof.com](mailto:mlo@mlof.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### LITHUANIA

#### **Lideika, Petrauskas, Valiunas ir partneriai LAWIN**

**CONTACT INFORMATION:**

**Dovile Burgiene**

Lideika, Petrauskas, Valiunas ir Partneriai LAWIN  
Labdariu 5

LT-01120 Vilnius, Lithuania

Tel: 370.52.681826/ Fax: 370.52.125591

Email: [Dovile.burgiene@lawin.lt](mailto:Dovile.burgiene@lawin.lt)

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

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

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.*).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### LUXEMBORG Bonn Schmitt Steichen

#### CONTACT INFORMATION:

**Alex Schmitt**

Bonn Schmitt Steichen

44 Rue de la Vallée

L-2661 Luxembourg

Tel: 352.45.58.58/ Fax: 352.45.58.59

Email: [aschmitt@bsslw.lu](mailto:aschmitt@bsslw.lu)

Under Luxembourg Law<sup>245</sup> and according to the Luxembourg Bar Code of Conduct<sup>246</sup>, an attorney-at-law cannot be employed as an employee in the private sector or in the public sector, as he would not be independent. In Luxembourg, in-house counsel are employees of the legal department (as “*juristes d’entreprises*”) of a company, and are not bound by any attorney-client privilege within the meaning of Articles 5.1. to 5.3. of the Luxembourg Bar Code of Conduct. Indeed, according to those provisions, and to Article 458 of the Luxembourg Criminal Code, attorneys-at-law are subject to an obligation of absolute professional secrecy, and must not reveal to a third party any information pertaining to the client. Those provisions provide also for confidential communications between an attorney-at-law and his/her client.

Employees of legal departments can therefore disclose information given by another employee to officers, directors or other employees of the company they serve. In fact, the Luxembourg Bar Code of Conduct is not applicable to in-house counsel, as the latter are not members of the Bar.

However, pursuant to Article 458 of the Luxembourg Criminal Code, which is the general provision on professional secrecy, a person who discloses to third parties a fact which was learned in the course of the practice of his profession, can be sentenced to an imprisonment from eight (8) days up to six (6) months and to a fine from EUR 500.- up to EUR 5.000.-, except in the cases provided by law, or in case of testimony ordered by a court. Case law has extended the interpretation of a “professional secret” to any person who is a “necessary” and “obliged” confident in the sense that certain secrets must be disclosed to the latter in order to enable him to perform his function (i.e. expert). An in-house counsel may under certain circumstances be a “necessary” and “obliged” confident, and may therefore be bound by this provision with regard to his relations with the officers, directors and employees of the company.

Moreover, in-house counsel, like any employee of an undertaking, are prohibited to disclose to third persons any trade secrets pursuant to Article 309 of the Luxembourg Criminal Code.

In general, employment contracts provide for a confidentiality and secrecy clause. As a consequence, in-house counsel are bound by such contractual clause in their employment contracts, and must therefore respect the confidentiality and the secrecy regarding the information they receive within the framework of the performance of their function.

<sup>245</sup> Article 1, paragraph 5 of the law dated August 10, 1991 concerning the profession of the lawyer.

<sup>246</sup> Title 1, Article 1.2. of the Luxembourg Bar Code of Conduct.





## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **MALTA**

#### **Ganado & Associates**

##### **CONTACT INFORMATION:**

##### **Louis Cassar Pullicino**

Professor J.M. Ganado & Associates

171 Old Bakery Street

Valletta VLT 09, Malta

Tel: 356.21.235.406/ Fax: 356.21.225.908

Email: [lpullicino@jmganado.com](mailto:lpullicino@jmganado.com)

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.

The Prevention of Money Laundering Regulations, 2003, have now incorporated into Maltese Law the requirements of the EU Council Directive 91/308/EEC as amended by the EU Parliament and Council Directive 2001/97/EC of the 4<sup>th</sup> December 2001. As a result advocates are bound to maintain client identification procedures and are also bound to carry out reporting procedures to the Regulator where money laundering is suspected in defined instances such as transactions concerning :

- i. Buying and selling of business entities and/or real estate;
- ii. Managing of client money, securities or other assets unless the activity is undertaken under a license issued in terms of the Investment Services Act;
- iii. Opening or management of bank accounts;

- iv. Organization of contributions necessary for the creation, operation or management of companies;
- v. Creation, operation or management of trusts, companies or similar structures.

Advocates are exempted from the obligation of disclosing information indicating that a client may have been involved in money laundering if that information was obtained in the course of ascertaining the legal position for the client or in the course of defining or representing that client in the course of judicial proceedings.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **MAURITIUS De Comarmond & Koenig**

**CONTACT INFORMATION:**

**Thierry Koenig**

De Comarmond & Koenig

5<sup>th</sup> Floor Chancery House

Lislet Geoffroy Street

Port Louis, Mauritius

Tel: 230.212.2215/ Fax: 230.208.2986

Email: [koenig@intnet.mu](mailto:koenig@intnet.mu)

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.

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### MONACO Berg and Duffy LLP

#### CONTACT INFORMATION:

**James P. Duffy, III**

**Paolo Rinaldi**

Berg and Duffy LLP

Gildo Pastor Center

7, rue du Gabian

MC98000, Monaco

Tel: 377.97.97.87 77/ Fax: 377.97.97.87.78

Email: [jpduffy@bergduffy.com](mailto:jpduffy@bergduffy.com)

Email: [prinaldi@BergDuffy.com](mailto:prinaldi@BergDuffy.com)

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 not be employed in any capacity and remain a member of the Monegasque Bar. 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### MOROCCO

#### Cabinet Naciri & Associés – Gide Loyrette Nouel

##### CONTACT INFORMATION:

**Hicham Naciri**

**Richard Cantin**

Naciri & Associés – Gide Loyrette Nouel

52, boulevard Zerktouni

Casablanca, Morocco

Tel: 212.22.27.46.28/ Fax: 212.22.27.30.16

Email: [naciri@gide.com](mailto:naciri@gide.com)

Email: [cantin@gide.com](mailto:cantin@gide.com)

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

In Morocco, pursuant to Article 36 of the Dahir-law n° 1-93-162 of 10 September 1993 organizing the legal profession, the attorney is prohibited, in all matters, from divulging anything that would contravene the attorney-client privilege and he must refrain from communicating any information from his files or from publishing evidence, documents or letters relating to an ongoing matter. As such, and as indicated by Article 14 of the Interior Regulations of the Casablanca Bar Association, the attorney-client privilege is general and absolute in all aspects of his professional activity, without any discrimination. The attorney cannot deliver the content of any evidence entrusted to him, nor testify in favor or against his client.

The only limitation to the attorney-client privilege is the denunciation to the judicial or administrative authority of criminal acts and bad treatment against minors of less than 18 years of age that an attorney would be privy to, in which case the attorney is free to testify or not. Aside from this exception, the attorney, should he breach the attorney-client privilege, is exposed to an imprisonment term of one to six months and a fine of 120 to 1,000 dirhams (Art. 446 of the Moroccan Penal Code), in addition to disciplinary sanctions of his order (warning, reprimand, temporary disbarment of up to three years or permanent disbarment), as provided for by Article 60 of the Dahir-law n° 1-93-162 of 10 September 1993 organizing the legal profession<sup>247</sup> and by Article 80 of the Interior Regulations of the Casablanca Bar Association.

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<sup>247</sup> As completed by the Dahir n° 1-96-117 of 10 August 1996.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### NETHERLANDS ANTILLES **VanEps Kunneman Van Doorne**

**CONTACT INFORMATION:**

**F.B.M. Kunneman**

VanEps Kunneman Van Doorne

Julianaplein 22

P.O. Box 504

Willemstad, Curaçao, Netherlands Antilles

Tel: 599.9.461.34.00/ Fax: 599.9.461.20.23

Email: [kunneman@promes-vandoorne.com](mailto:kunneman@promes-vandoorne.com)

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 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### NETHERLANDS HOUTHOFF BURUMA

#### CONTACT INFORMATION:

W.J. Brants  
Houthoff Buruma  
Postbus 75505, 1070 AM Amsterdam  
Gustav Mahlerplein 50, Amsterdam  
Tel. : 31.0.20.6056944/ Fax: 31.0.20.6056709  
Email: [w.brants@houthoff.com](mailto:w.brants@houthoff.com)

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

The general privilege of non-disclosure in proceedings is secured in private, criminal and administrative law (art. 165, sub 2 sub b Dutch Code of Civil Procedure (*Wetboek van Rechtsvordering*) juncto art. 218 Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) juncto art. 5:20 General Administrative Act (*Algemene Wet Bestuursrecht*)). The disclosure of confidential information by an advocate is punishable under criminal law (art. 272 Dutch Criminal Code (*Wetboek van Strafrecht*)). The scope of general privilege of non-disclosure is restricted to information which has been obtained by the advocate in the pursuance of his profession (article 6 Dutch Code of Conduct for Advocates (*Gedragsregels*)). There is, furthermore, a derived privilege of non-disclosure for those who work for an advocate.<sup>248</sup> Correspondence between client and advocate is also covered by the pledge of secrecy and cannot be seized in a conducted search (art. 98 Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*)). However, it remains possible to conduct a search without violating the advocate's privileges. A search of the premises of a advocate remains possible if it is conducted in pursuance of suspicion of certain offences and does not violate the advocate's privilege (art. 218 Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*)).

The case-law of the Dutch Supreme Court underlines that the scope of this article also covers the correspondence between advocate and client, which is located at the premises of the client.<sup>249</sup> This case-law, however, relates only to criminal law. The scope of the legal privilege in administrative law is less clear. Therefore, in accordance with European case-law, this legal privilege has been explicitly codified in the Dutch Competition Act (art. 51 *Mededingingswet*).

In-house counsels in the Netherlands are not covered by a strict code of professional conduct and do not enjoy the same privileges as advocates. Therefore the communication with the officers,

<sup>248</sup> Bijz. Raad van Cassatie, 8 november 1948, NJ 1949, 66.

<sup>249</sup> HR 19 november 1985, NJ 1986, 533.



directors and employees they serve is not covered by legal privilege and has to be disclosed upon request in legal procedures. Moreover, they cannot object to a search of the premises of the company nor can they object to the seizure of evidence. Moreover they can be called to testify against the company they worked for.

Since 1997, however, there is a possibility for in-house-counsel to have their communication with directors, employees and officers covered by legal privilege. Through the introduction of the Regulation on law practice in the exercise of an employment (*Verordening op de praktijkuitoefening in dienstbetrekking*) it became possible for in-house-counsel to be admitted to the Bar and to have the same privileges as advocates. These in-house counsel (*Cohen-advocaten*) are advocates having only one client, namely the company they work for. It is necessary that they in principal handle legal work only. The employer guarantees the impartiality of the in-house advocate by signing a special impartiality-contract, in which the employer guarantees that the in-house advocate can exercise his profession in full impartiality.

On the basis of the in-house advocate's admittance to the Bar, the correspondence with directors, employees and officers is covered by legal privilege, but only in so far as it is related to legal issues. It remains unsure if non-legal issues will be covered by legal privilege.<sup>250</sup>

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<sup>250</sup> Note 15, *Verordening op de praktijkuitoefening in dienstbetrekking*.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### NEW ZEALAND Simpson Grierson

#### CONTACT INFORMATION:

**Michael Cole**

**Hershla Ifwersen**

Simpson Grierson

Simpson Grierson Building

92-96 Albert Street, Private Bag 92518

Wellesley Street, Auckland 1, New Zealand

Tel: 64.9.977.5000/ Fax: 64.9.977.5038

Email: [michael.cole@simpsongrierson.com](mailto:michael.cole@simpsongrierson.com)

Email: [hershla.ifwersen@simpsongrierson.com](mailto:hershla.ifwersen@simpsongrierson.com)

In-house counsel attorneys 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### NICARAGUA

#### **Alvarado y Asociados**

##### **CONTACT INFORMATION:**

**Gloria Maria de Alvarado**

**Cesar C. Porras Rosses**

Alvarado y Asociados

Reparto Colonial los Robles VI Etapa

Del Restaurante Lacmiel 5 c. Arriba

300 Metros a la Derecha, Casa #75

P.O. Box 5893

Managua, Nicaragua

Tel: 505.277.4028/ Fax: 505.278.7491

Email: [gmalvara@alvaradoyasociados.com.ni](mailto:gmalvara@alvaradoyasociados.com.ni)

Email: [cporrasr@alvaradoyasociados.com.ni](mailto:cporrasr@alvaradoyasociados.com.ni)

In Nicaragua 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 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. Note that in Nicaragua to be a Public Notary it is necessary to have a Lawyer degree.

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 thereafter.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### NORWAY

#### Thommessen Krefting Greve Lund AS

##### CONTACT INFORMATION:

**Finn E. Engzelius**

Thommessen Krefting Greve Lund AS

Haakon's VII Gate 10

P.O. Box 1484 Vika

N-0116 Oslo, Norway

Tel: 47.2311.1101/ Fax: 47.2311.1010

Email: fen@thommessen.no

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. (The functions of an attorney serving as a member of a Board of Directors, will fall outside the ambit of the attorney-client privilege.) The attorney – client privilege does also cover subordinates and assistants of the attorney. An attorney may, however, testify if the client waives the attorney-client privilege – which it 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. (It has been argued that special limitations of the attorney-client privilege may apply in anti-trust or competition cases<sup>251</sup>. The prevailing theory in Norwegian jurisprudence is that the attorney-client privilege shall prevail over competition rules. In particular a unanimous jurisprudence does not recognize any difference between in-house counsel and independent attorneys<sup>252</sup>. The scope of "an attorney's assistant" is disputed. Neither has the attorney – client privilege so far been limited to a strict "right of defense", but will also cover preceding counseling.) Information received by 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.

<sup>251</sup> EU-court: AM&S Europe Ltd v Commission, case 155/79 [ECR 1982/1575]

<sup>252</sup> Åge Karlsen in Commentary to the Competition 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.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **PAKISTAN**

#### **Rizvi Isa Afridi & Angell**

**CONTACT INFORMATION:**

**Syed Ahmad Hassan Shah**

Rizvi Isa Afridi & Angell  
94-West, Jinnah Avenue, Blue Area  
Aslamabad 44000, Pakistan

Tel: 92.51.2823110/ Fax: 92.51.2823009

Email: aak@isb.comsats.net.pk

Broadly speaking, Pakistani 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 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 Pakistani 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.

Pakistani law in this area is developing and, therefore, whether attorney-client privilege regarding any connection/information can be invoked requires a contextual examination.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**PANAMA**

**Arosemena, Noriega & Contreras**

**CONTACT INFORMATION:**

**Julio C. Contreras, III**

**Shanina J. Contreras**

Arosemena, Noriega & Contreras

P.O. Box 0816-01560

Panama 5

Republic of Panama

Tel: 507.265.3411/ Fax: 507.263.8539

Email: [anc@anorco.com.pa](mailto:anc@anorco.com.pa)

Email: [abog56@anorco.local](mailto:abog56@anorco.local)

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.





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### PARAGUAY

#### **Peroni, Sosa, Tellechea, Burt & Narvaja**

##### CONTACT INFORMATION:

##### **Dr. Esteban Burt**

Peroni, Sosa, Tellechea, Burt & Narvaja  
Calle Eulogio Estigarribia 4846 (Villa Mora)  
Eulogio Estigarribia 4846 (Villa Morra)  
P.O. Box 114  
Asunción, Paraguay  
Tel: 595.21.663.536/ Fax: 595.21.600.448  
Email: eburt@pstbn.com.py

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

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

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

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **PERU**

#### **Estudio Olaechea**

##### **CONTACT INFORMATION:**

**Jose Antonio Olaechea**

**María Luisa Gubbins**

Estudio Olaechea

Bernardo Monteagudo 201

San Isidro

Lima 27, Peru

Tel: 51.1.264.4040/ Fax: 51.1.264.4050

Email: joseantonioolaechea@esola.com.pe

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### PHILIPPINES

#### Romulo, Mabanta, Buenaventura, Sayoc & De Los Angeles

##### CONTACT INFORMATION:

##### **Ricardo J. Romulo**

Romulo, Mabanta, Buenaventura, Sayoc & De Los Angeles  
30<sup>th</sup> Floor, Citibank Tower  
8741 Paseo de Roxas  
Makati City, Philippines  
Tel: (632) 848-0114/ Fax: (632) 813-4197  
Email: romulo@rmbssa.com

It is the duty of a lawyer to maintain inviolate the confidence and to preserve the secrets of his client.<sup>253</sup> Rules on confidential communication between an attorney and his client apply to communications between in-house counsel and the officers, directors or employees of the companies they serve. An in-house counsel is employed as legal adviser for the purpose of obtaining from him legal advice and opinion concerning the corporation's rights and obligations relating to the subject matter of the communication.<sup>254</sup> Further, in the course of his work, an in-house counsel is engaged in the practice of law. He handles the legal affairs of a corporation and renders services requiring the knowledge and the application of legal principles and techniques to serve the interests of another. He gives advice on matters connected with the law and the legal implications involved in business issues.<sup>255</sup> Hence, communications between the officers, directors and employees of a corporation and its in-house counsel for the purpose of seeking legal advice or requiring the application of legal knowledge are privileged and confidential.

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

- When it is authorized by the client after acquainting him of the consequences of the disclosure.
- When it is required by law.
- When it is necessary to collect his fees or to defend himself, his employees or associates or by judicial action.<sup>256</sup>
- When the communication by the client to his lawyer was made for the purpose of its communication to a third person.<sup>257</sup>
- When the communication was made by a client to his lawyer in contemplation of a crime he intends to commit.<sup>258</sup>

<sup>253</sup> Section 20(e), Rule 138 of the Rules of Court; Canon 21 of the Code of Professional Responsibility.

<sup>254</sup> Francisco, *The Revised Rules of Court in the Philippines, Evidence*, Vol. VII, Part I, 1997 ed., pp. 272-273.

<sup>255</sup> Cayetano vs. Monsod, 201 SCRA 210, 212-219.

<sup>256</sup> Rule 21.01 of the Code of Professional Responsibility.

<sup>257</sup> Uy Chico vs. Union Life Assurance Society, Ltd., 29 Phil. 163, 165.

<sup>258</sup> People vs. Sandiganbayan, 275 SCRA 505, 519.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### PORTUGAL

#### Morais Leitão, Galvão Teles, Soares da Silva & Associados

##### CONTACT INFORMATION:

##### Filipa Arantes Pedroso

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Rua Castilho, 75 – 1<sup>st</sup> Floor

1250 Lisbon, Portugal

Tel: 351.21.3817428/ Fax: 351.21.3817499

Email: fapedroso@mlgt.pt

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

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

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

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

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

Thus, the client-attorney privilege covers:

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

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

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

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

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



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### ROMANIA

#### **Nestor Nestor Diculescu Kingston Petersen**

##### **CONTACT INFORMATION:**

##### **Manuela M. Nestor**

Nestor Nestor Diculescu Kingston Petersen  
Neocity Tower, Floors 9-12  
Calea Dorobantilor, 237B  
Bucharest 1, Romania  
Tel: 40.21.20.11.200/ Fax: 40.21.20.11.210  
Email: [Manuela.nestor@nnkp.ro](mailto:Manuela.nestor@nnkp.ro)

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

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

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

The attorney-client privilege is provided under law no. 51/1995 and the Statute of the profession and implies that a lawyer shall not reveal information relating to representation of a client unless the client consents after the consultation.

The confidentiality obligation of the lawyer is absolute and is not limited in time. Such obligation covers all the activities of the lawyer, his associates, agents, employees and other lawyers. Under no circumstances can the lawyer be obliged to disclose the professional secrecy.

With a view to protect the professional secrecy the professional documents and works preserved by the lawyer or in his/her professional office are inviolable. The corporeal investigation or the research at the lawyer's domicile or professional place may be effected only by the prosecutor on the basis of the special mandate issued in accordance with the law.

The professional communications of the lawyer as well as his professional correspondence may not be listened or registered under no circumstances other than under the special conditions and with the special procedures provided by the law.

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

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





**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**ST KITTS**

**Kelsick, Wilkin & Ferdinand**

**CONTACT INFORMATION:**

**Charles Wilkin**

Kelsick, Wilkin & Ferdinand

P.O. Box 174

Independence Square South

Basseter, ST. Kitts

West Indies

Tel: 869.465.2645/ Fax: 869.465.7808

Email: [lawkwf@caribsurf.com](mailto:lawkwf@caribsurf.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### SAUDI ARABIA

#### Law Office of Mohammed S. Al-Rasheed

(In association with: Baker Botts, L.L.P.)

#### CONTACT INFORMATION:

##### Nabil A. Issa

Law Office of Mohammed S. Al-Rasheed

(In association with Baker Botts, L.L.P.)

P.O. Box 62982

Riyadh 11595

Riyadh, Kingdom of Saudi Arabia

Tel: 966.1.464.3139/ Fax: 966.1.464.9264

Email: [nabil.issa@bakerbotts.com](mailto:nabil.issa@bakerbotts.com)

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 not 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 by the lawyer.

The above rules would not necessarily include in-house counsel 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 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### SCOTLAND

#### Maclay, Murray & Spens LLP

**CONTACT INFORMATION:**

**Gareth Tenner**

**Alayne Swanson**

Maclay, Murray & Spens LLP

151 St. Vincent St.

Glasgow G2 5NJ, Scotland

Tel: 44.141.248.5011/ Fax: 44.141.248.5819

Email: [Gareth.tenner@mms.co.uk](mailto:Gareth.tenner@mms.co.uk)

Email: [AES@maclaymurrayspens.co.uk](mailto:AES@maclaymurrayspens.co.uk)

In Scotland, at 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 current position in Scotland, based on the recent decision in the Three Rivers Case, is that only communications between lawyers and clients "pertaining to the rights and obligations of the client are subject to legal privilege. The "dominant position" or topic of advice or discussion must be rights or obligations. However, where the initial relationship between a client and solicitor consisted of advising on rights and liabilities, legal advice privilege will then cover a broad spectrum of communication and ancillary matters. Furthermore, under these recent developments, litigation privilege is limited to communications where legal proceedings are "reasonably in prospect" i.e. more than a 50% chance of occurrence. The Three Rivers case has signaled sweeping changes in the law of privilege in Scotland.

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 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 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **SLOVAK REPUBLIC** **Čechová & Partners**

#### **CONTACT INFORMATION:**

**Tomas Maretta**

Čechová & Partners

Hurbanovo nám. 5

811 03 Bratislava, Slovak Republic

Tel: 421.2.544.14.441/ Fax: 421.2.544.34.598

Email: [Tomas.maretta@cechrak.sk](mailto:Tomas.maretta@cechrak.sk)

Email: [Katarina.cechova@cechrak.sk](mailto:Katarina.cechova@cechrak.sk)

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **SOUTH AFRICA Bowman Gilfillan**

#### **CONTACT INFORMATION:**

**Miles Carter**

Bowman Gilfillan

165 West Street, Sandton

P.O. Box 785812

2146 Sandton, South Africa

Tel: 27.11.669.9550/ Fax: 27.11.660.9001

Email: [m.carter@bowman.co.za](mailto:m.carter@bowman.co.za)

Legal professional privilege can be claimed in respect of 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. 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### SPAIN

**Uría Menéndez**

**CONTACT INFORMATION:**

**Esteban Astarloa Huarte-Mendicoa**

Uría Menéndez

Diagonal, 514

08006 Madrid, Spain

Tel: 34.93.416.5185 / Fax: 34.91.586.04.02

Email: eah@uria.com

The attorney-client relationship and the documents and communications exchanged between the parties thereto are protected in Spain by the general rule of professional confidentiality or secrecy, established in article 542.3 of the Judiciary Law<sup>259</sup>, and article 32 of the General Regulation of the Legal Profession<sup>260</sup> (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 any spoken or written communications, documents or correspondence exchanged between a lawyer and his/her client, opposing parties and other attorneys within the context of an attorney-client relationship must be kept confidential. Any breach of this duty could lead to the attorney being held criminally liable and to sanctions being imposed by the Bar Association. However, in addition to this duty, the attorney is also afforded a privilege to maintain such confidentiality.

As regards in-house counsel, article 27.4 of the GRLP sets out that the legal profession can be engaged in under a labor relationship governed by the corresponding written labor contract. In such cases, internal or in-house counsel enjoy the same rights and obligations as external counsel to carry out their professional duties according to the general principles of freedom and independence. Accordingly, although there are no specific provisions in this regard, it should be understood that in-house counsel have the same duty of confidentiality and secrecy. In fact, article 437.2 of the Judiciary Law establishes that all attorneys must keep confidential all information that they have knowledge of as a result of “carrying out their professional activity and thus cannot be required to testify in a court of law with regard to such information”.

As a consequence of new European rules on the prevention of money laundering and financing of terrorism<sup>261</sup>, lawyers must examine any transaction that they suspect may involve money laundering or the financing of terrorist activities. They must also abstain from participating in any such transactions. To this end, law firms must implement an internal control procedure and adopt

<sup>259</sup> Organic Law 6/1985 on the Judiciary, as amended by Organic Law 19/2003.

<sup>260</sup> Royal Decree 658/2001 of 22 June 2001.

<sup>261</sup> Transposed into Spanish law by Law 19/1993 of 28 December (as amended by Law 19/2003 of 4 July) and Law 12/2003 of 21 May



measures to ensure that all their employees are aware of and comply with the provisions of Spanish legislation on the prevention of money laundering and the financing of terrorist activities. The Spanish regulations also establish the legal duty to report suspicious transactions to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (known by its Spanish abbreviation SEPBLAC). In-house counsel, as lawyers, must also abide by these obligations.

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



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **SRI LANKA F.J. & G. De Saram**

#### **CONTACT INFORMATION:**

**Ayomi Aluwihare**

F.J. & G. De Saram

216, De Saram Place

Colombo 10, Sri Lanka

Tel: 009411.4.718200/ Fax: 009411.4.718220

Email: [Ayomi.aluwihare@fjgdesaram.com](mailto:Ayomi.aluwihare@fjgdesaram.com)

Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 of Sri Lanka published in Gazette Extraordinary No. 535/7 of 07.12.1988 sets out rules relating to the protection of information disclosed by a client to his/her lawyer.

These rules apply to every attorney-at-law admitted and enrolled by the Supreme Court of Sri Lanka.

Under the said rules an attorney-at-law has a duty to keep in strict confidence all information whether oral or documentary acquired by him in any matter in respect of the business and affairs of his client ('the Information'). This duty lies not only during the existence of his professional relationship with the client but indefinitely thereafter even after the said attorney-at-law has ceased to act for the said client and after the death of the clients as well.

The duty to keep strict confidentiality extends to any partner or associate of the attorney-at-law and to any employee of the attorney-at-law. In fact, in the normal course if he becomes aware of the Information it would be the duty of the said attorney-at-Law in such circumstances to take all reasonable steps to prevent the disclosure of the Information by such persons even after the termination of his relationship with such persons.

However exceptions to the above named duties are as follows.

- An attorney however may disclose the Information if it is expressly or impliedly authorized by his client in writing or in the event of death of his client by the legal representative of the client. Provided however he should be careful to disclose only the Information as is necessary in the circumstances and no more.
- An attorney may disclose the Information in order to defend himself, his associates or employees against any allegation of misconduct or malpractice made by his client as well as to prevent the commission of a crime, fraud or illegal act.

- In the case of joint retainer or where the client has a joint interest with others, an attorney may disclose the Information to such members of the joint retainer or others having a joint interest with the client, as the case may be.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **SWEDEN**

#### **Vinge KB, Advokatfirman**

**CONTACT INFORMATION:**

**Per Eric Alvsing**

Vinge KB, Advokatfirman

Smålandsgatan 20

Box 1703

SE-111 87 Stockholm, Sweden

Tel: 46.8.614.30.14/ Fax: 46.8.614.31.90

Email: [Per\\_eric.alvsing@vinge.se](mailto:Per_eric.alvsing@vinge.se)

Communications between in-house counsel 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”.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **SWITZERLAND Pestalozzi Lachenal Patry**

**CONTACT INFORMATION:**

**Dr. Robert Furter**

**Michael Kramer**

Pestalozzi Lachenal Patry

Loewenstrasse 1

CH-8001 Zürich, Switzerland

Tel: 41.1.217.91.11/ Fax: 41.1.217.92.17

Email: robert.furter@plplaw.ch

Email: michael.kramer@plplaw.ch

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 principles of general business secrecy or special business secrecy, 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 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 counsel, some precautions may prove helpful:

- If a company, in preparation for litigation, has to gather sensitive information from its employees, an external lawyer should conduct the investigation and, in particular, the interviews with the company's directors and officers.
- An external lawyer should draft memoranda assessing the company's chances and risks related to a pending or threatening case.
- International contracts usually contain an arbitration clause. Very often, the arbitral tribunal follows the IBA Rules on 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 counsel, the arbitral tribunal is likely to respect the parties' agreement on the scope and the availability of the privilege.

At first sight, some of the suggested steps may seem to be complicated and overly precautionary. However, as long as the protection of the attorney-client privilege is not enlarged by Swiss legislation and case law, and as long as the privilege is not available to the in-house counsel, it is wise for a company to take the adequate precautionary measures.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **TAIWAN Tsar & Tsai Law Firm**

#### **CONTACT INFORMATION:**

**C.Y. Huang**

Tsar & Tsai Law Firm  
8<sup>th</sup> Floor, 245, Tun Hwa S. Road, Section 1  
Taipei 106, Taiwan, Republic of China  
Tel: 886.2.27814111/ Fax: 886.2.27213834  
Email: cyhuang@tsartsai.com.tw

In Taiwan, the attorney-client privilege to protect communications from disclosure is available only in civil discovery proceedings. 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 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### THAILAND

#### Tilleke & Gibbins International Ltd.

##### CONTACT INFORMATION:

**John E. King**

Tilleke & Gibbins International Ltd.

64/1 Soi Tonson, Ploenchit Road

Bangkok 10330, Thailand

Tel: 66.2263.7700/ Fax: 66.2263.7710

Email: [postmaster@tillekeandgibbins.co.th](mailto:postmaster@tillekeandgibbins.co.th)

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. Under Section 323 of the Penal Code, it is also a criminal offence (punishable by a small fine and/or up to six months imprisonment) for legal professionals and their staff to disclose client information which could cause injury to the client.

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

There are some law school graduates providing legal advice in Thailand without an attorney license. Strictly speaking, these persons are not governed by the Lawyers Act or the Law Society regulations. 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **TRINIDAD Hamel-Smith**

#### **CONTACT INFORMATION:**

**Jonathan Walker**

Hamel-Smith

P.O. Box 219

19 St. Vincent Street

Port of Spain

Trinidad, West Indies

Tel: 868.623.4237/ Fax: 868.627.8564

Email: [jonathan@trinidadlaw.com](mailto:jonathan@trinidadlaw.com)

As a matter of public policy, the law of Trinidad & Tobago treats certain communications between an attorney and his or her client as privileged communications, whether these are documentary or oral. The general rule is that a client cannot be compelled (either by discovery process, at a trial or otherwise) to disclose any privileged communications. However, the privilege is that of the client who may, either expressly or by its conduct waive any claim for privilege.

Communications are privileged where the information is confidential and is referable to the attorney-client relationship. In general, communications which concern the rights, liabilities, obligations and remedies of the client are referable to the attorney-client relationship. Additionally, communications between an attorney and a third party will be protected from disclosure as privileged communications (litigation privilege) where

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

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

In principle, this rule of public policy which protects these categories of communications as being privileged applies to communications involving an in-house attorney in the same way that it applies to communications involving external counsel. In the practical application of this principle, however, there are important differences. These differences arise primarily from the fact that in-house attorneys typically operate, and relate to their clients, in ways that are different to how external counsel operate and relate to their clients.

Typically, the role of an in-house attorney extends beyond acting as a legal advisor to the company by which he is employed. In relation to any particular matter, an in-house attorney may

be acting purely as a member of the management team, with his or her activities having little (if anything) to do with the practice of law. Or, he or she may be acting as a legal advisor to the company in connection with that matter but also, at the same time, as a member of the management team in relation to the same or other aspects of that matter.

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

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

To maximize the chances that communications involving an in-house attorney will attract and retain the protection of privilege, it is important to keep as clear a line as possible between communications with an in-house Attorney in his or her capacity as a legal advisor and those in which he or she is involved because of his or her broader role. For example, care should be taken to avoid dealing, in the same document, with matters which concern the rights, liabilities, obligations and remedies of the company and with other matters in respect of which the in-house attorney is playing a broader role as a member of the management team. Even where this is done, it is useful to have the document which is entitled to the protection of privilege clearly reflect the basis on which it does so, to have it appropriately labeled as a privileged document, and to restrict its circulation as far as possible.

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

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

Finally, it should be noted that attorneys in Trinidad & Tobago are required to annually obtain a practicing certificate, by paying a modest subscription. If an in-house attorney does not obtain a current practicing certificate, it is arguable that he or she cannot lawfully practice as an attorney and that communications with him or her are incapable of attracting the protection of privilege. To avoid this difficulty, each in-house attorney simply needs to ensure that he or she maintains a current practicing certificate.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **TURKEY Pekin & Pekin**

#### **CONTACT INFORMATION:**

**Lale Giray**

Pekin & Pekin

10 Lamartine Caddesi

Taksim 80090

Istanbul, Turkey

Tel: 90.212.313.35.00/ Fax: 90.212.313.35.35

Email: [lgiray@pekin-pekin.com.tr](mailto:lgiray@pekin-pekin.com.tr)

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

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

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

The attorney-client privilege with respect to the practice of in-house counsel of banks are additionally governed by the relevant provisions of the 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. In addition, according to Article 22.10 of the Banks Act, in the event such persons reveal confidential information about the relevant bank in order to gain any advantage for either themselves or for third persons, persons making such revelations may be subjected to imprisonment for three to five years and monetary fine not

to be less than TL 3,000,000,000 (three billion Turkish Lira) and, depending on the severity of their actions in this respect, such persons may be temporarily or permanently exempted from working with entities within the scope of the Banks Act. 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. In the event disclosure under the Banks Act is punishable under both the Banks Act and any other applicable law, Article 22.11 of the Banks Act indicates that the severest punishment under the relevant laws shall be administered.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **TURKS & CAICOS ISLANDS Misick and Stanbrook**

#### **CONTACT INFORMATION:**

**Ariel Misick**

Misick and Stanbrook

Town Centre Mall

P.O. Box 127

Providencials, Turks & Caicos Islands

Tel: 649.946.4732/ Fax: 649.946.4734

Email: [ariel@misickstanbrook.tc](mailto:ariel@misickstanbrook.tc)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### UNITED ARAB EMIRATES Afridi & Angell

**CONTACT INFORMATION:**

**Charles S. Laubach**

Afridi & Angell

P.O. Box 9371

Emirates Towers, 35<sup>th</sup> Floor

Sheikh Zayed Road

Dubai, United Arab Emirates

Tel: 971.4.330.3900/ Fax: 971.4.330.3800

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.

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.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**URUGUAY**  
**Guyer & Regules**

**CONTACT INFORMATION:**

**Alvaro Tarabal**  
Guyer & Regules  
Plaza Independencia 811  
11100 Montevideo, Uruguay  
Tel: 598.2.902.15.15/ Fax: 598.2.902.54.54  
Email: atarabal@guyer.com.uy

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.





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### VENEZUELA Hoet Pelaez Castillo & Duque

#### CONTACT INFORMATION:

**Francisco M. Castillo**  
Hoet Pelaez Castillo & Duque  
Centro San Ignacio, Torre Kepler, Piso 4  
Av. Blandin, La Castellana  
Caracas, 1060, Venezuela  
Tel: 58.212.201.8611 Ext. 8502/ Fax: 58.212.2637744  
Email: FCastillo@hpcd.com

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- FEDERAL

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 (4<sup>th</sup> 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<sup>262</sup>.

If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys<sup>263</sup>.

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. Meredith*, 572 F.2d 596, 608-609 (8<sup>th</sup> 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<sup>264</sup>.

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<sup>262</sup> Upjohn, 449 U.S. at 394.

<sup>263</sup> 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)

<sup>264</sup> *Harper and Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7<sup>th</sup> Cir. 1970).

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’<sup>265</sup>.” 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<sup>266</sup>. 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<sup>267</sup>. 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<sup>268</sup>.

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.<sup>269</sup>

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<sup>270</sup>. 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<sup>271</sup>. 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<sup>272</sup>. Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character<sup>273</sup>.

<sup>265</sup> *Id.* at 14 citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 404 (8<sup>th</sup> 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).

<sup>266</sup> *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *Hawkins v. Stables*, 148, F.3d 379 (4<sup>th</sup> Cir. 1998); *United States v. Tedder*, 801 F.2d 1437, 1441 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1996).

<sup>267</sup> *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4<sup>th</sup> Cir. 1984).

<sup>268</sup> *Hodges, Grant & Kaufmann v. U.S.*, 768 F.2d 719 (5<sup>th</sup> Cir. 1985); *Texaco, Inc. v. Louisiana Land & Exploration Co.*, 805 F. Supp. 385 (M.D. La. 1992).

<sup>269</sup> *In re Grand Jury Proceedings*, 517 F.2d 666 (5<sup>th</sup> Cir. 1975); *New Orleans Saints v. Griesedieck*, 612 F.Supp. 59, 62 (E.D. La. 1985), aff’d, 790 F.2d 1249 (5<sup>th</sup> Cir. 1986).

<sup>270</sup> *In re Hutchins*, 211 B.R. 330 (Bkrctcy. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrctcy. E.D.Ark. 1997).

<sup>271</sup> *American Standard, Inc. v. Bendix Corp.*, 80 F.R.D. 706 (D.C. Mo. 1978).

<sup>272</sup> *U.S. v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990).

<sup>273</sup> *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).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- ALABAMA Maynard Cooper & Gale P.C.

#### CONTACT INFORMATION:

**George G. Lynn**

**Jonathan Kipp**

Maynard Cooper & Gale P.C.

1901 Sixth Avenue North, Suite 2400

Birmingham, Alabama 35203

Tel: 205.254.1000/ Fax: 205.254.1999

Email: glynn@mcglaw.com

Email: jkipp@mcglaw.com

Alabama attorney-client privilege is governed by Alabama Rules of Evidence Rule 502 (2004). Rule 502(b) states the general rule, protecting “a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client” between an attorney and his or her client. In *Exxon Corporation v. Department of Conservation and Natural Resources*, 859 So.2d 1096 (Ala. 2002), the Alabama Supreme Court applied this rule to the question of communications between in-house counsel and their corporate clients. The Court held that “Charles Broome was employed as an in-house attorney for Exxon; thus, Broome’s client was Exxon.” *Id.* at 1103. Additionally, the court found that “[c]orporations are entitled to the benefit of the attorney-client privilege because corporations are included in the definition of “client” in Rule 502(a).” *Id.* This straightforward analysis extended the full measure of the attorney-client privilege to in-house counsel and corporations in Alabama.

Because of the nature of the relationship between in-house counsel and corporations, a few points are important to preserving attorney-client privilege. First, “the client must be consulting an attorney who is acting in the capacity of providing legal advice and counsel.” Ala. R. Evid., Advisory Committee’s Notes to Rule 502(a)(1) (2004). Alabama courts have made it clear that an attorney’s advice on business or personal matters is not protected. *See id.*; *see also Ex parte Birmingham News Company, Inc.*, 624 So.2d 1117, 1130 (Ala. Crim. App. 1993) (“Further, the attorney-client privilege does not protect information acquired by an attorney while acting in a nonlegal capacity (e.g., as an investigator).”). Since the advice sought from and given by in-house counsel may be somewhat broader than that from outside attorneys, to protect attorney-client privilege with respect to a specific communication, counsel and corporation should be careful to make sure that the communication involves only legal advice. Second, the advice must be a “confidential communication.” Rule 502(a)(5) states that “[a] communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication.” A final issue, what persons are representatives of the client, is closely related to confidentiality. Alabama follows the United States Supreme Court’s lead on this point, “expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include

anyone who ‘for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.’” Ala. R. Evid., Advisory Committee’s Notes to Rule 502(a)(2) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1991)).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- ARIZONA Snell & Wilmer L.L.P.

#### CONTACT INFORMATION:

**Barbara Dawson**

Snell & Wilmer L.L.P.

One Arizona Center

Phoenix, Arizona 85004-2202

Tel: 602.382.6000/ Fax: 602.382.6070

Email: bdawson@swlaw.com

Arizona expressly recognizes corporations as clients for purposes of attorney-client privilege protection.<sup>274</sup> 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.<sup>275</sup> Arizona uses a functional approach to determine whether communications are protected between in-house counsel and other corporate employees.<sup>276</sup> This approach focuses on the nature of the communication rather than the status of the communicator.<sup>277</sup> 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.<sup>278</sup>

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.<sup>279</sup> 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.<sup>280</sup>

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<sup>274</sup> A.R.S. 12-2234(B).

<sup>275</sup> *Id.*

<sup>276</sup> *Samaraitan Foundation v. Goodfarb*, 176 Ariz. 497, 499, 862 P.2d 870, 872 (1993).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 500.

<sup>280</sup> *Id.* at 504.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- ARKANSAS Rose Law Firm

#### CONTACT INFORMATION:

**Brian Rosenthal**

Rose Law Firm

120 East Fourth Street

Little Rock, Arkansas 72201

Tel: 501.377.0340/ Fax: 501.375.1309

Email: brosenthal@roselawfirm.com

Rule 502 of the Arkansas Rules of Evidence governs Arkansas law on the attorney-client privilege.<sup>281</sup> Under the rule, a client is defined to include 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.”<sup>282</sup> The privilege belongs to the client and is client’s to assert or waive, although the attorney may assert it on the client’s behalf.<sup>283</sup> A client may assert the privilege with respect to confidential communications that are “(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 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.”<sup>284</sup>

A corporate attorney will often have to obtain information about the actions and observations that occur within the scope of any 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 corporate-employer client and is within the privilege.”<sup>285</sup> 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.<sup>286</sup>

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.

<sup>281</sup> ARK. R. EVID. 502.

<sup>282</sup> ARK. R. EVID. 502(a)(1).

<sup>283</sup> *Spencer v. Regions Bank*, 73 Ark. App. 55, 61, 40 S.W.3d 319 (2001)

<sup>284</sup> ARK. R. EVID. 502(b).

<sup>285</sup> *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)).

<sup>286</sup> *Courteau*, 307 Ark. at 518, 821 S.W.2d at 48.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- CALIFORNIA Morrison & Foerster LLP

#### CONTACT INFORMATION:

**Cedric C. Chao**

**Anthony Solana, Jr.**

Morrison & Foerster LLP

425 Market Street

San Francisco, California 94105-2482

Tel: 415.268.7000/ Fax: 415.268.7522

Email: [cchao@mof.com](mailto:cchao@mof.com)

Email: [asolana@mof.com](mailto:asolana@mof.com)

In California state courts, the attorney-client privilege applies to communications between a client and in-house counsel in the same way that the privilege applies to such communications between a client and outside counsel. *See State Farm Fire & Cas. Co. v. Superior Court*, 54 Cal. App. 4th 625, 639 (1997). Similarly, the United States Court of Appeals for the Ninth Circuit (the federal appellate court with jurisdiction over California) has stated that federal law recognizes that the “attorney-client privilege will apply to confidential communications concerning legal matters made between a corporation and its house counsel. This principle has been followed with virtual unanimity by American courts.” *See U.S. v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996).

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





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- CONNECTICUT Murtha Cullina LLP

#### CONTACT INFORMATION:

**Timothy L. Largay**  
Murtha Cullina LLP  
CityPlace I, 185 Asylum Street  
Hartford, Connecticut  
06103-3469  
Tel: 860.240.6000/ Fax: 860.240.6017  
Email: [tlargay@murthalaw.com](mailto:tlargay@murthalaw.com)

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.<sup>287</sup>

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.<sup>288</sup> 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.<sup>289</sup> 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.<sup>290</sup>

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<sup>287</sup> 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.); see also Uniroyal Chem. Co. v. Syngenta Crop Prot., No. 3:02cv2253, 2004 U.S. Dist. LEXIS 18412 (D. Conn., Jul. 21, 2004) (citing PAS Assoc., 2001 Conn. Super. LEXIS 3392).

<sup>288</sup> Morganti National, 2001 Conn. Super. LEXIS 1751, at \*3 (noting that memoranda and notes authored and received by in-house counsel were "fairly characterized as predominantly legal."); see also Metropolitan Life Ins., 249 Conn. at 52; Shew v. FOIC, 245 Conn. 149, 157 (1998).

<sup>289</sup> 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).

<sup>290</sup> See PAS Assoc., 2001 Conn. Super. LEXIS 3392, at \*15-20; See also Connecticut Practice Book § 13-3.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- DELAWARE Richards, Layton & Finger, P.A.

#### CONTACT INFORMATION:

**Samuel A. Nolen**

Richards, Layton & Finger, P.A.

One Rodney Square

P.O. Box 551

Wilmington, Delaware 19899

Tel: 302.651.7700/ Fax: 302.651.7701

Email: [Nolen@RLF.com](mailto:Nolen@RLF.com)

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.*, 621 A.2d 773, 781 (Del. 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 inapposite. *Grimes v. LCC International, Inc.*, C.A. No. 16957, 1999 WL 252381, (Del. Ch. Apr. 23, 1999); see also *Texaco v. Phoenix Steel Corp.*, 264 A.2d 523, 525-26 (Del. Ch. 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*, C.A. Nos. 13323, 13284, 1995 WL 761222, at \*2, (Del. Ch. 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 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.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **USA- GEORGIA Alston & Bird LLP**

#### **CONTACT INFORMATION:**

**H. Stephen Harris, Jr.**  
Alston & Bird LLP  
1201 West Peachtree Street, N.W.  
Atlanta, Georgia 30309-3424  
Tel: 404.881.7000/ Fax: 404.881.7777  
Email: [sharris@alston.com](mailto:sharris@alston.com)

The attorney-client privilege is available in Georgia 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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- GUAM

### Sterling Johnson Martinez & Leon Guerrero P.C.

#### CONTACT INFORMATION:

##### Bill Blair

Sterling Johnson Martinez & Leon Guerrero P.C.

1008 Pacific News Building

238 Archbishop F.C. Flores Street

Hagåtña, Guam 96910

Tel: 617.477.7857/ Fax: 671.472.4290

Email: [ejblair@kbsjlaw.com](mailto:ejblair@kbsjlaw.com)

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.

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 were 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.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- HAWAII**  
**Case Lombardi & Petit A Law Corporation**

**CONTACT INFORMATION:**

**Greg Hansen**

**Debbie Higuchi**

Case Lombardi & Petit A Law Corporation

Suite 2600, Mauka Tower

737 Bishop Street

Honolulu, Hawaii 96813

Tel: 808.547.5400/ Fax: 808.523.1888

Email: [gmh@casebigelow.com](mailto:gmh@casebigelow.com)

Email: [dah@casebigelow.com](mailto:dah@casebigelow.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- IDAHO Hawley Troxell Ennis & Hawley, LLP

#### CONTACT INFORMATION:

**Patrick V. Collins**

Hawley Troxell Ennis & Hawley, LLP  
877 West Main Street, Suite 1000  
P.O. Box 1617  
Boise, Idaho 83701  
Tel: 208.344.6000/ Fax: 208.342.3829  
Email: pvc@hteh.com

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 client and a representative of the client, or (5) among lawyers and their representatives representing the same client.<sup>291</sup>

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.<sup>292</sup>

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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

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.<sup>296</sup> The privilege belongs to the client, whether or not the client is a party to the proceeding in which the

<sup>291</sup> Rule 502(b), I.R.E.

<sup>292</sup> 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).

<sup>293</sup> Rule 502(a)(1), I.R.E.

<sup>294</sup> Rule 502(a)(2), I.R.E.

<sup>295</sup> Rule 502(a)(3), I.R.E.

<sup>296</sup> See Comment to Rule 502(b), I.R.E.



privileged communication is sought. It survives the death of an individual and the dissolution of a corporation.<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup>

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 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.<sup>304</sup> Despite this holding, commentators agree that the attorney-client privilege is muddled 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.”<sup>305</sup>

Moreover, it is commonly accepted that “[t]he attorney-client privilege attaches only when the attorney acts in that capacity.”<sup>306</sup> It does not apply when in-house counsel is engaged in “nonlegal work.”<sup>307</sup> Such “nonlegal work” would include the rendering of business or technical advice unrelated to any legal issues.<sup>308</sup> However, “[c]lient communications intended to keep the attorney apprised of business matters may be privileged if they embody ‘an implied request for legal

<sup>297</sup> Rule 502(c), I.R.E.

<sup>298</sup> See Comment to Rule 502(c), I.R.E.

<sup>299</sup> Rule 502(d)(1), I.R.E.

<sup>300</sup> Rule 502(d)(2), I.R.E.

<sup>301</sup> Rule 502(d)(3), I.R.E.

<sup>302</sup> Rule 502(d)(4), I.R.E.

<sup>303</sup> Rule 502(d)(5), I.R.E.

<sup>304</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

<sup>305</sup> *U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156 (E.D. N.Y. 1994).

<sup>306</sup> *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).

<sup>307</sup> *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).

<sup>308</sup> *Id.* at 13-14 citing *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 510-511 (D.N.H. 1996).

advice based thereon.”<sup>309</sup> 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.”<sup>310</sup>

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.<sup>311</sup> (“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.”).<sup>312</sup> Furthermore, the mere fact that in-house counsel is present at a meeting does not shield otherwise unprivileged communications from disclosure.<sup>313</sup> For communications at such meetings to be privileged, they must have related to the acquisition or rendition of professional legal services.<sup>314</sup>

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 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.<sup>315</sup>

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.”

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<sup>309</sup> 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).

<sup>310</sup> Id.

<sup>311</sup> *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-644 (S.D.N.Y. 1987).

<sup>312</sup> *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).

<sup>313</sup> *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).

<sup>314</sup> Id. at 292.

<sup>315</sup> “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).

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- ILLINOIS Sonnenschein Nath & Rosenthal LLP

#### CONTACT INFORMATION:

##### Chunlin Leonhard

Sonnenschein Nath & Rosenthal LLP  
800 Sears Tower, 233 Wacker Drive  
Chicago, Illinois 60606-6404  
Tel: 312.876.8090/ Fax: 312.876.7934  
Email: cleonhard@sonnenschein.com

The threshold requirements for determining whether an attorney-client privilege exists in a corporate setting in Illinois include: (1) a showing that the communication originated in a confidence that it would not be disclosed; (2) the communication was made to an attorney acting in his or her legal capacity for the purpose of securing legal advice or services; and (3) the communication remained confidential.<sup>316</sup> Thus, among the factors relevant to a determination of whether the attorney-client privilege applies is the purpose for which the statement was made, which is particularly relevant in a corporate setting where legal counsel may be called upon to give either business and legal advice in the appropriate circumstances.<sup>317</sup> The attorney-client privilege will only protect communications necessary to obtain legal advice, and not those communications primarily regarding business or other non-legal matters.<sup>318</sup>

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.<sup>319</sup> 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.<sup>320</sup> The burden of showing these facts is on the party claiming the exemption.<sup>321</sup>

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 privilege for the corporate client to the extent reasonably necessary and the basic purpose of the

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<sup>316</sup> Archer Daniels Midland Co. v. Koppers Co., 138 Ill. App. 3d 276, 279 (1 Dist. 1985) (citing Consolidated Coal v. Bucyrus-Erie Co., 89 Ill. 2d 103, 432 N.E.2d 250 (1982)).

<sup>317</sup> Midwesco-Paschen Joint Venture for Viking Projects v. IMO Indus., Inc., 265 Ill. App. 3d 654, 660-61, 638 N.E.2d 322, 327 (1st Dist. 1994) (finding certain documents which give specific legal advice protected by the privilege, and also finding failure to carry burden of proving that other documents involve confidential legal advice, not protected by the privilege).

<sup>318</sup> Id.

<sup>319</sup> Consolidated Coal, 89 Ill. 2d 103; 432 N.E.2d 250 (1982); Day v. Illinois Power Co., 50 Ill. App. 2d 52; 199 N.E.2d 802 (5th Dist. 1964).

<sup>320</sup> Consolidated Coal Co., 89 Ill. 2d at 119-20, 432 N.E.2d at 257-58.

<sup>321</sup> Id. at 119, 432 N.E.2d at 257.

privilege.<sup>322</sup> Under the test, an Illinois appellate court has refused to find senior product engineer to be within the control group.<sup>323</sup> The focus of the court for finding the privilege is “on individual people who substantially influenced decisions, not on facts that substantially influenced decisions.”<sup>324</sup>

The Illinois work product doctrine also may shield certain communications, when those communications are prepared in anticipation of litigation or for trial.<sup>325</sup> “Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.”<sup>326</sup> In 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.<sup>327</sup>

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<sup>322</sup> Id. at 118-19, 432 N.E.2d at 257.

<sup>323</sup> Archer Daniels Midland Co., 138 Ill. App. 3d 276, 485 N.E.2d 1301 (1st Dist. 1985).

<sup>324</sup> Id. at 280, 485 N.E.2d at 1304.

<sup>325</sup> Waste Management, Inc. v. Int’l Surplus Lines Ins. Co., 144 Ill. 2d 178, 196, 579 N.E.2d 322, 329-30 (1991).

<sup>326</sup> Illinois Supreme Court Rule 201(b)(2).

<sup>327</sup> See, e.g., Consolidated Coal Co., 89 Ill. 2d at 108-10; 432 N.E.2d at 252-53.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- INDIANA  
Baker & Daniels**

**CONTACT INFORMATION:**

**Brian K. Burke**

**Jerry R. Jenkins**

Baker & Daniels

60 East 96<sup>th</sup> Street, Suite 600

Indianapolis, Indiana 46240

Tel: 317.569.9600

Fax: 317.569.4800

[bkburke@bakerd.com](mailto:bkburke@bakerd.com)

[jerry.jenkins@bakerd.com](mailto:jerry.jenkins@bakerd.com)

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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- IOWA

### Davis, Brown, Koehn, Shors & Roberts, P.C.

#### CONTACT INFORMATION:

**William J. Koehn**

**Beverly Evans**

Davis, Brown, Koehn, Shors & Roberts, P.C.

The Financial Center

666 Walnut Street, Suite 2500

Des Moines, Iowa 50309-3993

Tel: 515.288.2500

Fax: 515.243.0654

[billkoehn@lawiowa.com](mailto:billkoehn@lawiowa.com)

Under Iowa's common law, "any confidential communications between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client." *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995). Attorney-client privilege is also codified at Iowa Code Section 622.10, which states in pertinent part:

A practicing attorney...who obtains information by reason of the [attorney's] employment shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the [attorney] in the [attorney's] professional capacity, and necessary and proper to enable the [attorney] to discharge the functions of the [attorney's] office.

The applicability of the attorney-client privilege to communications involving in-house counsel is highly dependent on the specific facts and circumstances surrounding the communication. We have examined Iowa cases, Iowa ethics opinions, and other materials available, and although we have found no discussion of this specific issue in any Iowa authority, it is our opinion that the mere presence of in-house counsel at a business meeting does not ensure the application of the attorney-client privilege. Instead, the purpose of the communication must be to seek or provide legal advice in order to obtain the protection of the privilege.

Recent revisions in United States federal law, proposed rules posted by the Iowa Supreme Court on September 13, 2004 (the "Proposed Rules") and recent proposed rules from the American Bar Association, however, are relevant to this question. A court-appointed drafting committee delivered its final report and proposed new Iowa Rules of Professional Conduct to the Iowa Supreme Court on July 8, 2002. ABA Proposed Rule 1.6 regarding "Confidentiality of Information" and Rule 1.13, regarding the "Organization as Client" were adopted by the committee and have been included, but modified, by the Supreme Court in the Proposed Rules. Portions of the existing Iowa rules, the Proposed Rules and the United States Federal rules are summarized below.

## IOWA RULES

### DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of a client.
- (2) Use a confidence or secret of a client to the disadvantage of the client.
- (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(C) A lawyer 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 the client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect a fee or to defend oneself, employees, or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee. [Court Order November 9, 2001, effective February 15, 2002]

## THE PROPOSED IOWA RULES

Proposed Rule 1.6, as posted by the Iowa Supreme Court on September 13, 2004. Proposed Rule 1.16 is patterned after, but is not identical to the ABA Model Rule.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of



another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission or a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

Proposed Rule 1.13, as posted by the Iowa Supreme Court on September 13, 2004. Proposed Rules 1.13 is patterned after, but is not identical to the ABA Model Rule.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer or an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary or in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 1.7. If the organization's consent to the dual representation is required by rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## FEDERAL RULES

Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245)

Final Rules, January 29, 2003, Implementation of Standards of Professional Conduct for Attorneys ( Release Nos. 33-8185; 34-47276 )

- Became Effective August 5, 2003
- Found in Part 205

Proposed Rules, January 29, 2003

- Proposed alternative to "noisy withdrawal" that would require the issuer, rather than the attorney, to publicly disclose the attorney's withdrawal.
- No final rule yet issued regarding this aspect of the rules.
- General Principles
- Supplement applicable standards of any jurisdiction where an attorney is admitted
- Not intended to limit ability of any jurisdiction to impose additional obligations not inconsistent with rules
- When standards of a state where an attorney is admitted or practices conflict with the rules, the rules govern.

General Requirement: Report "up the ladder" any *evidence* of a *material violation* of

- securities law
- breach of fiduciary duty
- or similar violation by the company or any agent of the company

*Evidence* is reportable if it would be unreasonable for a prudent & competent attorney NOT to conclude, under the circumstances, that it is reasonably likely that a material violation has occurred, is ongoing or is about to occur.

Material violation means

- a material violation of an applicable United States federal or state securities law,
- a material breach of fiduciary duty arising under United States federal or state law (under existing law), or
- a similar material violation of any United States federal or state law (not explained).

Applicable for attorneys appearing and *practicing before the Commission* in any way in the *representation of issuers*:

- Transact any business with the Commission, including communications;
- Represent an issuer in a proceeding or investigation;
- Provide securities advice on, *or prepare*, any document that you have notice will be filed with the SEC
- Advise an issuer whether information or other writing is required to be filed with any document

In the representation of an issuer means:

- providing legal services *as an attorney* for an issuer -
- regardless of whether the attorney is employed or retained by the issuer
- Does *not* include services provided by a non-practicing attorney.

Issuer means

- means an issuer, the securities of which are registered under the Act, or
- that is required to file reports, or
- that files or has filed a registration statement that has not yet become effective not been withdrawn, or
- any person controlled by an issuer.
- Does not mean foreign government issuer.

Basic concepts to keep in mind

- An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the *issuer as an organization*.
- A “material violation” can be by the issuer or by any officer, director, employee, or agent
- “*By communicating information to the issuer's officers or directors, an attorney does not reveal client confidences ... or otherwise protected information.*”

Reporting Attorney’s Duty is to determine whether there has been an appropriate response within a reasonable time

- If not, report the evidence of a material violation to:
- The audit committee;
- Another committee consisting solely of independent directors; or
- The issuer's board of directors (if no committee).

Alternative: may report to a previously formed qualified legal compliance committee - then is not required to assess the issuer's response to the report.

Qualified legal compliance committee.

- Must be empowered by the Board
- may be an audit committee
- at least one audit committee member and two or more non-employee members
- can act by majority vote
- written procedures for *confidential* receipt, retention & consideration of a report

Proposed Release of January 29, 2003

Provides alternative approaches to situations in which an attorney reasonably believes an issuer has either:

- made no response (within reasonable time) or
- has not made an appropriate response.

Proposed Rules distinguish between:

material violations that have *already occurred and are not ongoing*, and material violations that are *either ongoing or are about to occur*.

- outside attorneys and in-house attorneys employed by an issuer.

Alternative #1

Proposed 205.3(d)(1) concerns material violation *ongoing or about to occur*

An Outside Attorney *shall*:

- Withdraw from representing issuer, indicating withdrawal is based on professional considerations;
- Within one business day, give written notice to Commission, indicating withdrawal was based on professional considerations; and
- Promptly disaffirm anything filed or submitted, or incorporated into a filed document, that attorney has prepared or assisted in preparing that attorney reasonably believes is or may be materially false or misleading

An In-House Attorney *shall*:

- Within one business day, notify the Commission in writing that he or she
  - intends to disaffirm anything filed with or submitted to the Commission, or incorporated into a filed document, that the attorney has prepared or assisted in preparing and
  - reasonably believes is or may be materially false or misleading; and
- Promptly disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation etc.

Proposed 205.3(d)(2) material violation that has already occurred & not ongoing.

An Outside Attorney *May*:

- Withdraw forthwith from representing the issuer, indicating that the withdrawal was based on professional considerations;
- Give written notice to the Commission of the withdrawal, indicating that the withdrawal was based on professional considerations; and
- Disaffirm to the Commission, in writing,

- anything filed with or submitted to the Commission, or incorporated into a filed document, that attorney has prepared or assisted in preparing and attorney reasonably believes is or may be materially false or misleading

An In-house Attorney *May*:

- Notify the Commission in writing that
- he or she intends to disaffirm something filed with or submitted to the Commission, or incorporated into a filed document, that the attorney has prepared or assisted in preparing and
- that the attorney reasonably believes is or may be materially false or misleading; and
- Disaffirm the filed document

“The notification to the Commission prescribed by this paragraph does not breach the attorney-client privilege. “

Alternative #2 – Alternative to "Noisy Withdrawal"

Proposed Section 205.3(d)(1) concerns material violation *ongoing or about to occur*

An Outside Attorney *shall*

- shall withdraw from representing the issuer, and
- shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

An In-house Attorney *shall*

- cease forthwith any participation or assistance in any matter concerning the violation and
- notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time.

Duties of an issuer: within *two business days*, report the notice and the circumstances related thereto on *Form 8-K*.

Proposed Section 205.3(f) would *Permit* an Attorney to Inform the Commission Where an Issuer Has Not Complied with the Issuer Reporting Requirements

If Issuer Fails to File the 8-K, Attorney *May* inform the Commission that :

- the attorney has provided the issuer with such notice and
- that such action was based on professional considerations.

General Principles

- Supplement applicable standards of any jurisdiction where an attorney is admitted
- Not intended to limit ability of any jurisdiction to impose additional obligations not inconsistent with rules
- When standards of a state where an attorney is admitted or practices conflict with the rules, the rules govern.

*“An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.”*

Novel Issues Raised By SEC Adopting Release

- Existence of attorney-client relationship should be a “federal question.”
- Historically considered a state-law issue.
- Does SEC intend to develop separate federal law?
- Will state-law principles apply?
- Answers are unclear.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- KANSAS Foulston Siefkin LLP

#### CONTACT INFORMATION:

**Jeff A. Jordan**

Foulston Siefkin LLP

Bank of America Center

100 N. Broadway, Suite 700

Wichita, Kansas 67202

Tel: 316.267.6371/ Fax: 316.267.6345

Email: [jjordan@foulston.com](mailto:jjordan@foulston.com)

Kansas law recognizes the attorney-client privilege.<sup>328</sup> 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.<sup>329</sup>

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.”<sup>330</sup> “[T]he focus of the inquiry clearly must be whether the communications were made at the request of management in order to allow the corporation to secure legal advice.”<sup>331</sup> The court indicated that, under this test, even communications between in-house counsel and lower-level employees may be protected.<sup>332</sup>

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

<sup>328</sup> 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).

<sup>329</sup> 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).

<sup>330</sup> *Boyer*, 162 F. R. D. at 689-90.

<sup>331</sup> *Id.* at 689.

<sup>332</sup> *Id.* at 690.

communication between in-house counsel and a director, officer, or employee will depend upon the facts of each case.





## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- KENTUCKY Wyatt, Tarrant & Combs, LLP

#### CONTACT INFORMATION:

##### **Bill Hollander**

Wyatt, Tarrant & Combs, LLP  
500 West Jefferson Street, Suite 2600  
Louisville, Kentucky 40202  
Tel: 502.562.7318/ Fax: 502.598.0309  
Email: [whollander@wyattfirm.com](mailto:whollander@wyattfirm.com)

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.<sup>333</sup>

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.<sup>334</sup> 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.<sup>335</sup> 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.<sup>336</sup> 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.<sup>337</sup> The court cited as authority *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*,<sup>338</sup> a case that dealt in part with the attorney-client privilege in the context of communications with outside counsel.<sup>339</sup> Given that the court in

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<sup>333</sup> KRE 503(b).

<sup>334</sup> See *Morton v. Bank of the Bluegrass and Trust Co.*, 18 S.W.2d 353, 360-61 (Ky. Ct. App. 2000).

<sup>335</sup> See *id.* at 355-56.

<sup>336</sup> See *id.* at 360.

<sup>337</sup> See *id.*

<sup>338</sup> 807 S.W.2d 476 (Ky. 1991).

<sup>339</sup> See *Morton*, 18 S.W.3d at 360.

*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 U.S. Supreme Court's decision in *Upjohn Co. v. United States*,<sup>340</sup> the leading federal case on attorney-client privilege in the corporate context, and state court decisions along the same lines.<sup>341</sup> 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,<sup>342</sup> 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.<sup>343</sup>

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<sup>340</sup> 449 U.S. 383 (1981).

<sup>341</sup> See JEROME G. SNIDER AND HOWARD A. ELLINS, CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION § 2.05[2][c] (2001) [hereinafter SNIDER AND ELLINS].

<sup>342</sup> 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).

<sup>343</sup> KRE 503(d).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- LOUISIANA Lemle & Kelleher, LLP

#### CONTACT INFORMATION:

**Charles R. Talley**  
Lemle & Kelleher, LLP  
21<sup>st</sup> Floor Pan American Life Center  
601 Poydras Street  
New Orleans, Louisiana 70130  
Tel: 504.584.9114/ Fax: 504.584.9142  
Email: ctalley@lemle.com

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. 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 company.<sup>344</sup> If these criteria are satisfied, the attorney/client privilege will protect statements made by corporate employees to corporate attorneys.<sup>345</sup>

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.<sup>346</sup> 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.<sup>347</sup> 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.<sup>348</sup>

The elements essential to the application of the attorney/client privilege are:

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<sup>344</sup> *Up John*, 449 U.S. at 394.

<sup>345</sup> 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)

<sup>346</sup> *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980); *Hawkins v. Stables*, 148, F.3d 379 (4<sup>th</sup> Cir. 1998); *United States v. Tedder*, 801 F.2d 1437, 1441 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1996).

<sup>347</sup> *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4<sup>th</sup> Cir. 1984).

<sup>348</sup> *Hodges, Grant & Kaufmann v. U.S.*, 768 F.2d 719 (5<sup>th</sup> Cir. 1985); *Texaco, Inc. v. Louisiana Land & Exploration Co.*, 805 F. Supp. 385 (M.D. La. 1992).

(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.<sup>349</sup>

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.<sup>350</sup> 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.<sup>351</sup> 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.<sup>352</sup> Stated simply, merely because factual information is transmitted through an attorney does not mean that it takes on a confidential character.<sup>353</sup>

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, 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.<sup>354</sup>

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.)"<sup>355</sup>

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."<sup>356</sup>

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<sup>349</sup> In re Grand Jury Proceedings, 517 F.2d 666 (5<sup>th</sup> Cir. 1975); New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 62 (E.D. La. 1985), aff'd, 790 F.2d 1249 (5<sup>th</sup> Cir. 1986).

<sup>350</sup> In re Hutchins, 211 B.R. 330 (Bkrcty. E.D.Ark. 1997), on reconsideration in part, 216 B.R. 11 (Bkrcty. E.D.Ark. 1997).

<sup>351</sup> American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (D.C. Mo. 1978).

<sup>352</sup> U.S. v. Davis, 132 F.R.D. 12 (S.D.N.Y. 1990).

<sup>353</sup> 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).

<sup>354</sup> LSA-C.E. §506

<sup>355</sup> 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).

<sup>356</sup> LGS Natural Gas Co. v. Latter, 1998 WL 205417.

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.<sup>357</sup> 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.”<sup>358</sup>

The second instance a waiver can occur is when “a party places privileged communications at issue”.<sup>359</sup> 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.”<sup>360</sup>

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.<sup>361</sup> 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.<sup>362</sup> 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.”<sup>363</sup>

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<sup>357</sup> See, *Landry-Scherer v. Latter*, 1998 WL 205417 (E.D.La. 1998).

<sup>358</sup> *Landry-Scherer*, 1998 WL 205417.

<sup>359</sup> *Landry-Scherer*, 1998 WL 205417, \*3.

<sup>360</sup> *Landry-Scherer*, 1998 WL 205417, \*3.

<sup>361</sup> *Landry-Scherer*, 1998 WL 205417, \*4.

<sup>362</sup> *Landry-Scherer*, 1998 WL 205417, \*5.

<sup>363</sup> *Landry-Scherer* 1998 WL 205417, \*5.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MAINE Bernstein Shur

#### CONTACT INFORMATION:

**John M.R. Paterson**

Bernstein Shur

100 Middle Street

Portland, Maine 04101

Tel: 207.228.7212/ Fax: 207.774.1127

Email: [jpaterson@bssn.com](mailto:jpaterson@bssn.com)

Under Rule 502 of the Maine Rules of Evidence, confidential communications between an attorney and a client or a “representative of the client” made for the purpose of “facilitating the rendition of professional legal services to the client” are privileged and are not admissible in evidence. Although the Rule on its face does not specifically discuss communications with in-house counsel, a fair reading of the Rule would support the conclusion that the privilege applies to such communications. First, sub-section 502(a)(2) defines a “representative of a client” as one who has authority to obtain advice from or act on advice rendered by a lawyer. Such definition plainly encompasses corporate employees. Further, sub-section 502(c) permits the privilege to be claimed by a representative of a corporation, association or other organization.”

The Maine Supreme Judicial Court has not had occasion to address the issue of whether such communications fall within the Rule. However, consistent with the foregoing reading of Rule 502, the U.S. District Court for the District of Maine had held that communications between in-house counsel and a corporate employee that “contained information regarding the subject matter of the litigation” and which “requested advice from the [in-house] attorney” are covered by Rule 502. Scott Paper Co. v. Ceilcote Co., Inc., 103 F.R.D. 591 (D.Me. 1984).



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **USA- MASSACHUSETTS Foley, Hoag LLP**

#### **CONTACT INFORMATION:**

**Barry White**

Foley, Hoag LLP

155 Seaport Boulevard

Boston, Massachusetts 02210

Tel: 617.832.1000/ Fax: 617.832.7000

Email: [bbwhite@foleyhoag.com](mailto:bbwhite@foleyhoag.com)

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, conversations in which in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are susceptible to challenge on the ground that it is business advice that is being given and not legal advice.<sup>364</sup>

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<sup>364</sup> Epstein, The Attorney-Client Privilege and the Work-Product Doctrine (4<sup>th</sup> ed.), Section of Litigation, American Bar Association.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MICHIGAN Butzel Long

#### CONTACT INFORMATION:

**Marcia Proctor**

Butzel Long

Suite 900, 150 West Jefferson

Detroit, Michigan 48226-4450

Tel: 313.225.7000/ Fax: 313.225.7080

Email: [proctor@butzel.com](mailto:proctor@butzel.com)

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.<sup>365</sup>

The attorney-client privilege applies to both written and oral communications.<sup>366</sup> The privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”<sup>367</sup>

The privilege attaches only to confidential communications.<sup>368</sup> 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.<sup>369</sup> An exception to this principle applies where the third party is an agent of

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<sup>365</sup> 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).

<sup>366</sup> *In re Bathwick's Estate*, 241 Mich 156, 158-159; 216 NW 420 (1927).

<sup>367</sup> *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 (6<sup>th</sup> 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).

<sup>368</sup> *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).

<sup>369</sup> *In re Dalton Estate*, 346 Mich 613, 619; 78 NW2d 266 (1956).



the client,<sup>370</sup> and the courts have recognized that “[c]ommunications made through a client’s agent are privileged.”<sup>371</sup>

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 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.<sup>372</sup> 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*,<sup>373</sup> 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 *Fassih* case, the Michigan Court of Appeals held that “the attorney-client privilege belongs to the [corporate] control group.”<sup>374</sup> This case probably should not be read to indicate, however, that *Fassih* 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 *Fassih* was submitted and, therefore, the Court of Appeals may simply have been unaware of the *Upjohn* decision. Second, *Fassih* does not discuss *Upjohn* or state that it is rejecting the *Upjohn* analysis. And, finally, there may be nothing technically inconsistent between *Fassih* 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:

<sup>370</sup> 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”).

<sup>371</sup> *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).

<sup>372</sup> See, eg, *United States v Upjohn Co*, 600 F2d 1223 (6th Cir 1979).

<sup>373</sup> 449 US 383 (1981).

<sup>374</sup> *Fassih v Sommers, Schwartz*, 107 Mich App 509, 518; 309 NW2d 645 (1981).

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 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.”<sup>375</sup>

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.<sup>376</sup> 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.

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<sup>375</sup> *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)).

<sup>376</sup> See Michigan Rule of Professional Conduct 1.13(a).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MINNESOTA Briggs and Morgan, P.A.

#### CONTACT INFORMATION:

**David Mason**

Briggs and Morgan, P.A.

2200 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402

Tel: 612.977.8400/ Fax: 612.977.8650

Email: [dmason@briggs.com](mailto:dmason@briggs.com)

Generally, the attorney-client privilege can be invoked when a professional attorney-client relationship exists and a confidential communication seeking or providing legal advice is made pursuant to the relationship.<sup>377</sup> Minnesota courts strictly construe the privilege since “[t]he attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts....”<sup>378</sup>

In Minnesota, corporations and in-house counsel may assert the attorney-client privilege. The difficulty, however, is ascertaining what communications are protected by the attorney-client privilege because the Minnesota Supreme Court has neither embraced nor rejected the “control group” or “subject matter” test.<sup>379</sup> Rather, and due to courts strictly construing the privilege, communications to in-house counsel are analyzed on a case-by-case, document-by-document basis to determine if a communication is protected or privileged.<sup>380</sup>

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

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<sup>377</sup> Minn. Stat. Ann. § 595.02 subd. 1(b).

<sup>378</sup> *Leer v. Chicago, Milwaukee, St. Paul Cty. Ry. Co.*, 62 N.W.2d 305, 307-309 (Minn. 1981), cert denied 455 U.S. 939 (1982).

<sup>379</sup> *Leer*, 62 N.W.2d at 309.

<sup>380</sup> *Kahl v. Minnesota Wood Specialty, Inc.*, 277 N.W.2d 395, 399 (Minn. 1979)



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MISSISSIPPI Butler, Snow, O'Mara, Stevens & Cannada, PLLC

#### CONTACT INFORMATION:

**John C. Henegan**

**Benjamin M. Watson**

Butler, Snow, O'Mara, Stevens & Cannada, PLLC

17<sup>th</sup> Floor, Amsouth Plaza

210 East Capitol Street

Jackson, Mississippi 39201

Tel: 601.948.5711/ Fax: 601.985.4500

Email: [John.henegan@butlersnow.com](mailto:John.henegan@butlersnow.com)

Email: [Ben.Watson@butlersnow.com](mailto:Ben.Watson@butlersnow.com)

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 the confidentiality of communications made by the client, or the client's representative, to a lawyer or the lawyer's representative "for the purpose of facilitating the rendition of professional legal services to the client."<sup>381</sup> Under Rule 502, a 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.<sup>382</sup> 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."<sup>383</sup> An attorney must not reveal the confidences of the client.<sup>384</sup> 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; or (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.<sup>385</sup>

Based on the foregoing authorities and subject to the exceptions noted, the privilege may attach to 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 not solely of a personal or a business nature.<sup>386</sup> Under certain circumstances, letters, draft affidavits, and other

<sup>381</sup> Miss. R. Evid. 502(b).

<sup>382</sup> Miss. R. Evid. 502(a)(1) & (c).

<sup>383</sup> Miss. R. Evid. (a)(3).

<sup>384</sup> Miss. R. Evid. 502cmt.; Mississippi Rules of Prof'l Conduct R.1.6; and Miss. Code73-3-37(4) (1972).

<sup>385</sup> Miss.R. Evid. 502(d).

<sup>386</sup> Miss.R. Evid. 502 & cmt.

correspondence circulated among counsel for separate corporate defendants on matters of common interest may be protected under the "common interest" prong of the attorney-client privilege as well as the work-product doctrine.<sup>387</sup>

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<sup>387</sup> *Hewes v. Langston*, 853 So. 2d 1237, 1249 (Miss. 2003).



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MISSOURI Armstrong Teasdale LLP

#### CONTACT INFORMATION:

**Edward R. Spalty**

**Thomas H. Bottini**

Armstrong Teasdale LLP

2345 Grand Boulevard, Suite 2000

Kansas City, Missouri 64108-2617

Tel: 816.221.3420/ Fax: 816.221.0786

Email: [espalty@armstrongteasdale.com](mailto:espalty@armstrongteasdale.com)

Email: [tbottini@armstrongteasdale.com](mailto:tbottini@armstrongteasdale.com)

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.<sup>388</sup> 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.<sup>389</sup> All four of the above elements must be present for the privilege to apply.<sup>390</sup> 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.<sup>391</sup>

Additionally, it is by now well established that the attorney-client privilege applies to corporations as well as to individuals.<sup>392</sup> 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.<sup>393</sup> 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.<sup>394</sup> The second test, formulated in *Harper and Row Publishers, Inc. v. Decker*, focuses upon why an attorney was consulted, rather than with whom the attorney communicated.<sup>395</sup>

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<sup>388</sup> State ex rel. Great American Insurance Co. v. Smith, 574 S.W.2d 379, 382 (Mo. Banc 1978).

<sup>389</sup> State v. Longo, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990).

<sup>390</sup> Id.

<sup>391</sup> Id.

<sup>392</sup> Upjohn Co. v. United States, 449 U.S. 383 (1981).

<sup>393</sup> Diversified Industries Inc. v. Meredith, 572 F.2d 596, 608 (8<sup>th</sup> Cir. 1977).

<sup>394</sup> 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 (8<sup>th</sup> Cir. 1977)).

<sup>395</sup> Id. (citing Harper and Row Publishers, Inc. v. Decker, 423 F.2d 487 (7<sup>th</sup> 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)).

Missouri law applies a modified version of the second, or Harper and Row test, to determine whether an employee's communications are privileged.<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup>

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.<sup>399</sup> 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.<sup>400</sup> This limitation is commonly referred to as the "crime-fraud exception" to the attorney-client privilege.<sup>401</sup>

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<sup>396</sup> Id. at 609.

<sup>397</sup> Id.

<sup>398</sup> Id.

<sup>399</sup> In Re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 641 (8<sup>th</sup> Cir. 2001).

<sup>400</sup> Id.

<sup>401</sup> Id.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- MONTANA

### Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P

#### CONTACT INFORMATION:

**Terri Hogan**

**Allan Karell**

Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P

490 N 31<sup>st</sup> Street, Suite 500 TW2

Billings, Montana 59101

Tel: 406.252.3441/ Fax: 406.259.4159

Email: [thogan@crowleylaw.com](mailto:thogan@crowleylaw.com)

Email: [akarell@crowleylaw.com](mailto:akarell@crowleylaw.com)

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:

- (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.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- NEBRASKA Baird Holm LLP

#### CONTACT INFORMATION:

**Lawrence Kritenbrink**

Baird Holm LLP

1500 Woodmen Tower

Omaha, Nebraska 68102

Tel: 402.636.8231/ Fax: 402.344.0588

Email: lkritenbrink@bairdholm.com

There is little Nebraska case law which deals with the attorney-client privilege in the context of the corporate setting. Although the Nebraska Supreme Court has held that it is vested with the inherent power and authority under the Nebraska Constitution to admit lawyers to the practice of law and to discipline and regulate them, *State ex rel. 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 of the mutual company had acted in their own interests, breached their fiduciary duties to the policyholders, and failed to make proper disclosures in the proxy statements soliciting the policyholders’ approval of the sale. A money judgment was entered against certain of the defendants, who appealed to the Nebraska Supreme Court. One of the claims of error assigned to the trial court was the admission into evidence of certain communications between the director-president of the mutual company and its counsel. Both the mutual company and the president claimed that the communications came within the attorney-client privilege. In rejecting that claim, the Supreme Court concluded that because the facts clearly demonstrated the president’s conduct was fraudulent and violated his fiduciary duties, the communications were not privileged. The Court wrote:

We hold, under the provisions of section 27-503 . . . a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud.

202 Neb. at 607, 277 N.W.2d at 44. Two of the seven judges<sup>402</sup> concurred in the result, writing that they would restrict the holding to the particular corporate context of this case. Accordingly, they would:

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

202 Neb. at 624, 277 N.W.2d at 49. In their view, the holding that the lawyer-client privilege is not available in any case where the attorney's services are obtained in order to commit or plan to commit what the client knew to be a fraud, was "far too broad," notwithstanding the specific language of § 27-503. No other published Nebraska appellate case dealing with the crime-fraud exception was found.<sup>403</sup>

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

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

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<sup>402</sup> The Nebraska Supreme Court consists of seven members; of the seven judges who sat and decided this case, two—including one of the dissenters—were trial court judges sitting by invitation.

<sup>403</sup> 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 to a lawyer's testimony about the inaccurate contents of an affidavit his client had signed and the circumstances surrounding its execution. The appellate court, however, rested its affirmance on the attestation exception. *Smith v. Smith*, 2000 WL 228651 (Neb. App. Feb. 29, 2000).

“exercise independent professional judgment on behalf of a client,” then Ethical Consideration 5-18, which provided that an attorney employed by a corporation owed allegiance to the corporation and required that professional judgment be exercised uninfluenced by the desires of others, and then Ethical Consideration 5-14, which prohibited the acceptance of employment where two or more clients had differing interests.

The former Code has been replaced by the Nebraska Rules of Professional Conduct (2005) which, insofar as is relevant to the *Detter* decision, imposes obligations which are essentially the same as those imposed by the earlier Code. More specifically, Rule 2.1 requires that a lawyer exercise independent professional judgment in representing a client. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents (that is, the corporation's officers, directors, employees and shareholders). Comment [10] thereto makes clear that the lawyer's allegiance is owed to the organization by noting that when an organization's interest becomes adverse to those of a constituent, the lawyer should advise such constituent of the conflict, that the lawyer cannot represent the constituent, and that discussions between the lawyer and constituent may not be privileged. Rule 1.7 prohibits a lawyer from representing a client if there exists a concurrent conflict of interest and Rule 1.9 protects the interests information of former clients unless the current or former client consents to the representation. Thus, at least in the absence of valid waivers by all parties, the result in *Detter* would likely be the same under the current Rules as it was under the former Code.

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

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

Comment [2] to Rule 1.13 provides that when a constituent communicates in a corporate capacity with corporate counsel, the communication is privileged as set forth in Rule 1.6.



## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- NEVADA Lionel Sawyer & Collins

#### CONTACT INFORMATION:

**Todd Kennedy**

Lionel Sawyer & Collins  
1700 Bank of America Plaza  
300 South Fourth Street  
Las Vegas, Nevada 89101  
Tel: 702.383.8965/ Fax: 702.383.8845  
Email: tkennedy@lionelsawyer.com

Nevada's general rule regarding the attorney-client privilege states that:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between himself or his representative and his lawyer or his lawyer's representative.
2. Between his lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest. NRS 49.095.

"Client" is defined to include a "corporation, association or other organization or entity." NRS. 49.045. "Lawyer," as defined for the purposes of the attorney-client privilege in Nevada, is sufficiently broad to include in-house counsel. *See* NRS 49.065. No reported Nevada case, however, specifically addresses the issue of whether or not communications to in-house counsel fall within the privilege.

The Nevada Supreme Court considered when the attorney-client privilege exists in a corporate setting in *Wardleigh v. Second Judicial Dist. Court*.<sup>404</sup> In *Wardleigh*, the Court considered both the "control group" test and the test adopted by the United States Supreme Court in *Upjohn Co. v. United States*.<sup>405</sup> The Nevada Supreme Court expressed approval of the *Upjohn* test but held that, under the facts of *Wardleigh* (minutes of a homeowners' association meeting where unrepresented members were present), neither the "control group" test nor the *Upjohn* test would render the subject communications privileged. *Wardleigh* did not consider the applicability of the privilege to in-house counsel.

It is likely in Nevada that communications to in-house counsel are protected by the attorney-client privilege *provided* the requirements of NRS 49.035-49.115 and the *Upjohn* test are satisfied. Particularly in the circumstances of in-house counsel, it is important to consider the purpose of

<sup>404</sup> *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 891 P.2d 1180 (1995).

<sup>405</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389-97, 101 S.Ct. 677, 682-86, 66 L.Ed.2d 584 (1981).

the communication and the role the in-house attorney is serving. A Nevada Discovery Commissioner opinion has considered applicability of the attorney client-privilege for communications to in-house counsel and, although assuming that such communications *could* be covered by the privilege, rejected the claim of privilege because, *inter alia*, the subject communications had not been given to the in-house counsel for the purpose of obtaining legal advice.<sup>406</sup> In addition, the Nevada Supreme Court held in *City of Reno v. Reno Police Protective Assoc.*, that an e-mail memorandum sent by a city employee to the city attorney was a protected communication,<sup>407</sup> and in *Weiner v. Beatty*, that a lawyer hired by a union to represent an individual member had an attorney-client relationship with the union, not the member.<sup>408</sup>

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<sup>406</sup> See Discovery Commissioner Opinion No. 2, *Grassinger v. Trudel* (August, 1988), available at [http://www.nvbar.org/publicServices/DisCommOpinion\\_Southern.html](http://www.nvbar.org/publicServices/DisCommOpinion_Southern.html).

<sup>407</sup> *City of Reno v. Reno Police Protective Assoc.*, 118 Nev. 889, 59 P.3d 1212 (2002). The actual issue in the case was whether e-mail communications had a sufficient expectation of privacy to qualify as privileged communications. In reaching its holding, the Supreme Court cited to a Massachusetts court decision finding e-mails to and from in-house counsel protected by the attorney-client privilege.

<sup>408</sup> *Weiner v. Beatty*, 121 Nev. 243, 116 P.3d 829, 200 Ed. Law Rep. 883.



## **IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

### **USA- NEW HAMPSHIRE Sheehan Phinney Bass + Green, P.A.**

#### **CONTACT INFORMATION:**

##### **Kathleen McElman**

Sheehan Phinney Bass + Green, P.A.

Hampshire Plaza

1000 Elm Street

Manchester, New Hampshire 03101

P.O. Box 3701

Manchester, New Hampshire 03105-3701

Tel: 603.668.0300/ Fax: 603.627.8121

Email: [KMcelman@sheehan.com](mailto:KMcelman@sheehan.com)

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. 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 practitioner 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<sup>212</sup>.

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.<sup>213</sup>

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 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.

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<sup>212</sup> (See Restatement of the Law Governing Lawyers, 3d Edition, 1998, Section 73).

<sup>213</sup> (See Rule 502(a) Definitions, 55 (2) “representative of a client”).

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- NEW JERSEY  
Day Pitney LLP**

**CONTACT INFORMATION:**

**Benjamin E. Haglund**

**Pamela Sesso Petrolino**

Day Pitney LLP

200 Campus Drive

P.O. Box 1945

Morristown, New Jersey 07962-1945

Tel: 973.966.6300/ Fax: 973.966.1550

Email: bhaglund@pitneyhardin.com

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.”<sup>214</sup>

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.<sup>215</sup> 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.<sup>216</sup>

The attorney-client privilege does *not* extend “(a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by *inter vivos* transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer.”<sup>217</sup>

A communication also will not receive the protection of the attorney-client privilege where such “grave circumstances” exist that public policy concerns compel disclosure.<sup>218</sup> 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

<sup>214</sup> New Jersey Rules of Professional Conduct 1.13.

<sup>215</sup> See, e.g., *United Jersey Bank v. Wolosoff*, 196 N.J. Super. 553, 562 (App. Div. 1984).

<sup>216</sup> *Id.*

<sup>217</sup> N.J.S.A. 2A:84A-20.

<sup>218</sup> See *Dontzin v. Myer*, 301 N.J. Super. 501, 508 (App. Div. 1997).

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.<sup>219</sup>

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<sup>219</sup> See *In re Kozlov*, 79 N.J. 232, 243-44 (1979).

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- NEW MEXICO  
Rodey, Dickason, Sloan, Akin & Robb, P.A.**

**CONTACT INFORMATION:**

**Kip Purcell**

**Rex Throckmorton**

Rodey, Dickason, Sloan, Akin & Robb, P.A.

Albuquerque Plaza, Suite 2200

201 Third Street, N.W.

Albuquerque, New Mexico 87102

Tel: 505.765.5900/ Fax: 505.768.7395

Email: [rthrockmorton@rodey.com](mailto:rthrockmorton@rodey.com)

Email: [kipurcell@rodey.com](mailto:kipurcell@rodey.com)

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

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

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

...

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

N.M. R. Evid. 11-503(B). Although the rejected federal standard, unlike the New Mexico rule, explicitly shields communications between the client or the client's representative and the lawyer or the lawyer's representative, it seems highly doubtful that the omission of this phrase from the New Mexico rule signals any intent to deny protection to communications between in-house counsel and corporate officers, directors, or employees. Thus, in Public Service Co. v. Lyons, 2000-NMCA-077, 129 N.M. 487, 10 P.3d 166 – in the course of adopting a “restrictive approach” to assertions that attorney-client privilege has been waived – the New Mexico Court of Appeals approvingly quoted Upjohn Co. v. United States, 449 U.S. 383 (1981), in which the United States Supreme Court confirmed that communications between corporate counsel and corporate employees for the purpose of facilitating the provision of legal services are privileged. 2000-

NMCA-077, ¶¶ 24-25. On the other hand, New Mexico case law does not expressly address the extent to which the privilege attaches to such communications.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- NEW YORK**  
**Day Pitney LLP**  
(Lex Mundi Member Firm for New Jersey)

**CONTACT INFORMATION:**  
**Benjamin E. Haglund**  
**Pamela Sesso Petrolino**  
Day Pitney LLP  
New York, New York  
Tel: 212.297.5800/ Fax: 212.297.2940  
Email: [bhaglund@pitneyhardin.com](mailto:bhaglund@pitneyhardin.com)

Corporations, as clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys that relate to their legal matters.<sup>220</sup> The attorney-client privilege applies to communications with attorneys, whether those attorneys are corporate staff counsel or outside counsel.<sup>221</sup>

The inquiry as to whether a communication between staff counsel and a corporation's employees is privileged is fact-specific.<sup>222</sup> 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."<sup>223</sup>

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.<sup>224</sup> 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.<sup>225</sup>

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

<sup>220</sup> See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 542 N.Y.S.2d 508, 509 (N.Y. 1989).

<sup>221</sup> *Id.*; C.P.L.R. 4503.

<sup>222</sup> *Id.* at 510.

<sup>223</sup> *Id.* at 511.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

being used to further a crime or fraud.”<sup>226</sup> Additionally, the attorney-client privilege may yield “where strong public policy requires disclosure.”<sup>227</sup>

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<sup>226</sup> New York Disciplinary Rule 4-101.

<sup>227</sup> See *Priest v. Hennessy*, 431 N.Y.S.2d 511, 514 (N.Y. 1980).

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- NORTH CAROLINA**  
**Womble, Carlyle Sandridge & Rice, PLLC**

**CONTACT INFORMATION:**

**Michael Ray**

**Susan Giamportone**

Womble, Carlyle Sandridge & Rice, PLLC

One West Fourth Street

Winston-Salem, North Carolina 27101

Tel: 336.721.3648/ Fax: 336.733.8312

Email: MRay@wcsr.com

North Carolina has adopted a five-part test to determine whether the attorney-client privilege applies to a particular communication. *See In Re Miller*, 357 N.C. 316, 335, 584 S.E. 2d 772, 786 (2003). The privilege applies if “(1) the relation of the 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.” *See State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E. 2d 438, 442 (1994). “If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged.” *See Miller*, 357 N.C. at 335, 584 S.E. 2d at 786. The attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material, and thus, North Carolina courts are obligated to “strictly construe” the attorney-client privilege to limit it to the purpose for which it exists: “to encourage thorough and frank communication between attorneys and their clients and thereby promote broader public interest in the observation of law and administration of justice.” *See Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 603, 617 S.E. 2d 40, 46 (2005) (citing *Evans v. United Serv. Auto Ass’n*, 142 N.C. App. 18, 31, 541 S.E. 2d 782, 790, cert. denied, 353 N.C. 371, 547 S.E. 2d 810 (2001)).

North Carolina courts apply the protection of the attorney-client privilege to in-house counsel in the same way that it is applied to other attorneys. *See Isom v. Bank of America, N.A.*, 628 S.E. 2d 458, 462 (N.C. App. 2006). 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 Isom*, 628 S.E. 2d at 462. A communication will not be deemed privileged merely because an in-house attorney was copied on the communication or forwarded a copy of a document. *Id.* “The burden of establishing the attorney-client privilege rests upon the claimant of the privilege.” *See Evans*, 142 N.C. App. at 32, 541 S.E. 2d at 791. In addressing the attorney-client privilege for in-house counsel, the North Carolina Court of Appeals has held that an insurance company’s claimed diary entries that contained either requests for advice from in-house counsel or counsel’s responses to such requests will protect it from disclosure by the attorney-client privilege. *See Evans*, 142 N.C. App. at 32, 541 S.E. 2d at 791. Similarly, the United States District Court for the Middle District of North Carolina clearly stated that the



protection of the privilege extends to an employee's communications of fact and opinions shared with corporate counsel in preparing the corporation's legal defense. *U.S. v. Duke Energy Corp.*, 208 F.R.D. 553, 556 (M.D.N.C. 2002). Where, however, bank officials exchanged emails and copied the bank's in-house counsel for what appeared to be purely informational purposes, the North Carolina Court of Appeals has found that the attorney-client privilege did not apply because there was no suggestion that the bank officials were seeking legal advice. *See Isom*, 628 S.E. 2d at 462.

If the requirements for the attorney-client privilege are not met, the communications may still be protected by the work-product doctrine if the document was generated in anticipation of litigation, unless the parties seeking discovery can show a "substantial need" for the information and "undue hardship" in otherwise obtaining the substantial equivalent information. *See* N.C. Gen. Stat. §1A-1, Rule 26(b)(3) (2006). The party asserting the work-product doctrine bears the burden of showing "(1) that the material consists of documents for tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant or agent." *See Isom*, 628 S.E. 2d at 463.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- NORTH DAKOTA**  
**Nilles Ivedson Plambeck & Selbo, Ltd.**

**CONTACT INFORMATION:**

**Andrew L. B. Noah**

Nilles Ivedson Plambeck & Selbo, Ltd.

1800 Radisson Tower

201 North Fifth Street

P.O. Box 2626

Fargo, North Dakota 58108

Tel: 701.237.5544/ Fax: 701.280.0762

Email: [anoah@nilleslaw.com](mailto:anoah@nilleslaw.com)

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.”<sup>228</sup> 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 disclosed to third persons.<sup>229</sup> 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.<sup>230</sup>

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.”<sup>231</sup> Next, a “lawyer” includes a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.<sup>232</sup> 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

<sup>228</sup> See N.D. R. Evid. 502(b).

<sup>229</sup> N.D. R. Evid. 502(a)(5).

<sup>230</sup> 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).

<sup>231</sup> N.D. R. Evid. 502(a)(1).

<sup>232</sup> N.D. R. Evid. 502(a)(3).

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.<sup>233</sup> 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 of “representative of the client,” are protected by Rule 502.

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<sup>233</sup> See N.D. R. Evid. 502(a)(2)(B).

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- OHIO**  
**Calfee, Halter & Griswold LLP**

**CONTACT INFORMATION:**  
**Zachary King**  
Calfee, Halter & Griswold LLP  
1400 McDonald Investment Center  
800 Superior Avenue, N.E.  
Cleveland, Ohio 44114-2688  
Tel: 216.622.8200/ Fax: 216.241.0816  
Email: [ZKing@Calfee.com](mailto:ZKing@Calfee.com)

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

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

The following persons shall not testify in certain respects: An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the expressed consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421<sup>234</sup> of the Revised Code to have waived testimonial privilege under this division, the attorney may be compelled to testify on the same subject...

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

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

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<sup>234</sup> Ohio Revised Code § 2151.421 deals with duties to report child abuse or neglect.

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 advice.”<sup>235</sup> As such, communications between an in-house counsel and an employee fall within the statutory attorney-client privilege.<sup>236</sup>

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.<sup>237</sup>

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.<sup>238</sup> 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).

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<sup>235</sup> See *id.*

<sup>236</sup> See *Shaffer v. OhioHealth Corp.*, 2004 Ohio App. LEXIS 15, \*7 (Franklin Cty. 2004) (noting that § 2317.021 extends the attorney client relationship to firms, partnerships or corporations as clients and the statute acknowledges that corporations can only communicate with counsel through their employees or agents; positing that in cases where the “corporation, partnership, or other collective entity is the client, the attorney-client privilege belongs to the company and not to its employees outside of their employment capacity.”) See also *State v. Today’s Bookstore, Inc.*, 86 Ohio App. 3d 810, 817 (Montgomery Cty. 1993) (finding that the communications between the City of Dayton and its chief prosecutor fell within the statutory definition of attorney-client communications under Ohio Rev. Code. § 2317.02 and § 2317.021).

<sup>237</sup> *State v. Post*, 32 Ohio St. 3d 380, 385 (1987) (modified by *State v. McDermott*, 72 Ohio St. 3d 570, 574 (1995), which states that while the court in *Post* could properly determine how common-law privilege (created between a client and an attorney’s agent) may be waived, waiver of privileged communications between an attorney and a client is governed exclusively by § 2317.02(A)).

<sup>238</sup> 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).

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- OKLAHOMA  
Crowe & Dunlevy**

**CONTACT INFORMATION:**

**Courtney K. Warmington**

Crowe & Dunlevy

20 North Broadway, Suite 1800

Oklahoma City, Oklahoma 73102

Tel: 405.235.7700/ Fax: 405.239.6651

Email: [warmingc@crowedunlevy.com](mailto:warmingc@crowedunlevy.com)

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 the client or a representative of the client and the client’s attorney or a representative of the attorney.” 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, 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). On the other hand, the Tenth Circuit Court of Appeals (applying Oklahoma law) has held that a draft memorandum prepared by in-house counsel regarding proposed guidelines for implementation of a reduction in force and lists prepared at request of in-house counsel for use in advising company's restructuring oversight committee were not merely generated as business advice. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550-51 (10<sup>th</sup> Cir. 1995). In holding that the documents were protected by the attorney-client privilege, the Court relied on the affidavit submitted by the in-house counsel, which stated that the draft memorandum contained legal advice for corporate restructuring of company, that the lists were prepared for his use in giving legal advice to the company's restructuring oversight committee, that the memorandum and lists were treated as confidential

documents, that he did not render business advice in the memorandum and lists, and that he served in capacity as legal advisor to the committee. *Id.* These decisions 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 person the lawyer knows to be represented by counsel without the consent of the opposing attorney. *See* 5 Okla. Stat. Ch. 1, App. 3-A, Rule 4.2. In the case of an organizational client, the official comment to Rule 4.2 states that the rule “prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having 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. 1-89*, 230 F.3d 1201, 1208-1209 (10<sup>th</sup> 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 company, as long as the communications were made for the primary purpose of obtaining legal advice.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- OREGON  
Davis Wright Tremaine LLP**

**CONTACT INFORMATION:**

**Patricia L. McGuire**

Davis Wright Tremaine LLP  
1300 SW 5<sup>th</sup> Avenue, Suite 1300  
Portland, Oregon 97201  
Tel: 503.241.2300/ Fax: 503.778.5299  
Email: [patriciamcguire@dwt.com](mailto:patriciamcguire@dwt.com)

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. 492,501-2 (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.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- PENNSYLVANIA  
Eckert Seamans Cherin & Mellott, LLC**

**CONTACT INFORMATION:**

**Gail Groninger**

Eckert Seamans Cherin & Mellott, LLC  
44<sup>th</sup> Floor, USX Tower  
600 Grant Street  
Pittsburgh, Pennsylvania 15219  
Tel: 412.566.5901/ Fax: 412.566.6099  
Email: [ggroninger@eckertseamans.com](mailto:ggroninger@eckertseamans.com)

In Pennsylvania, the attorney-client privilege has been codified at 42 PA. CON STAT. § 5928 (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”<sup>239</sup> 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?<sup>240</sup>

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. 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 in-house counsel and employees who have authority to act on behalf of the corporation.<sup>241</sup>

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

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<sup>239</sup> *Id.*

<sup>240</sup> 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 (6<sup>th</sup> Cir. 1979).

<sup>241</sup> *In re Ford Motor Co.*, 110 F.3d 954 (3<sup>rd</sup> Cir. 1997); *Coregis Ins. Co. v. Kafrissen*, 186 F.Supp.2d 567 (E.D. Pa. 2002); *Maleski by Chronister v. Corporate Life Ins. Co.*, 641 A.2d 1 (Pa. Cmwlth. 1994).

corporate employees to corporate counsel are privileged as to the corporation<sup>242</sup>, but not necessarily to employees who qualify as corporate representatives individually.<sup>243</sup>

Pennsylvania courts will not protect communications unless they are made for the purpose of obtaining legal advice.<sup>244</sup> 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 privileged; if it occurs in the presence of a non-privileged third party or an 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* § 111. B. (Pennsylvania Bar Institute 1998).

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<sup>242</sup> *Barr Marine Products Co. v. Borg-Warner Corp.*, 84 F.R.D. 631 (E.D. Pa. 1979).

<sup>243</sup> *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).

<sup>244</sup> *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(e), at 391.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- PUERTO RICO  
McConnell Valdés**

**CONTACT INFORMATION:**

**Carmen M. Ramírez Fiol**  
McConnell Valdés  
270 Muñoz Rivera Avenue  
San Juan, Puerto Rico 00918  
P.O. Box 364225  
San Juan, Puerto Rico 00936-4225  
Tel: 787.759.9292/ Fax: 787.759.8282  
Email: [cmr@mcvpr.com](mailto:cmr@mcvpr.com)

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. It has not applied the attorney-client privilege to business documents and agendas, interoffice business memos, 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.

## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### **USA- RHODE ISLAND Tillinghast Licht LLP**

#### **CONTACT INFORMATION:**

**Steven M. Richard**  
Tillinghast Licht LLP  
10 Weybosset Street  
Providence, Rhode Island 02901-2818  
Tel: 401.456.1316/ Fax: 401.456.1210  
Email: srichard@tllslaw.com

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.”<sup>245</sup> 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.<sup>246</sup> Thus the “mere existence of a relationship between an attorney and client does not raise the presumption of confidentiality.”<sup>247</sup> 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.<sup>248</sup> However, an inquiry may be made to determine whether the client reasonably understood the communication to be confidential, even though third parties were present.

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<sup>245</sup> Callahan v. Nvstedt, 641 A.2d 58, 61 (1994) (citations omitted).

<sup>246</sup> Id.

<sup>247</sup> Id.

<sup>248</sup> State v. Driscoll, 360 A.2d 857, 861 (1976).

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.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- SOUTH CAROLINA  
Wyche, Burgess, Freeman & Parham, P.A.**

**CONTACT INFORMATION:**

**Wallace K. Lightsey**

Wyche, Burgess, Freeman & Parham, P.A.

44 East Camperdown Way

Greenville, South Carolina 29601-3512

P.O. Box 728

Greenville, South Carolina 29602-0728

Tel: 864.242.8207/ Fax: 864.242.8324

Email: [wlightsey@wyche.com](mailto:wlightsey@wyche.com)

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.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- SOUTH DAKOTA  
Lynn, Jackson, Shultz & Lebrun, P.C.**

**CONTACT INFORMATION:**

**Gene N. Lebrun**

Lynn, Jackson, Shultz & Lebrun, P.C.  
909 St. Joseph Street, Suite 800  
Rapid City, South Dakota 57701  
P.O. Box 8250  
Rapid City, South Dakota 57709  
Tel: 605.342.2592/ Fax: 605.342.5185  
Email: [glebrun@lynnjackson.com](mailto:glebrun@lynnjackson.com)

On September 29, 2003, the South Dakota Supreme Court adopted the South Dakota Rules of Professional Conduct, effective January 1, 2004. These new Rules were adopted from the American Bar Association *Model Rules of Professional Conduct*. Although these new Rules did not amend Rule 502 of the South Dakota Rules of Evidence on lawyer-client privileges, in-house lawyers and their employers should be aware of certain provisions that may affect the in-house lawyer's duties and responsibilities under the Rules of Professional Conduct.

The statutory lawyer-client privilege SDCL 19-13-2 through 19-13-4 makes no distinction between communications between outside counsel and in-house counsel. The issue would revolve on the question of whether or not 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 statutory 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.

Some provisions of the South Dakota Rules of Professional Conduct that in-house lawyers and their employers should keep in mind include:

***Preamble: A Lawyer's Responsibilities***

*[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communications with a client concerning the representation. A lawyer should keep in confidence information relating to representations of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law,*

***Rule 1.6. Confidentiality of Information***

- (a) A lawyer shall not reveal information relating to the representations of a client unless the client gives informed consent except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by, and except as state in paragraph (b).*
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.**

The comment to this section (b)(1) of Rule 1.6 states:

*Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.*

Rule 1.13 deals exclusively with organizations as clients and governs the conduct of lawyers who are either retained or employed by an organization, that is, both retained outside counsel and in-house counsel. A review of that Rule 1.13 and associated Comments is recommended to all in-house counsel and their employers. It addresses the lawyer's duty to the organization as well as to the officers, employees or other persons affiliated with the organization.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- TENNESSEE**  
**Bass, Berry & Sims PLC**

**CONTACT INFORMATION:**  
**Wallace W. Dietz**  
Bass, Berry & Sims PLC  
315 Deaderick Street, Suite 2700  
Nashville, Tennessee 37238-3001  
Tel: 615.742.6276/ Fax: 615.742.2776  
Email: wdietz@bassberry.com

The attorney-client privilege in Tennessee has been codified in Section 23-3-105. Requirements for Tennessee's attorney-client privilege to apply are:

“(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.

In the in-house context, courts will pay special attention to the requirement that the communication be for the purpose of securing legal advice. 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.

Recently, a Tennessee court found that a former in-house counsel could reveal confidential information received during employment to the extent necessary to establish a retaliatory discharge claim.

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” and taking steps to limit internal access to the information, one could prevent disclosure by seeking a protective order or injunction.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- TEXAS  
Baker Botts L.L.P.**

**CONTACT INFORMATION:**

**Kyle Harris**

910 Louisiana Street, Suite 3000

Houston, Texas 77002

Tel.: 713.229.1403/ Fax: 713.229.1522

Email: kyle.harris@bakerbotts.com

The attorney-client privilege as applied under Texas law protects the confidentiality of communications between lawyer and client made for the purpose of facilitating the rendition of professional legal services.<sup>249</sup> The privilege allows a client to refuse to disclose and to prevent any other person from disclosing confidential communications: (a) between the client or a representative of the client and the client's lawyer or a representative of the lawyer; (b) between the lawyer and the lawyer's representative; (c) by the client or a representative of the client, or the client's lawyer representing another party in a pending action and concerning a matter of common interest therein; (d) between representatives of the client or between the client and a representative of the client; and (e) among lawyers and their representatives representing the same client.<sup>250</sup>

The attorney-client privilege extends to employees of a corporation regardless of their position within the organization<sup>251</sup> and applies in the same manner to in-house counsel as it does to outside counsel.<sup>252</sup> Nevertheless, determining whether the attorney-client privilege applies can be more complex in the in-house situation.

Simply because a communication is sent to or from an individual within an organization who is an attorney does not mean that the communication is privileged. To be privileged, the communication must be made to facilitate the rendition of professional legal services to the client.<sup>253</sup> If an attorney is functioning in a capacity other than a lawyer--such as an accountant, investigator, or business advisor--there is no privilege based on the rendition of his services.<sup>254</sup> Thus, for example, an e-mail sent to or from an attorney who is acting in a non-legal capacity as

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<sup>249</sup> TEX. R. CIV. EVID. 503(b)(1).

<sup>250</sup> Id. Texas law defines a "confidential communication" as one which 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 communication." TEX. R. CIV. EVID. 503(a)(5).

<sup>251</sup> Prior to 1998 Texas applied the "control group test," reflected in Tex. R. Civ. Evid. 503(a)(2)(A), under which corporations could only assert the privilege for the communications of employees "in a position to control or even take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney." See Nat'l Converting & Fulfillment Corp. v. Bankers Trust Corp., 134 F. Supp. 2d 804, 805-06 (N.D. Tex. 2001) (quoting Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993)). However, in 1998, the rule was amended to add 503(a)(2)(B), which added the "subject matter" test and brought Texas law into "alignment" with federal law. Id. at 806 n.1; accord In re Monsanto Co., 998 S.W.2d 917, 922 (Tex. App.--Waco 1999, no pet.).

<sup>252</sup> Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 139 n.13 (E.D. Tex. 2003); accord United States v. Mobil Corp., 149 F.R.D. 533, 537 (N.D. Tex. 1993) (citing Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981)).

<sup>253</sup> TEX. R. CIV. EVID. 503(b)(1).

<sup>254</sup> Navigant Consulting, Inc. v. Wilkinson, 220 F.R.D. 467, 474-75 (N.D. Tex. 2004) (applying Texas law).

CEO or CFO will not be privileged unless the communication was made to facilitate the rendition of legal services by another attorney (*e.g.*, in-house counsel) who *is* acting in a legal capacity.<sup>255</sup> Similarly, the fact that an in-house attorney is copied on an e-mail or is “one of many addresse[e]s” in an e-mail is “clearly insufficient” by itself to establish the attorney-client privilege.<sup>256</sup> Therefore, in-house counsel and employees who are corresponding with others for purposes of facilitating the rendition of professional legal services should be careful to make this purpose clear in their correspondence.

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<sup>255</sup> See *In Re Avantel, S.A.*, 343 F.3d 311, 321 (5th Cir. 2003) (applying Texas law).

<sup>256</sup> *Id.*

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- UTAH  
Van Cott**

**CONTACT INFORMATION:**

**Robert M. Anderson**

Van Cott

50 South Main

Suite 1600

Salt Lake City, Utah

Tel.: 801.237.0213/ Fax: 801.237.0437

Email: randerson@vancott.com

The attorney-client privilege in Utah is set forth under Rule 504 of the Utah Rules of Evidence, and protects “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” The privilege extends to communications “between the client and the client’s representatives, lawyers, lawyer’s representatives, and lawyers representing others in matters of common interest.”

After the U.S. Supreme Court case of Upjohn Co. v. United States, 449 U.S. 383 (1981), the Utah Advisory Committee revised the rule to address the scope of the privilege for communications made by corporate employees and representatives. The Committee rejected the “control group” test, and extended the privilege to communications made by “representative[s] of the client,” which includes not only those who have the authority to obtain or act on legal advice, but also people “specifically authorized [by the client] to communicate with the lawyer concerning a legal matter.” Thus, the corporate client may control and significantly extend the privilege through careful and deliberate grants of specific authorization.

The rule imposes no specific restrictions upon the privilege with respect to in-house counsel. So long as the communication meets the Rule’s requirements of confidentiality and purpose, as well as “specific authorization” where necessary, communications with in-house counsel should be privileged. Communications with the lawyer’s representative, such as paralegals who assist the lawyer in the rendition of his or her services, should also be covered.

The privilege does not extend to communications relevant to an issue between parties who claim through the same deceased client, so that, for example, an attorney may be required to disclose statements relevant to claims of undue influence or want of capacity in a will contest. See In Re Young’s Estate, 94 P. 731 (Utah 1908). Neither does the privilege extend to communications relevant to an action between joint clients, where the communication was made to a lawyer retained or consulted in common. The Utah rule also includes exceptions to the privilege for actions brought by clients against their lawyers for breach of duty and situations in which a lawyer becomes an attesting witness to a document.

As is the common rule, the privilege does not extend to communications made in furtherance of crime or fraud, but the Advisory Committee considered and rejected an exception to the privilege for communications made in furtherance of a tort. The Committee rejected the tort exception because of undesirable ambiguities and uncertainties that would be created.

Utah law also recognizes a work-product privilege that can be asserted by both the lawyer and client. To be considered work-product, the material must be “(1) documents and tangible things otherwise discoverable, (2) prepared in anticipation of litigation or for trial, [and] (3) by or for another party or by or for that party's representative.” Gold Standard, Inc. v. American Barrick Res. Corp., 805 P.2d 164, 168 (Utah 1990).

Rule 504 establishes whether a communication is privileged at the time it was made. Whether the privilege is subsequently waived is answered under Rule 507. Doe v. Maret, 984 P.2d 980 (Utah 1999).

## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- VERMONT Downs Rachlin Martin PLLC

**CONTACT INFORMATION:**  
**Steven P. Crowther**  
Downs Rachlin Martin PLLC  
P.O. Box 190  
199 Main Street, 6<sup>th</sup> Floor  
Burlington, Vermont 05402  
Tel: 802.863.2375/ Fax: 802.862.7512  
Email: scrowther@drm.com

In Vermont, the attorney-client privilege extends to corporations and other organizations.<sup>257</sup> 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*,<sup>258</sup> 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 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.<sup>259</sup>

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<sup>257</sup> *Baisley v. Missisquoi Cemetery Ass’n*, 167 Vt. 473 (1998).

<sup>258</sup> 449 U.S. 383 (1981).

<sup>259</sup> See Reporter’s Notes to V.R.E. 502(a)(2).

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.

## IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE

### USA- VIRGINIA McGuireWoods LLP

#### CONTACT INFORMATION:

**Thomas E. Spahn**  
McGuireWoods LLP  
1750 Tysons Blvd. Suite 1800  
McLean, Virginia 22102-4215  
Tel : 703.712.5417/ Fax : 703.712.5199  
Email: tspahn@mcguirewoods.com

The Virginia Supreme Court recognizes that in-house lawyers can have privileged conversations with employees of companies they represent.<sup>260</sup> Virginia Circuit Courts have also confirmed this principle.<sup>261</sup> Both Federal District Courts in Virginia have also recognized that in-house lawyers may have privileged communications.<sup>262</sup>

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.<sup>263</sup> One Virginia Circuit Court cited this strange definition in holding that the attorney-client privilege did not protect communications between in-house lawyers and their clients.<sup>264</sup> However, that decision seems to have been an aberration, and no other courts have taken the same approach.

As of July 1, 2004, in-house lawyers practicing law in Virginia without a full Virginia license must obtain either a registration or a certification from the Virginia State Bar.<sup>265</sup> Although this new approach did not explicitly change the definition of the "practice of law," the fact that all Virginia in-house lawyers must be licensed somewhere and must have some connection to the Virginia Bar makes it even less likely that a court would ever point to Virginia's unique definition in denying privilege protection for in-house lawyers.

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<sup>260</sup> Va. Elec. & Power Co. v. Westmoreland-LG & E Partners, 259 Va. 319, 326 (Va. 2000) (holding that the attorney-client privilege protected a draft letter sent for review to an in-house lawyer; explaining that "Communications between officers and employees of the same entity relayed to corporate counsel for the purpose of obtaining legal advice are entitled to attorney-client privilege.") (citing Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 638 (Va. 1992)).

<sup>261</sup> Inta-Roto, Inc. v. Aluminum Co., 11 Va. Cir. 499, 500 (Henrico 1980) ("That such [attorney-client] privilege does apply to in-house counsel is clear."); 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.") (internal citations omitted).

<sup>262</sup> 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.") (internal citations omitted).

<sup>263</sup> Va. R. pt. 6, § 1(B).

<sup>264</sup> Belvin v. H.K. Porter Co., 17 Va. Cir. 303, 308 (Norfolk 1989).

<sup>265</sup> Va. R. pt. 1A:5.



**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- U.S. VIRGIN ISLANDS  
Dudley, Topper and Feuerzeig, LLP**

**CONTACT INFORMATION:**

**Gregory H. Hodges**

Dudley, Topper and Feuerzeig, LLP

1000 Frederiksberg Gade

St. Thomas, Virgin Islands 00802

Tel: 340.715.4405/ Fax: 340.715.4400

Email: [ghodges@dtflaw.com](mailto:ghodges@dtflaw.com)

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

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

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- WASHINGTON  
Davis Wright Tremaine LLP**

**CONTACT INFORMATION:**

**Steven Caplow**

Davis Wright Tremaine LLP

2000 Century Square

1501 Fourth Avenue

Seattle, Washington 98101

Tel: 206.622.3150/ Fax: 206.628.7699

Email: [stevencaplow@dwt.com](mailto:stevencaplow@dwt.com)

Washington law does not distinguish between in-house counsel and other attorneys for purposes of the attorney-client privilege.<sup>266</sup> Under Washington's statutory enactment of the attorney-client privilege, "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."<sup>267</sup> Notwithstanding the narrow language of the statute, Washington courts extend the same privilege accorded to the attorney to the client,<sup>268</sup> and to documents that contain privileged communications.<sup>269</sup>

For the attorney-client privilege to apply, (1) there must be an attorney-client relationship, (2) the communication must involve legal advice, and (3) the communication must have been made and kept in confidence. First, the test for an attorney-client relationship is the individual's subjective belief such a relationship exists, if is reasonably formed based on the attending circumstances, including the attorney's words or actions.<sup>270</sup> Second, communications with an attorney that are business related, rather than involving legal advice, are not privileged. "Where one consults an attorney not as a lawyer but as a friend or a business adviser or banker or negotiator, or as an accountant . . . the consultation is not professional nor the statement privileged."<sup>271</sup> Finally, if the communication is intended to be, or is, disclosed to others, any applicable privilege is lost.<sup>272</sup>

The party asserting the privilege has the burden of showing both that the attorney-client relationship existed and that disclosure would reveal communications that were both legal in nature and confidential.<sup>273</sup> When disclosure of evidence is opposed on the basis of privilege, in

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<sup>266</sup> See, e.g., *State v. American Tobacco Co., Inc.*, 1997 WL 728262 \*8 (Wash. Super. Nov. 21, 1997) (unpublished trial court order) (upholding privilege for redaction of in-house counsel's advice regarding regulatory compliance issues).

<sup>267</sup> RCW § 5.60.060(2)(a).

<sup>268</sup> *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn. App. 725, 735, 812 P.2d 488, 494 (1991).

<sup>269</sup> *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, 111 P.3d 866, 878 (2005).

<sup>270</sup> *Dietz v. Doe*, 131 Wn.2d 835, 843-44, 935 P.2d 611 (1997).

<sup>271</sup> *State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340, rev. denied, 96 Wn.2d 1019 (1981).

<sup>272</sup> *State v. Sullivan*, 60 Wn.2d 214, 217-18, 373 P.2d 474 (1962).

<sup>273</sup> *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 501, 903 P.2d 496 (1995), rev. denied, 129 Wn.2d 1010 (1996).

camera review is the only way a court can determine whether a document is exempt from disclosure.<sup>274</sup>

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<sup>274</sup> Versuslaw, 127 Wn. App. at 331 n.27, 111 P.3d at 877 n.27 (2005) (error for trial court to deny motion to compel without conducting in camera review)

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- WASHINGTON, D.C.  
Steptoe & Johnson LLP**

**CONTACT INFORMATION:**

**Matthew J. Mesmer**

Steptoe & Johnson LLP

1330 Connecticut Avenue, N.W.

Washington, DC 20036

Tel: 202.429.8191/ Fax: 202.261.0578

Email: [mmesmer@steptoe.com](mailto:mmesmer@steptoe.com)

It is well-established that the attorney-client privilege extends to communications with in-house counsel. See, e.g., Paul R. Rice, Attorney – Client Privilege In the United States § 3.14, at 53 (2d ed. 1999) (noting that “[t]he confidential communications between in-house counsel and [the] client are privileged to the same extent as communications between outside retained counsel and the clients who have consulted him for legal advice or assistance.”). Federal courts in Washington, D.C. have followed this general rule. E.g., Avianca, Inc. v. Corriea, 70 F.3d 637 (D.C. Cir. 1995) (memo) (unpublished opinion subject to D.C. Cir. R. 28(c)), [full text available at 1995 U.S. App. LEXIS 30863](#); Neuder v. Battelle Pac. Northwest Nat’l Lab., 194 F.R.D. 289 (D.D.C. 2000).

Neither the District of Columbia Court of Appeals nor the District of Columbia Superior Court (which are, respectively, the equivalent of state appellate and trial courts in Washington, D.C.) has addressed whether the attorney-client privilege extends to communications made to in-house counsel. However, Rule 49(c)(6) of the District of Columbia Court of Appeals Rules authorizes in-house counsel to practice in the District without first becoming a member of the District bar. It would be reasonable to infer from the rule that because it clearly contemplates an in-house attorney acting as a lawyer to receive information for the purpose of giving advice and to give such legal advice, such communications would be protected under the attorney-client privilege.

A common, and sometimes difficult, question that arises in the context of the attorney-client privilege and in-house counsel is whether a communication by an in-house attorney is of a legal or business nature. E.g., Boca Investorings P’ship v. United States, 31 F. Supp. 2d 9, 12 (D.D.C. 1998) (noting that “[b]ecause an in-house lawyer often has other functions in addition to providing legal advice, the lawyer’s role on a particular occasion will not be self-evident as it usually is in the case of outside counsel.”); United States v. Philip Morris, Inc., 209 F.R.D. 13 (D.D.C. 2002), [available at 2002 U.S. Dist. LEXIS 15787](#), at \*14 (holding that testimony on “substantial non-legal, non-litigation responsibilities, including corporate, business, managerial, public relations, advertising, scientific, and research and development responsibilities” by an in-house counsel was not subject to the attorney-client or work product privilege protections). However, the applicable principles for resolving that issue – namely, the standard elements of the attorney-client privilege, including the requirements that the advice sought and provided is of a

legal nature – will be the same for in-house and outside counsel, although the hazards with respect to in-house counsel may be more pronounced.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- WEST VIRGINIA  
Jackson Kelly PLLC**

**CONTACT INFORMATION:**

**Jill Obenchain**

Jackson Kelly PLLC

1600 Laidley Tower

P.O. Box 553

Charlestown, West Virginia 25322

Tel: 304.340.1018/ Fax: 304.340.1050

Email: [jobenchain@jacksonkelly.com](mailto:jobenchain@jacksonkelly.com)

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).<sup>275</sup> 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 management, where the requirements of *Burton* are not met. See, e.g., *Westbrook Health Services, Inc.* 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

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<sup>275</sup> 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).

counsel and (2) the employee(s) sought legal advice from in-house counsel. *Bedell* at 326, 484 S.E.2d at 209.<sup>276</sup>

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;
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

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<sup>276</sup> 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.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- WISCONSIN  
Michael Best & Friedrich LLP**

**CONTACT INFORMATION:**

**John A. Busch**

Michael Best & Friedrich LLP  
100 E. Wisconsin Avenue, Suite 3300  
Milwaukee, Wisconsin 53202-4108  
Tel: 414.271.6560/ Fax: 414.277.0656  
Email: [jabusch@mbf-law.com](mailto:jabusch@mbf-law.com)

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 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.

**IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE**

**USA- WYOMING**  
**Brown, Drew & Massey, LLP**

**CONTACT INFORMATION:**

**Mistee L. Godwin**

Brown, Drew & Massey, LLP

45 East Loucks, Suite 109

Sheridan, Wyoming 82801

Tel: 307.673.8565/ Fax: 307.673.6612

Email: [mlg@browndrew.com](mailto:mlg@browndrew.com)

*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.<sup>277</sup> 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 “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.*

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<sup>277</sup> See *Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 631 (S.D. Cal. 2001).