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A PROBLEM OF PRIVILEGE: IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES AND THE EUROPEAN COMMUNITY

*Alison M. Hill**

I. INTRODUCTION

In recent years, many companies have hired lawyers to work as in-house legal counsel in an attempt to obtain necessary legal work in an efficient manner.¹ In the U.S. these lawyers are governed by the same ethical and disciplinary rules as other attorneys in their jurisdiction.² However, in some of the countries in the European Community (EC) in-house counsel are treated differently, and not permitted to be members of the bar.³ When the European Court of Justice (ECJ) was faced with the question of whether to permit in-house counsel in the EC to exercise the attorney-client privilege,⁴ it looked to the rules and laws in the Member States and determined that in-house counsel would not be given the

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¹ Multinational corporations make great efforts at high cost to obtain expert legal advice in all the jurisdictions in which they operate. However, the very complexity of multibillion dollar enterprises, with numerous products and services marketed and manufactured by tens or even hundreds of thousands of people throughout the world, requires that the confidential communication with legal counsel be conducted in a particular manner in order that it may reach the right people at the appropriate decision-making level and also be cost effective. Modern multinational corporations have, therefore, engaged fully qualified lawyers to work in-house to provide this legal service, since it is virtually impossible for outside counsel to perform this function adequately.

Peter H. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW. 677, 686 (1986).

In the U.S. as of 1990, 10% of attorneys, over 55,000 attorneys, were employed in private industry. "In addition to just numbers, the quality of work being performed has undergone a significant change. . . . More and more substantive work — including litigation — is being performed by the corporation's own attorneys." Thomas B. Metzloff, *Ethical Considerations for the Corporate Legal Counsel*, available in Westlaw, C566 ALI-ABA 109, 111 (1990).

² See *infra* note 107 and accompanying text.

³ See *infra* notes 57-76 and accompanying text.

⁴ See *infra* notes 8-10 and accompanying text for a general discussion of the attorney-client privilege in the EC.

See *infra* notes 100-10 and accompanying text for a similar discussion in the U.S.

attorney-client privilege that exists for independent attorneys in the EC.⁵ The decision was based on the assumption that once attorneys are employed by a corporation they can no longer be independent.⁶ This assumption was the basis for the decision of several countries of the EC not to permit attorneys who became employees to remain members of the bar.⁷ The decision by the ECJ raises the question of whether in-house counsel should be treated like other attorneys, or whether there are significant differences which require that in-house counsel be governed by different rules.

This Note will answer that question by exploring the attorney-client privilege in the EC and the U.S., and whether its policies and goals can be better met when the privilege is given to in-house counsel. Section II of the Note will discuss the rules that apply to attorneys in the EC, and how and why the rules were formed. Section III will focus on the same issues in the U.S. Section IV will discuss whether the attorney-client privilege should be available to in-house counsel. The final section will conclude that the EC should modify its rules to permit in-house counsel to exercise the attorney-client privilege in Member States where they remain members of the bar.

II. THE RULES OF ATTORNEY-CLIENT PRIVILEGE IN THE EC

Although the attorney-client privilege is not specifically granted by the laws of the EC, the ECJ held in *AM & S v. Commission*,⁸ that under

⁵ The case posing the question for the ECJ was Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575. After this decision was handed down the American Bar Association, supported by the U.S. State Department, requested that the European Community provide

the same protection, including the procedural safeguards, against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a member state of the European Community. . . . The report contends that any lesser protection than full privilege would deny clients of U.S. lawyers a right that U.S. courts and antitrust enforcement agencies grant to clients of European lawyers.

EC Attorney-Client Privilege Extension to House Counsel Supported by U.S., Int'l Trade Rep, U.S. Import Weekly (BNA) (October 12, 1983).

⁶ Not only must [the in-house lawyer] be sensitive to the interests and activities of his employer, but he must take due account of the opinions and attitudes of his superiors. . . . Permanent involvement with the activities of one firm and direct dependence on this firm for their salary is thought to lead in-house lawyers to identify themselves with the firm's interest to the detriment of their independence. . . .

Theofanis Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 9 FORDHAM INT'L L.J. 1, 16 (1985-1986).

⁷ See *infra* note 49 and accompanying text.

⁸ Case 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575.

certain circumstances the privilege does exist. "That general principles which have not been expressly stated in the Treaty or subordinate legislation may exist as part of the Community law, the observance of which the Court is required to ensure, needs no emphasis."⁹ In determining the rule of law, the ECJ compared the laws of the Member States and determined the best resolution for the Community.¹⁰ *AM & S* was an important decision because it defined the scope of attorney-client privilege in the EC and gave notice to all attorneys that the protection was limited to particular lawyers in particular circumstances.

A. *The AM & S Case*

AM & S was the first opportunity for the ECJ¹¹ to investigate the existence of the attorney-client privilege for attorneys in the EC. The case came before the ECJ on an appeal by *AM & S Europe Ltd.*¹² (*AM &*

This case was somewhat unusual procedurally because after the initial oral arguments and opinion written by Advocate General Warner on January 20, 1981 [hereinafter Warner's opinion], the ECJ reopened oral arguments. The result was that two advocate general opinions were written before the case was decided by the ECJ. The second opinion, written by Advocate General Slynn, was issued on January 26, 1982 [hereinafter Slynn's opinion]. The final decision of the ECJ was issued on May 18, 1982. See generally P.J. Duffy, *Legal Privilege and Community Law*, 132 *NEW L.J.* 580, 581 (1982).

⁹ Slynn's opinion, *AM & S*, 1982 E.C.R. at 1648.

¹⁰ There is complete agreement that when the Court interprets or supplements Community law on a comparative law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' and 'most appropriate' solution.

Id. at 1649 (quoting Kutschler, *Methods of Interpretation as seen by a Judge at the Court of Justice*, JUDICIAL AND ACADEMIC CONFERENCE 1976 at 29).

¹¹ There are six Advocates General to the ECJ. Each is a member of the court but does not have a vote in the final decision by the Court. The Advocate General assigned to a particular case acts as an independent adviser, who researches the law, analyzes the facts and issues an opinion. According to Article 166 of the Treaty Establishing the European Economic Community, the Advocate General's role is to act "with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164." The judges are not bound to decide the case in accord with the Advocate General's opinion. After hearing the arguments of the parties and reviewing the opinion of the Advocate General, the ECJ issues a decision on the case. See L. NEVILLE BROWN, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (1989).

¹² *AM & S Europe Limited* is an English company. "It is a subsidiary of an Aus-

S) from a decision by the Commission of the European Communities (the Commission) which required AM & S to turn documents over to the Commission for its investigation of an alleged breach of competition regulations by AM & S.¹³ The attorneys for AM & S refused to give the Commission the documents it requested because they argued that the documents were subject to attorney-client privilege.¹⁴ Some of the documents involved in the case were prepared by in-house counsel and some were prepared by attorneys in private practice.¹⁵

1. The Facts of the Case

On February 20 and 21, 1979, three officials from the Commission conducted an investigation at the AM & S facility at its premises in

tralian company, Australian Mining and Smelting Limited. Both companies belong to the well-known Rio Tinto Zinc group. A subsidiary of [AM & S] owns and operates a zinc smelter at Avonmouth, near Bristol [England]." Warner's opinion, AM & S, 1982 E.C.R. at 1620.

¹³ Article 85 and 86 deal with prohibition of anti-competition or restraint of trade by companies within the EC.

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market,

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY] art. 85.

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- (b) limiting production, markets or technical development to the prejudice of consumers;

¹⁴ There were two major disputes in this case: (1) what powers the Commission had to require AM & S to turn over documents, and (2) what procedures should be used to determine whether the documents would be afforded privilege.

Under Regulation 17 (11) the Commission

may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings. . . .

Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied.

Council Regulation 17, art. 11, 1962 J.O. (204) 1; 1959-1962 O.J. SPEC. ED. 87, 90 [hereinafter Regulation 17].

¹⁵ See *infra* note 22.

Bristol, England in an attempt to determine the "competitive conditions concerning the production and distribution of zinc metals and its alloys and zinc concentrates in order to verify that there is no infringement of Articles 85 and 86 of the EEC Treaty."¹⁶ During and immediately after the initial investigation, AM & S refused to allow the inspectors to see some of the requested documents.¹⁷ After declining AM & S's invitation to find a mutually agreeable way of determining whether the documents were privileged, the Commission issued a decision on July 6, 1979. Under Article (3) of Regulation 17,¹⁸ the Commission determined that AM & S had to submit to a new investigation and turn over all the documents that had previously been requested for which privilege was claimed.¹⁹

AM & S continued to refuse to allow the officials to see the allegedly privileged documents in full.²⁰ On October 4, 1979, AM & S brought suit against the Commission asking the ECJ to declare the decision of the Commission void, or alternatively void at least as far as it required disclosure of entire documents to the inspector even though privilege was claimed.²¹ There were three types of documents in dispute: documents requesting advice, documents giving advice and documents which summarized advice.²²

¹⁶ AM & S, 1982 E.C.R. at 1579.

¹⁷ At the end of the investigation, though, AM & S permitted the officials to take copies of some documents with them and the Commission left a request for additional documents. In March 1979, AM & S refused to give the Commission the additional documents it had requested because AM & S claimed they were privileged. *Id.*

¹⁸ Article (3) of Regulation 17 provides that: "[w]here the Commission, upon application or upon its own initiative, finds there is infringement of article 85 or article 86 of the Treaty, it may by decision require the undertaking or associations of undertaking concerned to bring such infringement to an end." Regulation 17, art. 3, *supra* note 14, at 88.

¹⁹ AM & S, 1982 E.C.R. at 1579.

²⁰ They did agree, however, to show part of each document so that the officials could satisfy themselves that they were privileged. *Id.* at 1580.

²¹ *Id.* at 1581.

²² Slynn's opinion, *id.* at 1643. Specifically the documents included:

A. Documents requesting advice:

1. a letter requesting legal advice from in-house counsel of another company ("the Service Company") to AM & S destined for barristers in private practice;
2. a request for legal advice from executive of AM & S to a private solicitor in England;
3. a telex from an executive of AM & S to another executive of AM & S suggesting that legal advice should be sought from a solicitor in private practice in a third country;

B. Documents giving advice:

2. The Arguments of the Parties

One side of the dispute was argued by AM & S with support from two intervenors: the government of the U.K. and the Consultative Committee of the Bars and Laws Societies of the European Community²³

-
1. a memorandum containing legal advice from an in-house lawyer of another part AM & S's corporate family in a third country to employees of a third subsidiary of AM & S's parent;
 2. a letter containing legal advice on the law of a third country from a solicitor in private practice to an employee of AM & S's parent;
 3. a letter containing legal advice from a solicitor in private practice in England to a third subsidiary of AM & S's parent;
 4. letters containing legal advice sent by a solicitor in private practice in England to executives of AM & S;
 5. a memorandum containing legal advice sent by an in-house lawyer employed by the Service Company to executives at AM & S;
- C. Documents summarizing advice:
1. a memorandum summarizing the legal advice of the in-house lawyer of the Service Company sent between executives of AM & S;
 2. a memorandum summarizing legal advice of the in-house lawyer of the Service Company sent by an executive of AM & S to an executive of AM & S's parent;
 3. a memorandum summarizing legal advice of a private solicitor in England sent between executives of AM & S;
 4. telexes summarizing legal advice from barristers and solicitors in private practice in a third country between executives of AM & S and executives of AM & S's parent.

See id. at 1643-44.

Some of the documents involved in this case were prepared for members of the Rio Tinto Zinc group other than AM & S. However, the ECJ previously recognized that

the reality of the relationship between the members of a group of companies forming one economic unit may mean that their separate legal personality has to be treated as a formal rather than a substantial distinction. . . . Moreover, legal advice prepared by either lawyers employed or those in private practice retained by one member of the group may in fact be requested on behalf of all the members of the group.

Id. at 1661 (citation omitted).

²³ The Consultative Committee of the Bars and Law Societies of the European Community is now known as the Council of the Bars and Law Societies of the European Community (CCBE). It is composed of national delegations from the 12 Member States. Its objects, among others, are:

- (a) To act as a joint body on behalf of the Bars and Law Societies of the European Community in all matters involving the application of Community Treaties and Community law to the legal profession.
- (b) To co-ordinate the views, policies and activities of the Bars and Law Societies of the European Community in their common dealings with the European institutions.

(CCBE). On the other side, the French Republic intervened on behalf of the Commission. The parties said that they agreed that privilege existed in the EC and that the company must prove the privilege; the case before the ECJ was simply a matter of what procedure should be used to determine whether a document is privileged.²⁴ However, much of the debate between the parties centered around the scope of the privilege.

AM & S was concerned that the procedure not permit the Commission to see the document in order to determine whether it was privileged.²⁵ AM & S argued that the objective of determining whether a document is privileged could be accomplished without the Commission viewing the entire document.²⁶ The U.K. suggested a system that would give the ECJ the authority to make a final determination if the parties could not reach an agreement.²⁷

. . .
(g) To study and promote the study of all questions affecting the profession of lawyer and to develop solutions designed to co-ordinate and harmonise the practice of that profession.

HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* 3 (1992).

²⁴ AM & S, 1982 E.C.R. at 1581-82. In his opinion to the ECJ Advocate General Warner said the "questions here at issue relate to the extent to which, and the manner in which, communications between a lawyer and his client may be protected from disclosure in an investigation under Article 14." Warner's opinion, *id.* at 1620.

²⁵ AM & S argued that a procedure needed to be developed whereby the privileged nature of the document could be determined "without the Commission being entitled to see the contents of the material for which protection is claimed. In the ultimate event of a disagreement between the parties, it is only the Court of Justice which is in a position to inspect the documents and adjudicate the dispute." If the Commission viewed the entire document to determine whether it was privileged, "the confidentiality of the documents would be destroyed and the protection rendered largely valueless." AM & S, 1982, E.C.R. at 1581-82. Although the Commission claimed that its investigators would not use any information gained from documents, the company would be in the difficult position of attempting to prove that the inspector used the protected knowledge. *Id.* at 1589.

²⁶ AM & S argued that the objective of determining whether a document is privileged could and should be accomplished without the Commission viewing the entire document. The principle of proportionality recognized by the EC requires "that the means used must not go beyond what is necessary to achieve the objective sought." *Id.* at 1588.

²⁷ The U.K., who intervened on behalf of AM & S suggested that until a Community solution to the problem was reached, perhaps the national courts could hear the cases. The U.K. said that the solution to the problem must "(i) be fair and be seen to be fair; (ii) be carried out by persons who are qualified and impartial; (iii) exclude any risk (and even the appearance of a risk) of information obtained in the course of verification being used in breach of legal privilege." Otherwise the procedure itself

The CCBE argued that EC law recognized the principle of legal privilege and that the principle was part of the law of every Member State.²⁸ The CCBE went further than AM & S and the U.K. and claimed that legal privilege was a "practical guarantee of fundamental, constitutional or human rights."²⁹ The CCBE proposed that the parties attempt to settle the dispute through the use of experts or arbitration.³⁰

The Commission argued that although the attorney-client privilege was important, it was not an existing principle of Community law and its importance was outweighed by the need to have all relevant evidence before the Court.³¹ The Commission contended that the protection of privilege must be balanced against the need to have all evidence before the Court, and therefore wanted some verification before evidence was excluded in a given case.³²

France claimed that Community law did not provide for protection of documents between a lawyer and client (whether in-house or not) and that legal privilege was not "a principle common to the laws of all Member States"³³ because of the differences in the principle in each

would not protect the legal confidence. *Id.* at 1595-7.

²⁸ *Id.* at 1599. CCBE suggested that "not only do all Member States afford some protection to confidential relations between lawyer and client, but there is a remarkable consistency in the explanations of the *ratio legis* and a clearly discernible tendency to extend rather than to reduce the scope of that protection." *Id.* at 1600.

²⁹ *Id.*

³⁰ An expert could be used who would "confine himself to describing the documents or . . . [giving] an opinion as to whether the documents were entitled to protection or not." Alternatively, if the expert system were not permissible under Community law, then the parties could agree to arbitration to make the determination. *Id.* at 1602.

³¹ The Commission's argument had two parts: 1) the principle of privilege is nowhere an absolute rule with fixed, clear limits which overrides other legal principles when they conflict, but one of several legal principles which can be differently regulated and reconciled according to the circumstances; and 2) the AM & S procedure was not satisfactory because of the need to have all relevant evidence before the court and the need to prove clearly why evidence should not be disclosed if privilege is claimed. *Id.* at 1585.

The Commission rejected the AM & S procedure for four reasons: 1) it could easily be abused by dishonest companies; 2) the Commission would be placed in the impossible position of trying to determine whether the lawyer claiming the privilege could be trusted; 3) the inspector may believe he has not seen enough of the document to determine whether privilege is justified or not; and 4) it may be necessary to see the entire document in order to resolve related questions. *Id.* at 1587-8.

³² *Id.* at 1586. However, the Commission urged that decisions about whether a particular item is privileged should be determined on a case-by-case basis and in light of all the circumstances. *Id.* at 1584.

³³ *Id.* at 1598.

country. Furthermore, France argued that the creation of the principle of privilege as part of community law would prevent the "direct and uniform application in all the Member States of the provisions of Regulation Number 17" and should not be permitted.³⁴ France contended that permitting companies to claim privilege and preventing the Commission from seeing any document in full would frustrate the ability of the Commission to exercise its investigative powers granted by Regulation No. 17.³⁵

3. The Holding and Rationale of the Case

The ECJ decided that the attorney-client privilege did exist in some form in each of the Member States and therefore had to be recognized as part of EC law. In reaching its decision, the ECJ relied heavily on Advocate General Warner's conclusion drawn from The Edward Report³⁶ that "the differences between the laws of the different countries in the Community 'are differences of approach or method (made necessary by their fundamentally different legal systems) rather than differences of result.'"³⁷ In accepting the existence of the attorney-client privilege as a

Even though a certain amount of protection is to be found in the laws of all the Member States, it varies so much in its content that it is difficult to elevate that protection into a 'principle common to the laws of the Member States' and even more questionable to turn it into a rule of law capable of altering the meaning of Community texts. . . .

Id. Regulation 17 provides specific measures by which the Commission can ensure compliance with Articles 85 and 86 of the EEC TREATY. *See supra* note 13.

³⁴ "Undertakings would then be treated differently depending on whether the law of the Member State where they are established does or does not confer (or confers subject to stricter limits) protection for certain documents." AM & S, 1982 E.C.R. at 1597-98.

³⁵ [T]he Commission has acted within the framework of the powers conferred on it by Regulation No. 17. . . . [I]t would be contrary to that regulation to infer from it that the Commission may not have access to the whole contents of a document in order to check whether the protection claimed is well-founded. To decide otherwise would be to open the door to abuses, which are always possible.

Id. at 1598-99.

³⁶ The Consultative Committee of the Bars and Law Societies of the European Community published a report: D.A.O. EDWARD, THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITY (1976) [*hereinafter* THE EDWARD REPORT]. It was a comparative law study of the laws of the Member States with regard to the varying concepts of confidentiality and privilege. AM & S, 1982 E.C.R. at 1622.

³⁷ *Id.* at 1622 (quoting THE EDWARD REPORT, *supra* note 36). Warner's summary of THE EDWARD REPORT had four points. First, "some protection for the confidentiality of communications between lawyer and client is given by the laws of all the Member States." Second, "the protection is afforded primarily by imposing on the lawyer an

part of EC law, the ECJ recognized the importance of freedom of consultation with lawyers.³⁸

However, the scope of the privilege recognized did not include attorneys employed by the legal department of a company. The ECJ said

there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes, and in the interest of the client's rights of defence, and on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.³⁹

Thus a two-part test⁴⁰ was created to determine whether documents could qualify as privileged. The attorney-client privilege applies only to written communications which occur after the initiation of an administrative procedure or to earlier communications which have a subject-matter relationship to the procedure, and the attorney must be independent. The requirement of independent status

is based on the conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interest of that cause, such legal assistance as the client needs. . . . Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the Community, as is demonstrated by Article 17 of the Protocols in the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC.⁴¹

obligation not to disclose the contents of those communications." Third, "the development of the law has been largely conditioned by procedural rules characteristic of the legal system of that country." Finally, "the development of the law in each country has been conditioned by the organization of the legal profession in that country." *Id.* at 1632.

³⁸ ECJ determined the attorney-client privilege "serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it." AM & S, 1982 E.C.R. at 1610.

³⁹ *Id.* at 1611.

⁴⁰ The requirement that the communication be "in the interest of the client's rights of defence" is not a limiting requirement, as the right of defense has been very broadly interpreted. *See, e.g.,* LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES 127 (1987); Christoforou, *supra* note 6, at 9.

⁴¹ AM & S, 1982 E.C.R. at 1611-2. Article 17 of the Protocols of the Court of

Although the independence requirement did not receive much attention in the final opinion, it is a very important provision. The decision was based on the assumption that once an attorney is employed by a company, he no longer has the ability to remain free from improper influence by his client.⁴² However, this assumption is questionable.⁴³

Justice of the EEC and of the EAEC states that:

Other parties must be represented by a lawyer entitled to practice before a court of a Member State. Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the rules of procedure.

Statute of the Court of Justice of the European Community, art. 17, established by EEC TREATY, *supra* note 13, art. 4; Statute of the Court of Justice of the European Atomic Energy Community, art. 17, established by TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, art. 3, [hereinafter EURATOM TREATY].

Article 20 of the Protocols of the Court of Justice of the ECSC states that:

Undertakings and all other natural or legal persons must be represented by a lawyer entitled to practice before a court of a Member State.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in rules drawn up by the Court and submitted for the approval of the Council, acting unanimously.

Statute of the Court of Justice of the European Coal and Steel Community, art. 20, established by TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, art. 7 [hereinafter ECSC TREATY].

⁴² [T]he inference is that lawyers who are bound to the client by a relationship of employment are:

- (i) not independent;
- (ii) subject to the directions of the employer, which may conflict diametrically with the obligation to produce documents; and
- (iii) therefore capable of being subjected to pressures which might prevent the salaried legal adviser from exercising the independent discretion in relation to production of documents which alone could justify extending the activities of such advisers the shield of legal privilege.

Stephen Charles, *Legal Professional Privilege: Continued Erosion*, 57 LAW INST. J. 832, 833 (1983).

⁴³ This assumption is not accepted by the U.S. and several countries of the EC where in-house counsel have the attorney-client privilege. Additionally, in both Slynn and Warner's opinions, the need to differentiate between in-house and independent counsel was questioned. "I would reject any suggestion that lawyers (professionally qualified and subject to professional discipline) who are employed full time by . . . the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the rule." Slynn's opinion, AM & S, 1982 E.C.R. at 1655. Warner quoted a paper written by two members of the legal service of the Commission. Although the paper expressed their personal views and did not bind the Commission, they said, "[t]here seems to be no reason to treat

The ECJ determined that although in-house counsel in some Member States were fully licensed to practice and subject to the rules of the bar or law society in their country, they were not permitted the right to attorney-client privilege⁴⁴ that their fellow attorneys had. This result discriminates against those attorneys who remain members of the bar and subject to its rules and discipline, and puts them in an unfair position with respect to other attorneys in their country.

The decision also granted the attorney-client privilege only to attorneys entitled to practice in one of the Member States.⁴⁵ This limitation has significant effect on attorneys who are not entitled to practice in one of the Member States whether they are in-house or independent lawyers.⁴⁶ The possibility has been raised that the EC might negotiate with foreign states to recognize legal privilege on a reciprocal basis.⁴⁷

salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline." Warner's opinion, *id.* at 1623 (citation omitted).

⁴⁴ The EC views the attorney-client privilege as a right of the lawyer, not of the client. The CCBE Code in Rule 2.3.1 states: "Confidentiality is therefore a primary right and duty of the lawyer." ADAMSON, *supra* note 23, at app. 5, xlvii.

⁴⁵ "[T]he protection thus afforded by Community law . . . to written communications between lawyer and client must apply without distinction to any lawyer entitled to practice his profession in one of the Member States, regardless of the Member State in which the client lives." AM & S, 1982 E.C.R. at 1612.

⁴⁶ U.S. attorneys currently are permitted to provide legal services in individual countries in the EC through bi-lateral Treaties of Friendship, Commerce and Navigation. The countries with which the U.S. has signed these treaties agree to "reciprocally guarantee nationals and companies the right to engage lawyers of their choice." Dan R. Mastromarco, *Disparity in the Application of Legal Principles as a Form of Trade Restraint: Attorney-Client Privilege in the European Community*, 13 HASTINGS INT'L & COMP. L. REV. 479, 491-92 (1990).

Therefore it would seem that the best hope for non-EC-qualified U.S. attorneys seeking access to the EC legal market would be to turn to the national treatment and most-favoured-nation status provisions of treaties of friendship, commerce, and navigation with EC member states. However, it should be noted that these are merely bilateral treaties and as such do not entitle the U.S. lawyer to gain access to the EC as a whole.

ALAN TYRRELL & ZAHD YAQUB, *THE LEGAL PROFESSIONS IN THE NEW EUROPE* 400 (1993). See also Ian S. Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM & S Judgment*, 20 COMMON MKT. L. REV. 75, 83 (1983); K.P.E. Lasok, *AM & S - The Court Decides*, [1982] EUR. COMPETITION L. REV. 99, 104.

⁴⁷ In the interest of international equity and to avoid any deterioration of relations between the Community and countries in which the same professional ethics are respected, the Commission believes that it may be useful for the Community to conclude bilateral international agreements with interested third countries, on the basis of reciprocity, with

However, ten years after this possibility was raised, no such agreements have been reached.⁴⁸

B. Status of In-House Counsel in the EC

Several of the Member States in the EC do not recognize in-house counsel as members of the legal profession and do not permit them to be members of the bar.⁴⁹ This fact was very influential in the decision not to grant in-house counsel the right to the attorney-client privilege in *AM & S*. In reaching its decision the ECJ reviewed the legal systems of the Member States to determine whether, and to what extent, communications between clients and attorneys were considered privileged. "Since the aim of Community law is to find the best solution having regard to national laws, it is necessary to examine the spirit, orientation and general tendency of the national laws on legal privilege."⁵⁰

There is a slight difference in the underlying concept of privilege in the common law countries and the civil law countries. The concept of privilege in countries whose legal system developed from common law is "legal professional privilege."⁵¹ The privilege is a rule of evidence "which protects all aspects of the relationship between the lawyer and the client"⁵² and protects advice in the hands of either party.⁵³ In civil law

the aim of extending legal privilege to the lawyers of these countries.

Commission, Thirteen Report on Competition Policy 65 (1984).

For independent lawyers not entitled to practice . . . in a Member State (foreign lawyers), some hope is offered by the prospect of negotiations between the Community and non-Member countries with a view to concluding agreements for the reciprocal recognition of legal privilege. If foreign lawyers are not to be treated differently from their Community counterparts, any possible agreement will have to be based on the criteria laid down by the Court in *AM & S*.

Jonathan Faull, *AM & S: the Commission's Practice Note*, 8 EUR. L. REV. 411, 413-14 (1983).

⁴⁸ TYRRELL, *supra* note 46, at 397.

⁴⁹ "As I understand it in some Member States full-time employment is incompatible with the full professional status of a lawyer (apparently in Belgium, France, Italy and Luxembourg): in others the employed lawyer remains subject to professional discipline and ethics." Slynn's opinion, *AM & S*, 1982 E.C.R. at 1655.

⁵⁰ *AM & S*, 1982 E.C.R. at 1600. "[W]hen the Court derives general principles from the divergent laws and legal systems of the member states to restrict a validly promulgated regulation, it must take care not to offend any of the countries composing the community." Andrew N. Vollmer, *U.S. Lawyers Excluded from Protection in EEC Cases*, LEGAL TIMES, July 26, 1982, at 16.

⁵¹ SPEDDING, *supra* note 40, at 127.

⁵² *Id.* at 127-8.

⁵³ *AM & S*, 1982 E.C.R. at 1584.

countries the concept is "professional secret and it is a criminal offence to reveal another's secret."⁵⁴ Information given to the attorney is protected but information communicated from him is not.⁵⁵ In the six original Member States protection is only given to documents in the lawyer's possession.⁵⁶

1. Member States That Do Not Allow Membership in the Bar for In-House Counsel

Four of the countries in the EC do not permit in-house counsel to be members of the bar: Italy, France, Belgium and Luxembourg.⁵⁷ In these countries it is a crime for an attorney to reveal a confidence of his client.⁵⁸ In-house attorneys in these countries are not permitted to be practicing lawyers because of the belief that once they become in-house attorneys they cannot remain sufficiently independent.⁵⁹ These countries have provisions in their codes which provide that a relationship of employment is incompatible with the practice of law and therefore impermissible.⁶⁰

In France a breach of professional secrecy is a criminal offense.⁶¹

⁵⁴ SPEDDING, *supra* note 40, at 127. For relevant provisions see *infra* note 67 (Belgium); note 70 (Italy); note 61 (France); and note 74 (Luxembourg).

⁵⁵ AM & S, 1982 E.C.R., at 1584. "Documents written to a lawyer or by a lawyer requesting or giving legal advice, . . . may not be used as evidence if they are found in the hands of the lawyer." Slynn's opinion, *id.* at 1646.

⁵⁶ The six original member states are Belgium, France, Luxembourg, Netherlands, Germany and Italy. See THE EDWARD REPORT, *supra* note 36, at 6.

⁵⁷ See *supra* note 49.

⁵⁸ See *supra* note 54.

⁵⁹ See Charles, *supra* note 42.

⁶⁰ For relevant provisions see *infra* note 68 (Belgium); note 69 (Italy); note 62 (France) and note 76 (Luxembourg).

⁶¹ Slynn's opinion, AM & S, 1982 E.C.R., at 1652.

Les médecins . . . et toutes autres personnes dépositaires par état ou profession ou par fonctions temporaires ou permanentes, des secrets qu'on leur confie, qui hors le cas où la loi les oblige ou les autorise à se porter dénonciateurs, auront révélé ces secrets, seront punis . . .

GEORGE A. BERMAN ET AL., FRENCH LAW 8-33 (1989).

(Doctors . . . and all other persons who are in possession by virtue of their status, profession, or temporary or permanent duties, of secrets confided to them, and who, except in a case where the law obligates or authorizes them to make reports, reveal these secrets, shall be punished by imprisonment . . . and by a fine. . . .)

Article 378 of the French Penal Code makes revealing a secret a crime.

1. Secret professionnel. - En imposant à certaines personnes, sous une sanction pénale, . . . si celui qui a reçu la confiance d'un secret a toujours le devoir de le garder, la

A lawyer in France can practice law individually, as a member of a group or as an assistant to another lawyer or group of lawyers.⁶² Only those persons who are *avocats* "may assist or represent the parties, or plead (*postuler*) and argue (*plaider*) before the courts and quasi-judicial bodies of any kind whatever."⁶³ A lawyer who testifies in legal proceedings cannot breach his obligation of secrecy even if asked to give testimony about the secret information.⁶⁴

In Belgium a general practitioner who can practice in all areas of law, appear before the tribunals and has a right to plead in court is called an *avocat*.⁶⁵ All lawyers in Belgium are "required to be independent, ex-

révélation de cette confidence ne le rend punissable que s'il s'agit d'une confidence liée à l'exercice de certaines professions; ce que la loi a voulu garantir, c'est la sécurité des confidences qu'un particulier est dans la nécessité de faire à une personne dont l'état ou la profession, dans un intérêt général et d'ordre public, fait d'elle un confident nécessaire. . . .

6. Le secret professionnel couvre toutes les confidences que l'avocat a pu recevoir à raison de son état ou de sa profession.

CODE PÉNAL, art. 378 (Daloz 1992-93) (Fr.).

(1. Professional Secret - It is imposed on certain individuals, under the penalty of law . . . if one who has received a communication to be held in confidence, the revelation of this confidence will only be punishable if the secret was communicated during a professional relationship; what the law wants to guarantee is the security of confidences which a client communicates to a person whose profession, in the general interest or public order, makes that person a necessary confidant. . . .

6. Professional secrets include all confidences that a lawyer could receive by reason of his position or profession.)

⁶² "An *avocat* may practice his profession either individually, or as a member of a group within an association or within the framework of a civil professional partnership, or as an assistant (*collaborateur*) or another *avocat* or group of *avocats*." Law No. 71-1130 of December 31, 1971, art. 8 (Fr.).

⁶³ No one who is not an *avocat* may assist or represent the parties, or plead (*postuler*) and argue (*plaider*) before the courts and quasi-judicial or disciplinary bodies of any kind whatever subject to the provisions governing the *avocats* at the *Conseil d'Etat* and at the *Cour de cassation* and the *avoués* attached to the *cours d'appel*.

Id. at art. 4.

⁶⁴ THE EDWARD REPORT, *supra* note 36, at 18-19 citing CODE DE PROCÉDURE PÉNALE, art. 109 (Fr.) which provides that "[a] lawyer duly cited as a witness must therefore appear, take the oath and answer all questions which can be answered without violating the professional secret."

⁶⁵ CONSEIL DES BARREAUX DE LA COMMUNANTE EUROPEENE, CROSS BORDER PRACTICE COMPENDIUM Belgium-8 (D.M. Donald-Little ed., 1993) [hereinafter CROSS BORDER PRACTICE COMPENDIUM].

empt from external control, influence, pressure or support, in the carrying out of their professional duties.”⁶⁶ The Criminal Code requires that attorneys “observe complete confidence in respect of all information relating to clients, which is disclosed to them in the course of their work, save in so far as they may be specifically directed by the Court to disclose same.”⁶⁷ An in-house lawyer is called a *juriste d'entreprise* and has “academic qualifications as licentiate or doctor of laws. . . . He is not a practising advocate but may advise on legal matters.”⁶⁸

In Italy, lawyers are not permitted to be employees, either in civil service or in private industry, thus a person trained as a lawyer who becomes such an employee is no longer a lawyer.⁶⁹ “The law forbids

⁶⁶ *Id.* at Belgium-31.

Art. 437 - La profession d'avocat est incompatible: . . .

4^e avec les emplois et activités rémunérés, publics ou privés, à moins qu'ils ne mettent en péril ni l'indépendance de l'avocat ni la dignité du barreau.

Art. 444 -Les avocats exercent librement leur ministère pour la défense de la justice et de la vérité.

Ils doivent s'abstenir d'avancer aucun fait grave contre l'honneur et la réputation des personnes à moins que la nécessité de la cause ne l'exige et sous la réserve des poursuites disciplinaires et de l'application de l'article 445, s'il y a lieu.

CODE JUDICIAIRE, arts. 437, 444 (Bruylant Bruxelles, 1993) (Belg.).

(Art. 437 - The lawyering profession does not tolerate: . . .

4^e employment or paid activities, public or private which imperil the dignity or independence of the bar.)

(Art. 444 - Lawyers perform their functions for the defense of justice and truth.

Lawyers must refrain from impeaching the honor and reputation of clients unless, the necessity of the cause demands it and under the reservations of the disciplinary guidelines and the application of article 445. . .)

⁶⁷ CROSS BORDER PRACTICE COMPENDIUM, *supra* note 65, at Belgium-37.

Les médecins . . . et toutes autres personnes dépositaires, par état ou par profession, des secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis . . . “

CODE PÉNAL, art. 458 (Bruylant Bruxelles, 1993) (Belg.).

(Doctors and all other persons who are in possession, by virtue of their status, profession or temporary or permanent duties, of secrets confided to them and who, except in the case where the law calls them to testify and obligates them to tell these secrets, have revealed these secrets will be punished.)

⁶⁸ CROSS BORDER PRACTICE COMPENDIUM, *supra* note 65, at Belgium-9.

⁶⁹ Article 3 of the Legal Profession Law (Law of 22 January 1934, No. 36) describes activities which are incompatible with the professional legal practice of *avvocato*. It provides that “any activity as an employee, either as a civil servant or in private industry [is incompatible] since subordination does not permit the carrying out of services in an autonomous and independent way as . . . required of an *avvocato*.” TYRRELL, *supra* note 46, at 199-200.

lawyers from giving evidence of the information confided in them by their clients and entitles them to withhold documents covered by the doctrine of professional secrecy."⁷⁰ Protection in civil investigations is broader than protection in criminal investigations, but documents in the hands of the client are not protected.⁷¹ The purpose of the privilege recognized in Italy is to protect the right to a fair trial guaranteed by Article 24 of the Constitution.⁷²

The law in Luxembourg protects "legal confidences in the hands of the lawyers, and of the client after proceedings have begun, but little case law has been produced showing the application of these rules to practice."⁷³ As in the other countries, disclosure of a professional secret in Luxembourg is a criminal offence.⁷⁴ In-house counsel in Luxembourg are permitted to give legal advice⁷⁵ but are not permitted to be members of the bar.⁷⁶

⁷⁰ Slynn's opinion, AM & S, 1982 E.C.R. at 1653.

Whoever, having knowledge, by reason of his position or office, or his profession or trade, of a secret, discloses it, without just cause, or employs it for his own or another's benefit, shall be punished, if his act may result in harm, by imprisonment for up to one year or by a fine of from 12,000 to 200,000 lire. The crime shall be punishable on complaint of the victim.

CODICE PENALE art. 622 (Italy) in 23 THE AMERICAN SERIES OF FOREIGN PENAL CODES, THE ITALIAN PENAL CODE 211 (John Delany ed., Edward M. Wise, trans., 1978).

⁷¹ Slynn's opinion, AM & S, 1982 E.C.R. at 1653.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ "Les médecins . . . et toutes autres personnes dépositaires par état ou profession, des secrets qu'on leur confie, qui, hors le cas où il sont appelés à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis . . ." CODE PÉNAL, art. 458 (Bruylant Bruxelles, 1993) (Lux.).

(Doctors and all other persons who are in possession, by virtue of their status, profession or temporary or permanent duties, of secrets confided to them and who, except in the case where the law calls them to testify and obligates them to tell these secrets, have revealed these secrets will be punished.)

⁷⁵ In-house *avocats*, being persons who work under a contract of employment with a firm, company or group of companies, are authorized to give legal advice and generally do such legal work which is required by the nature of their work or have direct bearing on the activities of their employer.

TYRRELL, *supra* note 46, at 219.

⁷⁶ Certain activities are considered incompatible with membership of the legal profession, essentially activities which may be in conflict with or adversely prejudice the professional duties of the member. A number of incompatible occupations and activities are specified in article 1 of the Law of 10 August 1991: . . . salaried employee in private or public sector; director, managing director, or manager of a commercial concern, or general attorney or agent for an insurance company . . .

In these four countries, a person who is fully trained as a lawyer and perhaps has been practicing law for many years, cannot be a member of the bar once he accepts a position as in-house counsel. The assumption is that it is too difficult to ensure that the in-house lawyer maintain his independence because he is intimately involved in the corporation. Since the lawyers might be required or perhaps desire to put the interests of the corporation ahead of their duties as lawyers and administrators of justice, these countries do not permit them to be practicing lawyers.

2. Role of In-House Counsel in the EC

The role of in-house counsel in the EC is the same as for in-house counsel in other countries: "to keep his client advised about the law and out of trouble, and internal legal advice needs to be in writing no less than advice from outside counsel."⁷⁷ However, the laws and rules in countries which deny the attorney-client privilege to in-house counsel are based on the assumption that in-house counsel do not have the ability to remain independent of pressure from the management of the corporation in the exercise of their role as a lawyer. The ECJ was persuaded by the argument that "permanent involvement with the activities of one firm and direct dependence on this firm for their salary . . . lead[s] in-house lawyers to identify themselves with the firm's interests to the detriment of their independence."⁷⁸

Shortly after the ECJ announced its decision in *AM & S*, the Commission had the opportunity to use the exclusion of in-house counsel from attorney-client privilege to its advantage. The Commission investigated the John Deere Company⁷⁹ and its EC subsidiaries for a possible violation of Article 85.⁸⁰ During its investigation the Commission found that some

Id. at 220.

⁷⁷ Forrester, *supra* note 46, at 83.

⁷⁸ Christoforou, *supra* note 6, at 16.

⁷⁹ John Deere is a Delaware corporation that operates through branches and subsidiaries in several of the Member States of the EC. Commission Decision 85/79, art. 85, 1984 O.J. (L 35) 58 [hereinafter *John Deere Decision*].

⁸⁰ The problem in this case was that John Deere's internal policies made parallel trading difficult. Parallel trading occurs when the conditions in national markets are such that it would be cheaper to buy a product in another country and import it to one's own country. The conditions are affected by policies of the individual countries and currency fluctuations. John Deere's policies removed the profitability that would occur if individuals could engage in parallel trading. The complaint was raised by the National Farmers Union of the United Kingdom because a member was prevented from obtaining a tractor from an independent John Deere dealer in Belgium. The Commission visited the Belgium office and took copies of documents relating to cross border sales.

contracts used by John Deere and its independent dealers contained clauses which forbid exportation of equipment after purchase.⁸¹ The Commission concluded that John Deere knew its conduct, including the export ban, was illegal under both EC and national law.⁸² John Deere had included in its export ban a savings clause which said “. . . as far as no contrary legal regulation prevents.”⁸³ The Commission found that this clause was insufficient to prevent the contract from being void.⁸⁴ *John Deere* shows that the Commission will not hesitate to use an opinion from in-house counsel to the detriment of the company in competition infringement cases.⁸⁵

C. Other EC Regulations for Lawyers

In addition to decisions by the Commission and the ECJ about specific issues on the regulation of lawyers in the EC, lawyers are regulated and guided by the Code of Conduct for Lawyers in the European Community (CCBE Code)⁸⁶ and the Lawyers Services Directive.⁸⁷ One

The Commission received copies of opinions prepared by John Deere's in-house council and determined that John Deere had acted with knowledge of its infringement, and was therefore able to impose higher fines. *See id.* at 59-60.

⁸¹ *John Deere Decision*, *supra* note 79, at 60.

⁸² [John] Deere and Company knew that such conduct, and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised of this by its in-house counsel. Senior management of [John] Deere and Company in Moline, including a member of the main board, was fully informed.

Id. at 61.

⁸³ *Id.* at 62.

⁸⁴ However, the Commission holds that such an article constitutes an export ban in spite of this saving clause; the article is worded to read as if exporting is forbidden and imposed without explanation or negotiation by a company that ought to know the law on a multitude of small dealers; such dealers are less likely to know the law and unlikely, in the circumstances, to consult a lawyer. . . . [John] Deere's own in-house counsel expressed doubts as to the legitimacy of such a device.

Id.

⁸⁵ It seems that the in-house lawyers made a valiant effort to advise their client on complex and rapidly developing points of EEC law, which advice management can find difficult and expensive to accept. To have this opinion used afterwards as an admission against the interest of their client/employer, must have been painful indeed. How can it be that good advice by in-house counsel can later serve as ammunition for the Commission?

Burkard, *supra* note 1, at 681.

⁸⁶ On October 28, 1988, the EC

adopted a common Code of Conduct for Lawyers in the European Community as a framework of principles of professional conduct to be applied to all cross-border activities between lawyers in the EEC, including all professional contacts with lawyers of Member States (and other signatories) other than their own, and also to the profes-

of the goals of the CCBE Code is to minimize problems that lawyers face because they are governed by laws and rules in their own country and in the EC.⁸⁸ However, the decision of *AM & S* automatically causes problems for in-house counsel in states where they are permitted to practice law, because in their own country their communications will be covered by the attorney-client privilege, but in EC matters their communications will not be privileged. This result will make it difficult for in-house counsel who remain members of the bar to work effectively in EC matters because they will have to be aware that if an investigation or suit arises their communications will not be privileged.⁸⁹

Under the CCBE Code, lawyers from one country practicing in another country are required to obey the laws of their home country and when possible, the laws of the host country.⁹⁰ The CCBE Code also has

sional activities of lawyers in a Member State other than their own.

John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 *FORDHAM INT'L L.J.* 673 (1992). The CCBE Code was adopted by the 12 Member States and six observer countries (Austria, Cyprus, Finland, Norway, Sweden & Switzerland). ADAMSON, *supra* note 23, at 72.

⁸⁷ Council Directive 77/249, art. 57-66, 1977 O.J. (L78) 17 [hereinafter *Lawyers Services Directive*].

⁸⁸ 1. Preamble. . . . 1.3.1 The continued integration of the European Community and the increasing frequency of the cross-border activities of lawyers within the Community have made necessary in the public interest the statement of common rules which apply to all lawyers from the Community whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of 'double deontology' as set out in Art. 4 of EC Directive 77/249 of 22 March 1977.

ADAMSON, *supra* note 23, at app. 5, xlv-xlvi.

⁸⁹ This result will cause problems for in-house counsel who remain members of the bar when dealing with EC matters similar to those that would arise if the privilege did not exist at all. These lawyers will be forced to rely more heavily on oral communications. The result may be a lower quality of legal representation because the parties involved will hesitate to put things in writing if the writings are discoverable. The situation would be analogous to a refusal to recognize the work-product doctrine in the U.S. One court stated that if attorneys' work product was not protected,

much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947).

⁹⁰ "Article 4 does, on the whole, proceed on the basis that a lawyer remains subject to his home rules when carrying on professional activities in a host state. Host rules are only applied to their full extent to activities relating to legal proceedings or before public authorities." ADAMSON, *supra* note 23, at 66.

provisions which govern confidentiality,⁹¹ independence,⁹² demeanor toward the court⁹³ and prohibition of false or misleading information.⁹⁴ The goal of the CCBE is to have all the Member States modify their rules of conduct so that they are harmonious with the CCBE Code and eventually to implement the CCBE Code for dealings with non-Member States.⁹⁵

There have been many criticisms of the decision by the ECJ to exclude in-house counsel from the attorney-client privilege in countries where the in-house lawyers remain bound by the rules of the bar.⁹⁶ Critics argue that these attorneys may be as independent and free from

Article 4 of the Lawyers Services Directive provides: "2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations of the Member State from which he comes." Lawyers Services Directive, *supra* note 87.

⁹¹ 2.3 Confidentiality; 2.3.1 It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary right and duty of the lawyer.

ADAMSON, *supra* note 23, at app. 5, xlvii.

⁹² 2.1 Independence; 2.1.1. The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

Id. at app. 5, xlvii.

⁹³ "4.3 Demeanour in court. A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of his client honourably and in a way which he considers will be to the client's best advantage within the limits of the law." *Id.* at app. 5, lii.

⁹⁴ "4.4 False or misleading information. A lawyer shall never knowingly give false or misleading information to the court." *Id.*

⁹⁵ The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles . . . be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation." *Id.* at app. 5, xlvi. "It is also hoped that the code will be acceptable to the legal professions of other non-member states in Europe and elsewhere so that it could also be applied in the same way between them and the Member States. *Id.* at app. 5, lvi.

⁹⁶ "[I]n my opinion he is to be treated for present purposes in the same way as lawyers in private practice, so long as he is acting as a lawyer." Slynn's opinion, AM & S, 1982 E.C.R. at 1655. See also Duffy, *supra* note 8, at 582; Sandy Ghandi, *Legal Professional Privilege in European Community Law*, 7 EUR. L. REV. 308, 313 (1982); Vollmer, *supra* note 50, at 17; Christoforou, *supra* note 6, at 17 n.53.

influence in their decision making from their clients as non-employed lawyers. However, the ECJ determined independence by looking at the legal relationship rather than the actual relationship between the lawyer and the client.⁹⁷ The ECJ's refusal to analyze the underlying facts, and determine what relationship an in-house lawyer has with his client before removing his right to the attorney-client privilege seems unwise.⁹⁸ Since the purpose and acceptance of the attorney-client privilege is widely acknowledged, the ECJ should have been more careful in determining that in-house counsel who are still members of the bar, subject to its rules and discipline, and required to be independent from their clients are not worthy of that right.⁹⁹

III. THE RULES OF ATTORNEY-CLIENT PRIVILEGE IN THE U.S.

Attorney-client privilege¹⁰⁰ has been recognized in the U.S. since

⁹⁷ "As criterion for determining the lawyer's degree of independence the Court thus preferred the *legal* (absence of a relationship of employment) to the *actual* (professional conscience) relationship between lawyer and client." Christoforou, *supra* note 6, at 16.

⁹⁸ In seeking to substantiate its preference the Court resorts to the rules of professional ethics and discipline which it considers to constitute the counterpart of confidentiality. However, this plainly highlights the contradictions in its reasoning. The two Advocates-General (and almost everyone else who has voiced an opinion on the judgment) were unanimous in their view that legal privilege should also extend to in-house lawyers where they continue to be members of the appropriate lawyers' societies or bars and are subject to the rules of professional ethics and discipline.

Id. at 16-17 (citations omitted).

The writer does not suggest that the EC engage in a case-by-case analysis of the independence of in-house counsel of each company in the EC. Rather, she suggests that the EC carefully investigate the relationships and independence of in-house counsel in general in the EC to determine whether in-house counsel in general can remain as independent as non-in-house lawyers. There are many reasons to believe that independent attorneys are equally dependent on their relationship with their client, and just as easily influenced by the demands of the client. *See infra* notes 196-99 and accompanying text.

⁹⁹ Perhaps it would also be appropriate for the four Member States that do not permit in-house counsel to be members of the bar to reconsider whether the actions of in-house counsel in their countries are not independent because of the relationship of employment or, instead, because they are no longer permitted to be members of the bar.

¹⁰⁰ The attorney-client privilege in the U.S. is found in Federal Rule of Evidence 501 which states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

1888¹⁰¹ and for in-house counsel, since at least 1915.¹⁰² The main issues in the U.S. are 1) who exactly is the client and 2) how far should the privilege be extended.¹⁰³ Recognition of the attorney-client privilege is a policy choice that acknowledges that the seeking of legal advice is important although it may make finding the truth somewhat more difficult.¹⁰⁴ The justifications for the existence of the attorney-client privilege are similar to the justifications espoused by the EC and its Member States.¹⁰⁵ However, there is debate in the U.S. whether the justifications for privileged communications between an attorney and his client are as forceful when the client is a corporation or when the attorney is in-house counsel.¹⁰⁶

FED. R. EVID. 501.

The Supreme Court interpreted this law in *Trammel v. United States*, 445 U.S. 40, 51 (1980) and said "the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." According to Professor Wigmore a communication is privileged if the following eight-part test is met.

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2292, at 554 (McNaughton rev. 1961).

¹⁰¹ See *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

¹⁰² See *United States v. Louisville & N. R.R.*, 236 U.S. 318, 336 (1915).

¹⁰³ These questions are beyond the scope of this Note. However, several tests have been created by the courts to determine to whom the privilege should be extended. A good overview of these tests can be found in *Upjohn Co. v. United States*, 449 U.S. 383, 389-394 (1981) and Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?* 81 MICH. L. REV. 665, 668-691 (1983) [hereinafter Michigan Note]. See, e.g., *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa), petition for mandamus and prohibition denied *sub nom.* for a more complete discussion of the control group test. See, e.g., *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) for a more complete discussion of the subject matter test.

¹⁰⁴ Stephen A. Saltzburg, *The Federal Rules of Evidence: Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 283 (1984).

¹⁰⁵ See *supra* notes 28-29, 37-38 and accompanying text.

¹⁰⁶ See, e.g., *Radiant Burners Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd* 320 F.2d. 314 (7th Cir. 1963); Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473-81 (1987).

Attorneys in the U.S. are governed by the rules and codes of conduct of their states. The rules for in-house counsel are generally the same as the rules for lawyers practicing on their own, for the government or in firms.¹⁰⁷ The issue in the U.S. is not whether in-house counsel should be allowed to exercise the attorney-client privilege, but rather who in a particular company should be included in that protection. Although the rules differ somewhat by jurisdiction,¹⁰⁸ all attorneys have an obligation to maintain the confidences of their clients.¹⁰⁹ There are exceptions to the general rules that in some cases allow and in other cases require the attorney to disclose the confidential information.¹¹⁰ The rules are intend-

¹⁰⁷ The obligation of confidentiality is the same for in-house counsel as for independent lawyers. Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 411 n.126 (1992) citing *Doe v. A. Corp.*, 709 F.2d 1043, 1046-48 (5th Cir. 1983); *Coleman v. American Broadcasting Cos.*, 106 F.R.D. 201, 206 (D.D.C. 1985); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 601 (N.D. Tex. 1981); *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 635-36 (E.D. Pa. 1979).

Government lawyers are subject to additional special provisions. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.11, 6.2, 6.3, 6.4 (1992) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103, DR 8-101 (1983) [hereinafter MODEL CODE].

¹⁰⁸ Compare MODEL RULES with MODEL CODE. Versions of the Model Rules were adopted in more than 35 states and the District of Columbia by the fall of 1992. Some states have incorporated portions of the Model Rules into the Code previously adopted. In adopting the Rules or the Code, the states often change the text, sometimes in significant ways depending on their view of the appropriate scope of the lawyer-client relationship. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS x (1993). Although it is recognized that the differences in the rules adopted by the states may be significant, this Note uses the Model Rules and the Model Code as the basis for comparison.

¹⁰⁹ In Model Code jurisdictions attorneys are governed by Canon 4 which states that "[a] Lawyer should preserve the confidences and secrets of a client." MODEL CODE, *supra* note 107, at Canon 4. A "'Confidence' refers to information protected by 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 likely be detrimental to the client." *Id.* at DR 4-101 (A).

In Model Rules jurisdictions attorneys are governed by Rule 1.6 which states that "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." MODEL CODE, *supra* note 107, at Rule 1.6

¹¹⁰ The most important exceptions are those enacted to prevent a future crime or to prevent false evidence being presented to the courts. In Model Code jurisdictions:

ed to prevent an attorney (whether independent or in-house) from using their duty/right of confidentiality to obstruct justice, either for personal gain or because of demands by the client.

A. *The Upjohn Case*

The leading case in the U.S. discussing the availability of the attorney-client privilege for in-house counsel is *Upjohn Co. v. United States*.¹¹¹ After a letter to the Securities and Exchange Commission and the Internal Revenue Service (IRS), an investigation of Upjohn began.¹¹²

[a] lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL CODE, *supra* note 107, at DR 4-101 (C).

(A) In his representation of a client, a lawyer shall not: . . . (5) Knowingly make a false statement of law or fact. (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. (7) Counsel or assist his client in conduct that the lawyers knows to be illegal or fraudulent. (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Id. at DR 7-102 (A).

(B) A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id. at DR 7-102 (B).

In a Model Rules jurisdiction,

[a] lawyer may reveal such information 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; or (2) to establish a claim or defense on behalf of the lawyer. . . .

MODEL RULES, *supra* note 107, at Rule 1.6 (b).

A lawyer also has a duty of candor toward the tribunal.

(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; . . . (4) offer evidence the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyers shall take reasonable remedial measures. (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Id. at Rule 3.3.

¹¹¹ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

¹¹² In *Upjohn*, Mr. Gerard Thomas, General Counsel for Upjohn, learned from ac-

In connection with the investigation, Upjohn refused to produce some of the documents demanded by the IRS,¹¹³ claiming that they were protected from disclosure by attorney-client privilege and the work product doctrine.¹¹⁴

In reaching its decision that the documents demanded, including the written questionnaire and its answers, were protected, the Court briefly reviewed the history of and justifications behind the development of the attorney-client privilege and Federal Rule of Evidence 501. The Court said that the purpose of privilege is to encourage the "communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."¹¹⁵ Only by allowing uninhibited communication with attorneys can the public interest in justice be served.¹¹⁶ Furthermore, the Court recognized that, although the communication was protected, the underlying facts were not.¹¹⁷ The decision

countants working for the corporation that one of Upjohn's foreign subsidiaries had been making payments to foreign governments to secure government business. Mr. Thomas discussed the situation with the Chairman of the Board and an investigation of the "questionable payments" was started. A letter and questionnaire were sent to "All Foreign General and Area Managers" requesting information about the payments and stating that the investigation was to be considered "highly confidential." In March 1976, Upjohn submitted a Form 8-K to the Securities and Exchange Commission and the Internal Revenue Service (IRS) disclosing the questionable payments. The IRS began an investigation and issued a summons on November 23, 1976, demanding production of documents.

¹¹³ The IRS summons demanded "production of '[a]ll files relative to the investigation conducted under the supervision of Gerard Thomas [identifying] payments to employees of foreign governments.'" *Id.* at 387-88. The summons went on to state that "[t]he records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates and memorandums or notes of the interviews conducted in the U.S. and abroad with officers and employees of Upjohn Company and its subsidiaries." *Id.*

¹¹⁴ The work product doctrine protects attorneys' work prepared in anticipation of litigation. *See Hickman v. Taylor*, 329 U.S. 495 (1947).

¹¹⁵ *Upjohn*, 449 U.S. at 392.

¹¹⁶ A lawyer needs to have full and frank communications with his client in order to "promote [the] broader public interest [] in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* at 389.

¹¹⁷ [T]he protection of privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client . . . may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

did not question the proposition that in-house counsel should be entitled to the same attorney-client privilege as other lawyers.

The *Upjohn* case gave the Supreme Court the opportunity to explain clearly why and to what extent the attorney-client privilege should apply to corporations and to in-house counsel specifically; unfortunately, it did not.¹¹⁸ Cases heard in lower courts have recognized that the attorney-client privilege is available to in-house attorneys, but do not agree on the scope of the privilege.¹¹⁹ Although the Supreme Court did not clearly explain and justify its recognition of the availability of the attorney-client privilege to in-house counsel, it is a well-settled point of law.¹²⁰

B. Justifications for the Attorney-Client Privilege

There are two major justifications for the existence of the attorney-client privilege. The justification referred to in *Upjohn* is the traditional justification for attorney-client privilege; that the best administration of justice can only occur when clients can have full and frank communications with their lawyers.¹²¹ The other justification for attorney-client

Id. at 395-396, citing *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831.

¹¹⁸ When the United States Supreme Court agreed to hear *Upjohn Company v. United States*, scholars and practitioners alike took note. For decades, the Court had accepted tacitly the proposition that the attorney-client privilege available to individuals also was available to corporations, but it never had delineated the scope and meaning of the corporate attorney-client privilege. . . . *Upjohn* provided an opportunity for the Supreme Court both to explain its willingness to extend to corporations a privilege originally designed for individuals and to define precisely the scope and meaning of the corporate privilege. The *Upjohn* Court allowed the opportunity to pass, however.

John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U.L. REV. 443, 443-44 (1982).

¹¹⁹ The only case which refused to recognize the attorney-client privilege for a corporation was reversed on appeal. *Radiant Burners Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd*, 320 F. 2d. 314 (7th Cir. 1963).

¹²⁰ See, e.g., *Upjohn Co. v. United States*, 449 U.S. at 397; *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968); *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975) citing *Burlington Indus. v. Exxon*, 65 F.R.D. 26 (D. Md. 1974); *Lee Nat'l Corp. v. Deramus*, 313 F. Supp. 224 (D. Del. 1970); *Malco Mfg. Co. v. Elco Corp.*, 45 F.R.D. 24 (D. Minn. 1968); *Sperti Products Inc. v. Coca Cola Co.*, 262 F. Supp. 148 (D. Del. 1966).

¹²¹ This justification will be called the traditional justification for purposes of this Note. See, e.g., *Trammel v. United States*, 445 U.S. 40 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976), *Hunt v. Blackburn*, 128 U.S. 464 (1888), *United States v. Louisville & N. R.R.*, 236 U.S. 318 (1915), *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *petition for mandamus and prohibition denied*

privilege is based on the notions of privacy and autonomy of the client in determining who should have access to his information.¹²² Several critics suggest that the attorney-client privilege should not be extended to situations where the client is a corporation, or where the attorney is in-house counsel.

1. The Traditional Justification

Professor Wigmore in his treatise on evidence traced the existence of the attorney-client privilege back to the reign of Elizabeth I.¹²³ The justification is based on the utilitarian argument that, to promote freedom of consultation with legal advisers, the law must prohibit "disclosure except on the client's consent."¹²⁴

The traditional justification for the attorney-client privilege recognizes that the legal world is complex and that it is unreasonable to assume that the best administration of justice can occur without assistance to those before the courts.¹²⁵ Individuals being represented by attorneys will not

sub nom.

¹²² See *Developments in the Law - Privileged Communications: II. Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1480-83 (1985) [hereinafter *Theories and Justifications of Privileged Communications*].

¹²³ See *id.* at 1471-80; Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464-473 (1977) [hereinafter *Fixed Rules, Balancing, and Constitutional Entitlement*]; WIGMORE, *supra* note 100, § 2290, at 542.

Initially the privilege existed because of the "oath and the honor" of an attorney; it was considered "[t]he first duty of the attorney . . . to keep the secrets of his clients." *Id.* at 543. By the 1700's the justification for privilege changed and became based on the notion that it was necessary to provide "subjectively for the client's freedom of apprehension in consulting his legal adviser" and it was "proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law." *Id.*

¹²⁴ WIGMORE, *supra* note 100, § 2291.

Wigmore concludes that the four fundamental conditions for communication to be privileged are met in the attorney-client situation.

- 1) The communications must originate in a confidence that they will not be disclosed.
- 2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- 3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- 4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. Only if these four conditions are present should a privilege be recognized.

Id. § 2285.

¹²⁵ See also *Developments in the Law - Privileged Communications: III. Attorney-*

be willing to be as forthcoming with potentially relevant information if they believe that the attorney might be required at a later time to reveal that information. Furthermore, non-lawyers cannot function efficiently or effectively in the adversary system without assistance of counsel and because individuals need to seek advice on the law and its complexities to function within the system.¹²⁶ If individuals do seek legal assistance and conform with the laws, the benefits of this legally correct behavior will flow to society.

Certainty in determining whether communications are privileged is essential for the objective of encouraging communication to occur.¹²⁷ Clients will be candid if they are certain that their communications will not be disclosed.¹²⁸ If the professional knows that he might be forced to disclose communications, he may be hesitant to aggressively solicit information from his client.¹²⁹ Behavior modification of the client will

Client Privilege, 98 HARV. L. REV. 1501, 1502 (1985) [hereinafter *Attorney-Client Privilege*].

As matters become complex, lay persons will have no choice but to consult the experts. The threat of being sued or the need to sue for redress of grievances necessarily drives clients to lawyers. When litigation is not involved, the inability to understand or deal with a legal matter is usually the catalyst.

Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 364 (1989). "By encouraging clients to communicate information they would otherwise withhold from their lawyers, confidentiality enhances the quality of legal representation and thus helps produce accurate legal verdicts." *Id.* at 358 (citations omitted).

¹²⁶ The legal system is very complex and it is unreasonable to assume that individuals will be able to operate within the restrictions without assistance. "The multitude have not leisure for profoundly studying the laws: they do not possess the capacity for connecting together distant regulations - they do not understand the technical terms of arbitrary and artificial methods." *Attorney-Client Privilege*, *supra* note 125, at 1506 n.37 (1985) *citing* J. BENTHAM, A GENERAL VIEW OF A COMPLETE CODE OF LAWS, in 3 THE WORKS OF JEREMY BENTHAM 155, 161 (J. Bowring ed. 1843).

¹²⁷ Courts, recognizing the need for certainty have refused to engage in a case-by-case balancing test of the need for privilege and the harm from non-disclosure. *See, e.g., Fixed Rules, Balancing, and Constitutional Entitlement*, *supra* note 123, at 468 *citing* Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 429 (1970); Saltzburg, *supra* note 104, at 281.

¹²⁸ "Attorneys and corporate actors must have rules of sufficient clarity so that they can predict with confidence which communications will be privileged and which will not be. In the absence of such predictability, the corporate privilege may not act to induce any increment in communication with corporate counsel." Sexton, *supra* note 118, at 482. *See also Fixed Rules, Balancing, and Constitutional Entitlement*, *supra* note 123, at 469.

¹²⁹ The problem with this result is that the best administration of justice could not occur because the attorney will be hesitant to encourage the client to communicate free-

only result if the existence and application of the rule of attorney-client privilege are certain and predictable.¹³⁰ Courts have recognized that the privilege hinders the discovery of the truth and therefore should not be broadly construed.¹³¹

There are many criticisms of privilege, particularly of the underlying assumption that privilege increases communication. "Critics of an existing privilege commonly assert that people typically know little or nothing about their privilege and that, even if they did, the knowledge would rarely alter their communicative behavior."¹³² Unfortunately the little empirical data available that either supports or refutes the assumptions underlying the need to protect confidentiality is not conclusive.¹³³

ly with him. *Theories and Justifications of Privileged Communications*, *supra* note 122, at 1476-77. "If an attorney cannot promise to maintain the confidentiality of his client's communications, the only advice he or she could provide to the client would be 'Don't talk to me.'" *Samaritan Found. v. Sup. Ct. of the State of Ariz.*, 173 Ariz. 426 (Ct of Appeals Div. 1, Dept E 1992) *citing*, *Southern Cal. Gas Co. v. Public Utils. Comm'n*, 784 P.2d 1373, 1375-1376 (Cal. 1990).

¹³⁰ *Theories and Justifications of Privileged Communications*, *supra* note 122, at 1486-87.

If there is not certainty of privilege, clients will not be as open and honest with attorneys and the best administration of justice will not occur. "Society would surely suffer greatly if the lack of a privilege discouraged clients from conferring with their doctors, informants from talking to reporters, and spouses from sharing intimacies." *Id.* at 1473. *See also* Zacharias, *supra* note 125, at 364.

"[A]dvice is more likely to produce appropriate corporate behavior if based on full disclosure of the facts rather than incompleteness, half-truths and distortions prompted by the apprehension of revelation in litigation." Vincent Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 222 (1989).

¹³¹ Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

WIGMORE, *supra* note 100, § 2291, at 554 *citing* *Foster v. Hall*, 29 Mass. (12 Pick.) 89, 97 (1831).

"Courts and scholars recognize that it also imposes costs on the judicial system by keeping relevant evidence from the fact finder. Consequently, the privilege is not absolute and its requirements are strictly construed." Steven M. Abramowitz, Note, *Disclosure Under the Securities Laws: Implications for the Attorney-Client Privilege*, 90 COLUM. L. REV. 456, 458 (1990) (citations omitted).

¹³² *Theories and Justifications of Privileged Communications*, *supra* note 122, at 1474.

¹³³ "Well-respected scholars have also noted the lack of empirical evidence establishing its practical effectiveness. Yet no new studies have been conducted in response.

At least two of the studies conducted on the issue of attorney-client privilege have concluded that people seeking legal advice may misunderstand the privilege. An early study conducted at Yale University¹³⁴ concluded that lay peoples' understanding of the attorney-client privilege was erroneous in many cases and that it was more important to the attorneys than the clients.¹³⁵ Fred C. Zacharias completed a study¹³⁶ in which he found that clients had some misunderstanding about confidentiality, but that a substantial number had relied on confidentiality when giving information to their attorneys.¹³⁷

Another study, conducted by Professor Vincent Alexander at St. John's Law School¹³⁸ concluded that in most cases attorney-client privilege does encourage candid communications between management and attorneys.¹³⁹ Alexander's study also showed that there was a difference in the perceptions of in-house and independent counsel about the ability of the attorney-client privilege to increase candor of employees. Although fewer in-house counsel said that the privilege increases communications and candor,¹⁴⁰ a significant number still felt it was important. Prof.

Most commentators continue simply to assert the essential nature of strict confidentiality to our legal system." Zacharias, *supra* note 125, at 376 (citations omitted). *See also Theories and Justifications of Privileged Communications*, *supra* note 122, at 1474; Michigan Note, *supra* note 103, at 665 n.2.

¹³⁴ This study was a survey using a questionnaire of "judges, lawyers, accountants, marriage counselors, psychiatrists, psychologists, social workers and laymen." Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1226-27 (1962).

¹³⁵ "Lawyers significantly more than laymen, believe the privilege encourages free disclosure to them. . . . In fact, . . . most people were either unaware of the attorney-client privilege or believed that it extended to other professional relationships as well." *Id.* at 1232.

¹³⁶ Zacharias, *supra* note 125, at 379-80 (Mr. Zacharias recognized that there were substantial limitations to the information and conclusions drawn from his study because of the limited number and geographic area of the respondents. All (63 active lawyers, 42 non-lawyers) lived in Tompkins County, New York which is a rural area and influenced by the near-by presence of Cornell University.

¹³⁷ *Id.* at 380-81. He said that although his study was not conclusive, it seems that a less strict confidentiality standard might provide benefits to the justice system that outweigh costs associated with them. *Id.* at 355.

¹³⁸ Alexander, *supra* note 130, at 193. This study was based on 182 interviews with corporate attorneys, corporate management, federal judges and magistrates.

¹³⁹ "[T]he corporate attorney-client privilege, despite lingering doubts, may perform a useful function by enhancing candid disclosure between attorneys and corporate management. For this reason, and because of its potential contribution to corporate legal compliance, it is worthy of continued recognition in most circumstances." *Id.* at 200.

¹⁴⁰ *Id.* at 276.

Alexander's findings did not lead to the conclusion that the privilege should be taken away from in-house counsel.¹⁴¹

Professor Steven Shavell of Harvard Law School created a model to determine what influence confidentiality has on decisions to obtain advice.¹⁴² His model did not differentiate between in-house and independent attorneys in its attempt to predict clients' behavior in the face of confidentiality.¹⁴³

Legal advice can only lead to two types of changes in behavior: to a party's committing an act that is not sanctionable and that he would not otherwise have committed (because he erroneously thought it likely to be sanctionable) or to a party's not committing a sanctionable act that he would otherwise have committed (because he erroneously thought it unlikely to be sanctionable). Both these types of changes in behavior are socially desirable.¹⁴⁴

He concluded that in different situations, confidentiality will have different effects on whether a party seeks advice;¹⁴⁵ but that the main advan-

¹⁴¹ Alexander cited three reasons why the attorney-client privilege should remain for conversations with in-house counsel. 1) Although in-house counsel was less enthusiastic, 62% still believed it increased candor. 2) The samples surveyed were very small. 3) "Abolition might resurrect an unhealthy class distinction in the legal profession." *Id.*

¹⁴² "A party will obtain legal advice if its expected value exceeds its cost. The expected value of advice is determined by the probability that advice will lead a party to alter his behavior, multiplied by the benefit he will obtain from his altered behavior." Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, And Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 127 (1988).

¹⁴³ He differentiated between types of legal advice that include advice concerning the legality of acts, advice concerning the probability or magnitude of sanction, and advice instructing parties how to lower the probability or magnitude of sanctions. He assumes for purposes of his model that parties make decisions based on the expected values of the actions and that parties are risk neutral. *Id.* at 124-25. "[T]he value to a party of protection of confidentiality inheres in the possibility that, *after* he obtains advice, he will decide to commit an act for which he might be sanctioned." *Id.* at 137.

¹⁴⁴ *Id.* at 129.

¹⁴⁵ Type I: Advice about the sanctionability of acts.

Where definitive advice about the sanctionability of an act is possible, confidentiality will have no effect on the parties' decision to obtain advice. *Id.* at 130.

Where advice about sanctionability is not definitive, parties will still tend to obtain legal advice about the sanctionability. The advice given will be included in the client's calculation of whether to commit the questionable act. The social desirability of protection of confidentiality in this case depends on whether the expected sanctions are greater than or less than the harm done by the acts. *Id.* at 132-34.

Type II: Advice about the Magnitude of Probability of Sanctions

tage of confidentiality "is that more individuals will discuss their plans with attorneys and then may decide against acting."¹⁴⁶

Although the results of these studies do not lead to a clear answer, it seems that more support is found in these studies and discussions for continuing the attorney-client privilege than for abandoning it. Assuming it is at least possible and perhaps even probable that the attorney-client privilege increases communication between the attorney and his client, and the communication may lead to behavior modification, it seems necessary to continue to recognize it. If behavior modification is possible, and even likely in certain situations as Professor Shavell suggests, then extending the attorney-client privilege to all attorneys should cause the greatest amount of law-abiding behavior by clients, which in the long run will be beneficial to society.

2. The Privacy Rationale

The other major justification is based on the idea that the attorney-client privilege protects individual privacy and autonomy. There is a need for protection of personal autonomy because individuals should be able to control whether information about their communications is released or not and to whom.¹⁴⁷ The privacy interest of an individual is sufficient to override any "impairment of truth-seeking that privileges may cause."¹⁴⁸

This justification for the attorney-client privilege relies on three values to give it strength: "human autonomy regarding personal information, respect for relationships, and respect for the bonds and promises that protect shared information."¹⁴⁹ If an individual tells his attorney some-

If expected sanctions are equal to or greater than the harmfulness of the act, protection of confidentiality will lead to socially desirable changes in behavior. *Id.* at 134-36

Type III: Advice to those wishing to lower the probability or magnitude of sanctions

Protection of confidentiality in this situation is socially undesirable because it will assist individuals in engaging in socially undesirable behavior. *Id.* at 136-37.

¹⁴⁶ *Id.* at 143.

¹⁴⁷ "The other justification . . . would privilege attorney-client communications . . . because compelled disclosure of attorney-client communications is itself intrinsically wrong in certain circumstances." *Attorney-Client Privilege, supra* note 125, at 1501 (citation omitted).

¹⁴⁸ *Theories and Justifications of Privileged Communications, supra* note 122, at 1480-81.

¹⁴⁹ SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 120 (1982).

thing with the expectation that it will not be disclosed and for some reason the attorney must disclose it, two distinct harms can occur: "(1) embarrassment of having secrets revealed to the public and (2) the forced breach of an entrusted confidence."¹⁵⁰ These harms are very real to the person whose secret has been revealed and will have a chilling effect on others who may desire to seek assistance of counsel.

C. Applying Attorney-Client Privilege To Corporations

Three main criticisms of applying the attorney-client privilege to situations where the client is a corporation have been raised.¹⁵¹ These arguments can be broken down to 1) the *Radiant Burners* argument; 2) the claim that the evidentiary cost is too high; and 3) the claim that it is illogical and unnecessary to apply the privacy rationale to corporations and therefore no privilege should attach.¹⁵² Despite these counter arguments to the existence of privilege, none have been deemed sufficient to prevent the application of the privilege to corporations.

These values concern relationships between individuals and the need to have others respect what is shared with them in confidence. Individuals feel a duty to behave carefully when another has shared information with a request that it be kept confidential because an intimate relationship is created between the two. In support of these three premises, Bok first argues that if people did not maintain secrets no one could "maintain privacy or guard against danger." Second, it is legitimate to share secrets and the sharing creates relationships which are intimate. These relationships and the need to preserve the confidence is "rooted in loyalties." Third, once people promise to keep something confidential they are "no longer start[ing] from scratch in weighing the moral factors of a situation. They matter differently once the promise is given, so that full impartiality is no longer called for." *Id.* at 120.

¹⁵⁰ *Theories and Justifications of Privileged Communications*, *supra* note 122, at 1481.

¹⁵¹ Although the issue of whether the attorney-client privilege should be involved when the client is a corporation is not the central focus of this Note, it is useful to an understanding of the problems involved in extending the privilege to in-house counsel. If the criticisms of applying it to situations where the corporation is the client are accepted, then it follows that it should not be extended to in-house counsel either because the only client is the corporation and the in-house counsel would have no other dealings to be protected.

¹⁵² See *supra* notes 132-146 and accompanying text (discussing whether the privilege actually induces increased communications).

1. *Radiant Burners Case*¹⁵³

Although the *Radiant Burners* case was reversed on appeal and has not been followed by any other court, Chief Judge Campbell made a compelling argument that the attorney-client privilege should not be extended to corporations. He argued that courts and commentators had long taken for granted that the attorney-client privilege should be extended to corporations even though there was no authority for that conclusion.¹⁵⁴ Campbell argued that the attorney-client privilege should not apply to corporations for two reasons. First, the attorney-client privilege was analogous to the privilege against self-incrimination that can only be claimed by individuals and not corporations.¹⁵⁵ Since both were created by common law and their development was so interrelated, Campbell questioned whether the two were intended to be different privileges.¹⁵⁶ His second argument was that one element underlying the privilege is that the communication is completely confidential between the client and attorney. However, in a corporate setting the number of people with access to the information is greater than if an individual has the information, and the likelihood of accidental waiver will increase.¹⁵⁷

The Seventh Circuit overturned Campbell's decision saying "[w]ith deference to the ingenuity and judicial courage displayed by the district court in arriving at its conclusions we find ourselves in disagreement with the broad holding 'that a corporation is not entitled to make claim to the attorney-client privilege.'"¹⁵⁸ The court noted that the privilege had been granted to corporations in a large number of cases over the past century

¹⁵³ *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp 771 (N.D. Ill. 1962); *rev'd*, 320 F.2d 314 (7th Cir. 1963).

¹⁵⁴ "[A] corporation's right to assert the privilege has somewhat generally been taken for granted by the judiciary, myself included, without a proper reliance on *stare decisis* or the promulgation anywhere of record of a clear legal analysis of the issue involved." *Radiant Burners*, 207 F. Supp. at 772.

¹⁵⁵ The attorney-client privilege, analogous to the privilege against self-incrimination, is historically and fundamentally personal in nature. Both privileges have their genesis in common law and both still exist independently of statute. . . . It logically follows that this personal privilege of the client must, as in the case of the personal privilege against self-incrimination, be claimed only by natural individuals and not by mere corporate entities.

Id. at 773.

¹⁵⁶ "In its historic genesis in the common law it is so intimately entwined with its great partner the privilege against self-incrimination that a person reading its history begins to doubt that two separate privileges ever were originally intended." *Id.* at 775.

¹⁵⁷ *Id.* at 773-74.

¹⁵⁸ *Radiant Burners*, 320 F.2d at 318.

in both the U.S. and England.¹⁵⁹ The court stated that the privilege did not arise out of respect for the rights of individuals, rather that it was designed to promote the administration of justice and therefore should be fully applicable to corporations.¹⁶⁰

2. "Zone of Silence" Criticism

Others have argued that application of the attorney-client privilege in situations where the client is a corporation is dangerous to the administration of justice because of the creation of the "zone of silence."¹⁶¹ "A corporate client could structure its procedures so as to privilege much of its routine transactions through transmittal to corporate counsel. As one court noted 'in the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the "zone of silence" grows large."¹⁶² At first glance something that creates a "zone of silence" and hinders the evidence gathering process seems undesirable. However, this argument ignores that even though the communication may be privileged, the facts that surround the communication are still discoverable.¹⁶³ As the Supreme Court stated, "application of the attorney-client privilege . . . puts the adversary party in no worse position than if the communications had never taken place."¹⁶⁴ As long as the evidence can be obtained, there is no reason to discourage socially useful communications between lawyers and clients because the lawyer might be required to reveal communications.

¹⁵⁹ See *id.* at 319 for an extensive listing of federal, state and English cases recognizing the right of the attorney-client privilege for corporations.

¹⁶⁰ *Id.* at 321.

¹⁶¹ There is a "concern that excessively broad corporate privilege would give corporate parties an unwarranted litigation advantage and might permit a considerable amount of evidence to be concealed under the umbrella of the corporate attorney-client privilege." Saltzburg, *supra* note 104, at 288. See also, *Upjohn Co. v. United States*, 449 U.S. 383, 388-89 (1981); Sexton, *supra* note 118, at 477; Waldman, *supra* note 106, at 483; *Attorney-Client Privilege*, *supra* note 125, at 1507.

¹⁶² Waldman, *supra* note 106, at 483 (citation omitted).

¹⁶³ The study conducted at St. John's University stated that most judges believe the "same information is frequently discoverable in some other form." Alexander, *supra* note 130, at 260. See also *supra* note 131 and accompanying text.

¹⁶⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

3. Criticism of the Privacy Rational

Some commentators have argued that the need for privacy and autonomy that may justify the existence of privilege for individuals does not apply to corporations.¹⁶⁵

The recognition of organizational privacy has been more controversial. Some have treated it as different from but analogous to, individual privacy; others have viewed privacy as a right that generally attaches only to individuals. To the extent that privacy is valued for the functions it serves, it appears applicable to organizations. But to the extent that privacy is valued as an end in itself, it appears inapplicable to organizations. Nonetheless, because courts can and do justifiably recognize organizational privileges in order to prevent immediate harms, such as breaches of national security, limiting the privacy rationale to individuals is not a useful approach, despite the fact that the immediate harm prevented is not strictly a harm to privacy.¹⁶⁶

Corporations are not individuals but they are made up of and run by individuals. It seems unreasonable to believe that individuals can easily separate their expectations and need for privacy and control over information in their personal life from their professional life. Just because a person is in a corporate setting, his ideas, values and beliefs do not drastically change such that he finds it appropriate or expects to have confidential information shared.

Despite the criticisms, it is well-settled that the attorney-client privilege is extended to situations where the client is a corporation.¹⁶⁷ Although it might be more likely that corporations would seek legal advice even if there were no attorney-client privilege,¹⁶⁸ the need to have individuals in the corporation to be open and frank with counsel remains. It is not difficult to believe that some individuals in a corporation would be hesitant to come forward with information if they believed that the information would or could be used against them in the future.¹⁶⁹ The criticisms of applying the attorney-client privilege in situa-

¹⁶⁵ This justification is more difficult to apply to the grant of the attorney-client privilege to corporations. See *Theories and Justifications of Privileged Communications*, *supra* note 122, at 1480-83; BOK, *supra* note 149, at 142-43.

¹⁶⁶ *The Theories and Justifications of Privileged Communications*, *supra* note 122, at 1482 (citations omitted).

¹⁶⁷ See *supra* notes 158-59.

¹⁶⁸ Sexton, *supra* note 118, at 464; Corello, *supra* note 107, at 418.

¹⁶⁹ Sexton, *supra* note 118, at 464-65; Corello, *supra* note 107, at 413-14; Saltzburg,

tions where the client is a corporation directly affects whether in-house counsel should be included within the scope of the privilege. If corporations are not extended the attorney-client privilege, it would be unnecessary to decide whether in-house counsel should be included. Communications with in-house counsel would only occur with a client to which the protection is not extended, thus saying that in-house counsel are included in the scope of the attorney-client privilege would be meaningless because there would be no communications to protect.

IV. SHOULD THE PRIVILEGE BE APPLIED TO IN-HOUSE COUNSEL?

Many companies have decided for a variety of reasons that their legal needs can be best met if they have one or more attorneys who are employees of the corporation.¹⁷⁰ The corporation is the only client of these attorneys. The recognition that the corporation's right to the attorney-client privilege is the same whether the attorney is in-house or independent is well settled in the U.S. while the non-recognition for in-house counsel of the privilege in the EC is equally well-settled.¹⁷¹ Arguments supporting and attacking the extension of the attorney-client privilege to in-house counsel will be discussed below.

A. *Attorney-Client Privilege Should Not be Available*

Generally, critics argue that the privilege should not apply to in-house counsel for two reasons. First is the argument advanced by the decision in *AM & S*; an attorney will be influenced by the business needs of the company causing his independent professional judgment to be impaired.¹⁷² Second, critics say it is difficult to determine when the attorney is acting as an attorney and when a communication is legal, however these issues are important because only legal communications

supra note 104, at 283.

In the Tompkins County Study, Zacharias, *supra* note 125, at 386, "a majority of lay persons answered that they would withhold information" if a guarantee of confidentiality could not be given.

¹⁷⁰ For example, "The staff attorney's position exists also so that business people can have the benefit of legal advice long before it would be economical to call in outside talent. Corporate staff attorneys pride themselves on doing preventive law by advising on the structure of a business deal as it evolves." EVE SPANGLER, *LAWYERS FOR HIRE, SALARIED PROFESSIONALS AT WORK* 78 (1986). *See also supra* note 1.

¹⁷¹ *See, e.g., United States v. Louisville & N. R.R.*, 236 U.S. 318, 336 (1915); *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981). *See also Alexander, supra* note 130, at 195 n.8. For discussion of the non-recognition of the privilege for in-house counsel in the EC *see supra* notes 38-40 and accompanying text.

¹⁷² *See Charles, supra* note 42.

can be protected.¹⁷³ The attorney-client privilege in the U.S. and the EC both require the communication to be between an attorney and his client, with the attorney acting as an attorney.¹⁷⁴ The discussion below explains why these criticisms are insufficient to prevent the application of the attorney-client privilege where the attorney is in-house counsel.¹⁷⁵

1. Independent Professional Judgment

The first argument against extending the attorney-client privilege to in-house counsel is that the employment relationship between the attorney and the company creates a conflict for the attorney because he will be required to maintain his independent professional judgment while protecting and advancing the interests of the company. In certain situations these two obligations will conflict. The concern expressed by critics of an extension of privilege is that the attorneys will be more concerned with loyalty to their client and keeping their jobs than fulfilling their responsibilities as lawyers.¹⁷⁶

¹⁷³ See, e.g., Sexton, *supra* note 118, at 489; Abramowitz, *supra* note 131, at 463 and nn. 37-38; Corello, *supra* note 107, at 417.

¹⁷⁴ See *supra* note 39 (for EC) and *infra* note 182 (for U.S.) and accompanying text.

¹⁷⁵ This discussion of whether to extend the attorney-client privilege to in-house counsel assumes that in-house counsel are subject to the same ethical and disciplinary rules as other attorneys in their country. In situations, such as currently exist in Italy, France, Belgium and Luxembourg, these arguments do not apply. Persons who have legal training, but are not acting under the same rules as lawyers to uphold justice and remain independent from their clients probably will not remain independent and put the administration of justice first, so withholding the attorney-client privilege from these persons is sensible. To allow these persons to protect communications would be similar to allowing general business people to protect communications with other business people. This situation would not promote the objectives of recognizing the attorney-client privilege. However, if the in-house counsel in these countries actually do continue to act like independent lawyers despite the fact that they are not members of the bar, perhaps these countries should reconsider their decision to exclude them from the bar. See *supra* notes 38, 121-22 and accompanying text.

¹⁷⁶ The problem is that the only recourse from an unlawful demand by the company is for the lawyer to withdraw from representing it. However, withdrawal from representation for an in-house lawyer means unemployment.

Due to the scarcity of jobs, those seeking employment cannot afford to turn down offers regardless of the terms. Individuals already employed cannot easily refuse to work under particular conditions or to follow an employer's demand. These employees lack the luxury of being able to move from job to job and their immobility weakens their bargaining power.

Cathryn Dakin, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. (forthcoming).

Although it is true that in-house counsel are dependent on their corporation client for their income and job security,¹⁷⁷ it does not necessarily follow that they will be more easily subject to influence. The Model Rules, the Model Code, and the CCBE Code place a good deal of importance on the need for a lawyer to maintain certain professional standards that require him to remain free from being unduly influenced by his corporation client.¹⁷⁸ The problem of undue influence by the

¹⁷⁷ “[A]n in-house lawyer’s relationship to her employer is the same as other employees in most important respects: She is dependent on her employer for her sole income, benefits and pension. . . . The employer controls the lawyer’s hours and ‘the focus of [in-house counsel’s] practice.’” Corello, *supra* note 107, at 405-06 (citation omitted).

¹⁷⁸ Under the Model Code certain situations are set forth in which a lawyer may or must withdraw from employment. For example, a lawyer must withdraw if “[h]e knows or it is obvious that his client is bringing a legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him merely for the purpose of harassing or maliciously injuring any person” or if “[h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.” MODEL CODE, *supra* note 107, at DR 2-110(B)(1), (2). Thus a lawyer whose client is attempting to use the lawyer to break the law must withdraw from employment because the activity would be a violation of DR 7-102 (a lawyer must represent his “client within the bounds of the law.”).

Furthermore, Canon 5 states that “[a] lawyer should exercise independent professional judgment on behalf of a client.” MODEL CODE, *supra* note 107, at Canon 5.

A lawyer must avoid “even the appearance of impropriety.” Although this is not an exhaustive examination of the Model Code provisions governing the behavior of lawyers and the requirement that they act within the bounds of the law it is sufficient to make the point that although in-house counsel may be dependent on the corporation for their job and their salary, they are still required to behave under the same rules as other attorneys. MODEL CODE, *supra* note 107, at DR 9-101.

A similar observation can be made in jurisdictions observing the Model Rules.

A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES, *supra* note 107, at 1.2(d).

The EC provisions of the CCBE Code require attorneys to remain independent and free from influence of their clients.

2.1 Independence

2.1.1 The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

business people is generally diffused by the fact that corporate legal departments are segregated from the rest of the company "to protect not only the autonomy of the law department . . . [and] the corporation's long-term interest in having its executives' business practices adequately monitored."¹⁷⁹ It is not clear that situations where attorneys are pressured to go against their judgment because of corporate pressure are common.¹⁸⁰ For these reasons, it is unlikely that charges that in-house counsel are more easily corrupted or influenced by their client than independent counsel are valid.

2. Protecting Only "Legal" Communications

The second criticism is that in-house counsel are often intimately involved in all the company's affairs and therefore it may be difficult to determine whether a communication is legal or business and therefore whether the privilege should apply. U.S. courts have dealt with this problem in different ways, but it does appear possible to distinguish between legal and non-legal advice and to prevent the privilege from applying where it should not.¹⁸¹ As with any other attempt to claim that communications are privileged, a conversation with in-house counsel will only be protected if it is "legal" in nature.¹⁸² Despite the difference in

2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no value if it is given only to ingratiate himself, to serve his personal interest or in response to outside pressure.

ADAMSON, *supra* note 23, at app. 5, xlvii (1992).

"Unlike other employees, in-house attorneys are not forced to choose between violating the law and losing their job because violating the law is not an option for those bound by the ethical codes." Corello, *supra* note 107, at 403 (citation omitted).

¹⁷⁹ SPANGLER, *supra* note 170, at 76.

¹⁸⁰ "On-balance, in-house counsel maintain that situations seldom arise in which they are pressured to compromise their professional judgment." *Id.* at 99.

¹⁸¹ The specific requirements and tests used by courts differ but the result has been that non-legal advice has generally not been protected. *See* Sexton, *supra* note 118, at 489 n.149, for a listing of cases refusing to accord privilege to non-legal advice. *See also* Abramowitz, *supra* note 131, at 463 and nn.37-38; Corello, *supra* note 107, at 418 n.174.

¹⁸² "[P]rivilege and confidentiality only apply to those acting as attorneys." Corello, *supra* note 107, at 417 (citations omitted). *See also* Abramowitz, *supra* note 131, at 462:

The attorney-client privilege is applicable only to a client's communications of legal matters to the attorney because these are the communications that the privilege assumes might not be made absent a privilege. Consequently, if a communication is made for business purposes rather than as a request for legal advice, or if the attorney is acting in a role other than that of lawyer, the privilege does not apply.

the relationship between in-house and independent attorneys and their clients, since only legal conversations are privileged, there will be no additional evidentiary cost to the adverse party than if the client had retained independent counsel.

B. Attorney-Client Privilege Should Be Available

There are four main arguments why in-house counsel should be given the attorney-client privilege, and the decision of the ECJ should be reversed or at least modified to protect communication with certain in-house attorneys. First, in-house counsel may actually be in a better position than independent lawyers to encourage lawful behavior by the client and the administration of justice by having more influence over the officers and directors of the company. Second, lawyers in firms may not actually be more independent than in-house lawyers. Third, if the attorneys are subject to the same ethical principles, have the same duties to uphold the law and are required to maintain the same independence of judgment from the clients, they should be permitted the same rights as the other attorneys. Finally, given the scope of the world economy today, with the increases in international trade, the growth in the numbers of multinational companies with offices in many parts of the world and the opening up of new markets, the EC's refusal to grant in-house counsel the right to privilege will frustrate its desire to become a major player in the international game by causing other countries to be suspicious of dealings with EC companies and their attorneys for fear that their confidentiality will be breached because of the rules of the EC.

3. In-house counsel may be better able to persuade client to behave lawfully

In-house lawyers are very involved on a regular basis with many aspects of the corporation.¹⁸³ It is possible that these attorneys are able to influence the corporation not to do something that is illegal or questionable because of their long-standing relationship with the company or the fact that they are more involved with the day-to-day affairs of the

Abramowitz, *supra* note 131, at 462 (citations omitted). *See also*, Valente v. PepsiCo, 68 F.R.D. 361, 367 (D. Del. 1975); Natta v. Hogan, 392 F.2d 686, 692 (10th Cir. 1968) *citing* United States v. United Shoe Machinery Corp, 89 F. Supp. 357, 360 (D. Mass. 1950).

¹⁸³ *See generally* Corello, *supra* note 107, at 417; SPANGLER, *supra* note 170, at 75 (discussing that an in-house lawyer is not only expected to provide legal advice; often times they also provide business advice, and are expected to ensure that business transactions can occur).

company.¹⁸⁴ The officers and directors might be more willing to listen to the in-house attorney whom they know and have developed a relationship with when they might ignore an independent attorney hired to complete a particular job who recommends the company not proceed.¹⁸⁵

[I]n-house attorneys differ from outside corporate counsel in that they have better access to the facts, their personal and professional ties are to their client, and they are often asked to make decisions, rather than give advice. Therefore in-house counsel has greater ability to alter her client's behavior and thus a corresponding duty to use that ability to promote constructive behavior by the client.¹⁸⁶

Part of the role of in-house counsel is to help the company be as profitable as possible, and in many cases, persuading the company to look long-term and behave lawfully is in the best interest of the client and in the best interest of justice.¹⁸⁷ If an attorney fails to cause his client to behave lawfully, he might be in violation of the ethics rules¹⁸⁸ and

¹⁸⁴ "[Y]et in-house counsel have an ongoing relationship with the client. . . . Unlike most lawyers retained for litigation, in-house counsel develops a relationship before the wrongful act; therefore, she is in a position to influence future behavior." Corello, *supra* note 107, at 417 (citations omitted). "A corporation's attorney . . . is positioned to impart 'preventive' legal advice; she acts as a private law enforcement agent." Sexton, *supra* note 118, at 475. "The more frequent contact between house counsel and corporate representatives may produce a rapport that is alone sufficient to ensure candor. Nearly all of the executives in the survey, for example, said that they communicate with house counsel more often than outside counsel." Alexander, *supra* note 130, at 277.

The data and conclusions from the Tompkins County Study state that more than 75% of the attorneys surveyed had been able to dissuade their clients from wrongdoing because of confidentiality. Zacharias, *supra* note 125, at 381.

¹⁸⁵ The influence of an attorney in suggesting an alternative course of action depends mainly on the business person's prior experience with that attorney. 'You attain a lot of credibility in the company,' says one lawyer, 'because of your aptitude with business issues, your apparent willingness to really dig in and examine issues closely and develop a solution and not take the easy way out and say you can't do something.'

SPANGLER, *supra* note 170, at 93.

¹⁸⁶ Corello, *supra* note 107, at 409 (citations omitted).

¹⁸⁷ [I]n-house counsel's role as advisor is to promote the employer-client's long-term interest. Thus she is obligated to ensure lawful behavior by her employer because failure to comply with the law may cause harm to the corporation. This rule is consistent with the lawyer's professional obligation not to participate in crime or fraud.

Corello, *supra* note 107, at 409 (citations omitted).

¹⁸⁸ An attorney in any jurisdiction is not permitted to assist his client in criminal or fraudulent activities. See relevant provisions, *supra* note 110 and accompanying text for provisions governing U.S. lawyers. In the EC, lawyers must not violate the law in as-

therefore subject to discipline. All attorneys must work to prevent unlawful behavior by their clients; however, in-house counsel's unique position and early involvement in situations may make it even more likely that they can encourage lawful behavior by their employers.¹⁸⁹

For example, in the *John Deere* case¹⁹⁰ in-house counsel attempted to ensure that John Deere was obeying the competition laws of the EC by inserting a clause that said that the contract was not intended to contravene the law. Although John Deere was aware of the competition laws, and the prohibition of export bans, in-house counsel attempted to ensure that John Deere was within the law by including the "savings clause" in the sales contract. The fact that the Commission found documents that showed that in-house counsel was unsure whether the clause was sufficient shows that the in-house counsel was attempting to convince the company to act within the law. Although in-house counsel did not succeed in causing John Deere to act within the law, it is unclear whether independent counsel would have been more successful or would even have done anything differently.

Additional examples of in-house counsel attempting to force legal behavior from their employers can be seen in the "whistleblowing cases"¹⁹¹ that have been brought in the U.S. over the past several years.¹⁹² In many situations, in-house attorneys have been fired for refusing to assist their companies in violating the law or for refusing to violate the

sisting their clients. The CCBE Code provides: "2.7 Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of his client . . . 4.4 A lawyer shall never knowingly give false or misleading information to the court." ADAMSON, *supra* note 23, at app. 5, xlvii, lii (1992).

¹⁸⁹ The nature of an attorney as an arm of law enforcement lends support to the legitimacy of the corporate need for legal counsel. The probability of bringing corporations into compliance with the law is enhanced by the greater access of corporations to counsel resulting from the availability of the privilege. Therefore, corporations need effective legal counsel, perhaps even more than do individual clients, to advise them in their varied and complex array of activities.

Waldman, *supra* note 106, at 492 n.102 (citation omitted).

¹⁹⁰ See *supra* notes 79-85 and accompanying text for background and facts.

¹⁹¹ "Whistle blower suits are intended to encourage employees to object to unlawful conduct by their employer by deterring employers from firing workers who blow the whistle, and ultimately to reduce unlawful conduct by employers." Corello, *supra* note 107, at 396.

¹⁹² The law in the U.S. is unsettled at present whether in-house counsel should or should not be permitted to bring retaliatory discharge suits. *Id.* at 399-400. However, in at least three cases where the in-house counsel was reporting violation of the law by the in-house counsel "the courts found that public policy embodied in the Code and the Rules was sufficient to justify retaliatory discharge suits by in-house counsel. *Id.* at 402. See also Dakin, *supra* note 176.

code of ethics by which they are bound.¹⁹³ Cases brought by these attorneys claim wrongful discharge.¹⁹⁴ Although many of these suits have not been permitted, the fact that they have arisen show that attorneys do try to force lawful behavior by their employer even if it might cost them their job.¹⁹⁵ Thus despite the fact that the attorney is employed by a company, and a company may ask the attorney to assist it in violating a law or request the attorney to violate his ethical responsibilities, many attorneys refuse even though the result could be unemployment.

2. Law firm lawyers are not more independent

The independence of outside firms as contrasted with in-house counsel may be illusory.¹⁹⁶ In many situations, independent lawyers work extremely closely with one or only a very small number of clients

¹⁹³ For discussion of cases concerning discharge of in-house lawyers, *see, e.g.*, Dakin, *supra* note 176; Elliott M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271 (1991); Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553 (1988); Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959); Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981); Klages v. Sperry Corp., 118 L.R.R.M. (BNA) 246 (E.D. Pa. 1984); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied* 484 U.S. 850 (1987); Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Mourad v. Automobile Club Ins. Ass'n, 186 Mich. App. 715 (Mich. Ct. App. 1991).

¹⁹⁴ Increasingly, in-house counsel have been fired for refusing to violate professional ethics or for urging their employer to comply with the law. Many have argued that allowing in-house counsel the right to bring retaliatory discharge suits would "enable in-house attorneys to abide by the ethical codes by weakening the force of an employer's threat to discharge them." Corello, *supra* note 107, at 389-90.

¹⁹⁵ Many courts have also refused to recognize the right for in-house counsel to recover in retaliatory discharge actions. The number of these cases also supports the premise that in-house counsel do try to force their companies to obey the law. *See, e.g.*, Rand v. CF Indus., 797 F. Supp. 643 (N.D. Ill. 1992); Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991); Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21 91986; Willy v. Coastal Corp., 647 F. Supp 116, 118 (S.D. Tex. 1986); Nordling v. Northern States Power Co., 465 N.W. 2d 81 (Minn. Ct. App. 1991), *rev'd on other grounds*, 478 N.W. 2d 498 (Minn. 1991).

¹⁹⁶ [S]ome attorneys assert that the vaunted independence of the law firm is more apparent than real. . . . Typically, the judgment of when to call in outside counsel and which firm to retain is left to the general counsel. . . . General counsel are unanimous in saying that they do not hesitate to replace outside counsel if they are dissatisfied with either the financial or the substantive aspects of the work they have commissioned. SPANGLER, *supra* note 170, at 100.

and may be as closely linked to the company as in-house lawyers are. Competition for clients is extremely high and a firm that establishes a relationship with a client is not going to be willing to leave the client.

In-house lawyers may, in fact, feel safer and more confident leaving one corporation and seeking employment with another if they disagree with the management. . . . Furthermore, in-house lawyers can always get the advice of an outside lawyer in cases where they think they may disagree with the board of directors. By contrast, a lawyer or a small independent firm of lawyers may sometimes be willing to do anything for a major client, particularly when it is struggling for survival.¹⁹⁷

Thus it seems that a firm, though technically independent, could easily find that its survival required them to comply with the demands of their client.

Independent lawyers are permitted the right to the attorney-client privilege even though their independence and independent professional judgment could potentially be impaired because of their heavy involvement with certain clients. The number of clients that an attorney has is not a useful measuring stick for their ability to remain independent and free from undue influence by clients.¹⁹⁸ Whether an attorney has one client or hundreds, he must maintain his independent professional judgment or he will be in violation of his ethical responsibilities.¹⁹⁹ If an attorney is bound by the ethical rules in his country, the distinction between in-house and independent attorneys' ability to maintain that independence is weak because in many situations independent lawyers are dependent on their clients for their economic survival in the same way that in-house counsel are. Thus this argument does not seem sufficient to warrant removal of the attorney-client privilege from in-house counsel situations.

3. Where in-house and independent attorneys are bound by the same rules and have the same duties to uphold the law, they should receive the same treatment

In-house lawyers in some of the Member States are members of the bar or law society in that country and are bound by the same rules of

¹⁹⁷ Christoforou, *supra* note 6, at 16.

¹⁹⁸ "The privilege does not depend on the number of clients a lawyer has." *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968).

¹⁹⁹ *See supra* notes 92 and 178.

conduct and code of ethics as other lawyers in that country.²⁰⁰ Clearly in the countries where in-house counsel are not members of the bar and are not expected to behave in the same manner as other lawyers, it would be difficult to argue that they should have the right to the attorney-client privilege because they are not acting as a lawyer for the company.²⁰¹ These lawyers are no longer practicing lawyers;²⁰² denying them the privilege is sensible because there is not a mechanism to deal with breaches of duties of lawyers when they are not lawyers. The decision to refrain from granting the attorney-client privilege to these lawyers not acting as lawyers is consistent with decisions in the U.S. that refuse to privilege communications between in-house counsel and their client in situations where in-house counsel is not acting in a legal capacity.²⁰³ In-house lawyers who remain members of the bar are still required to maintain independent judgment over their activities, and must not assist their clients in committing crimes. They can, of course, be disciplined for breaches of the codes of conduct.²⁰⁴

The decision by the ECJ not to allow in-house lawyers the right to the attorney-client privilege is based on the assumption that they cannot maintain independence and may be too involved with the company to behave in the way other lawyers are expected to behave.²⁰⁵ "The Court was content to see the *form* (i.e. uniform application of Community protection of confidentiality) take precedence over the *substance* (i.e. protection of confidentiality of in-house lawyers in the Member States where they continue to be members of the appropriate lawyers' societies of bars and are subject to the rules of professional ethics and discipline)."²⁰⁶ This decision is overly broad. "Where the lawyer who is employed remains a member of the profession and subject to its discipline and ethics, . . . he is to be treated for present purposes in the same way as lawyers in private practice, so long as he is acting as a lawyer."²⁰⁷

In-house lawyers who remain members of the bar in their country are faced with the problem of having the right to the attorney-client

²⁰⁰ See *supra* note 44 and accompanying text.

²⁰¹ See discussion *supra* note 99 (arguing whether these countries should reconsider their exclusion of in-house counsel).

²⁰² Lawyers who take positions as in-house counsel are not permitted to remain members of the bar. See *supra* note 49 and accompanying text.

²⁰³ See *supra* note 183 and accompanying text.

²⁰⁴ See *supra* notes 108-09.

²⁰⁵ See Christoforou, *supra* note 6.

²⁰⁶ Christoforou, *supra* note 6, at 17.

²⁰⁷ Slynn's opinion, AM & S, 1982 E.C.R. at 1655.

privilege for matters within their country handled in the national courts and not having the right to the privilege in matters that are governed by EC law. This problem is made worse by the fact that the hope of the CCBE Code is that Member States will change their rules so that all the rules governing lawyers will be the same. Thus, the countries that do recognize in-house lawyers as full members of the bar are actually being asked to change the rules in their country to exclude them.²⁰⁸

4. Chilling Effect on Multi-National Corporations

The EC was created to permit its Member States to achieve economic and social development through removal of barriers between Member States.²⁰⁹ As a policy matter, the EC should be concerned with the effect the decision to exclude in-house counsel from the attorney-client privilege has on relations with other non-member nations and companies from those nations.

As the U.S.-European markets grow more interdependent, there is a consequent increase in the occasions when European and U.S. companies need access to advice from U.S. lawyers to maintain and develop the level of trade. . . . The Community therefore can and should offer reciprocity to prospective Treaty partners, to avoid further unnecessary conflicts and disparities.²¹⁰

John Deere showed the potentially “[c]hilling effect . . . on communications and deliberations within multinational corporations on matters of European competition law” because the opinion of an in-house attorney was used to the considerable detriment of the company.²¹¹

²⁰⁸ See *supra* note 86 and accompanying text.

²⁰⁹ The Preamble to the Treaty Establishing the European Economic Community states in part,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe, AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples, . . . ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions, . . . RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts, HAVE DECIDED to create a European Economic Community. . . .

EEC TREATY, Preamble.

²¹⁰ SPEDDING, *supra* note 40, at 208.

²¹¹ Burkard, *supra* note 1, at 680. See *supra* notes 79-85 and accompanying text.

Modern corporations are extremely concerned with cost cutting and efficiency in order to remain competitive and profitable in today's economy.

Only the in-house lawyer, assisted of course by outside legal experts, can get that advice to the right people within the company in a cost effective manner. Does it, therefore, make sense to penalize a company through the loss of legal privilege if it selects this form of legal communication, because the circumstances of modern multinational corporate life so demand?²¹²

When a lawyer works in-house, he is already familiar with the actors, the policies and the procedures.²¹³ It is likely to be faster, simpler and more economical²¹⁴ for a legal issue to be discussed and resolved with an attorney who is already familiar the corporation, than to explain everything from the beginning.²¹⁵

It seems unrealistic to expect companies outside the EC to change the way they play the game because of the rule in the *AM & S* case, just as it is unrealistic for non-EC countries to expect the EC to follow their rules. The holding of the *AM & S* case may have been an "unnecessarily broad answer to this concern and may deprive undertakings of useful legal assistance. . . . Some companies may be deprived of useful legal assistance because in-house lawyers may turn to outside counsel when they could have rendered cheaper, more comprehensive, and more informed advice."²¹⁶ This problem could be resolved if the EC extended the attorney-client privilege to all attorneys who have the attorney-client

²¹² Burkard, *supra* note 1, at 686.

²¹³ "The reason why economics generally favor in-house is because you have people that understand the products and who understand the company and can work the matters more efficiently than an outside counselor can. You get more productive hours on the problem inside than outside." SPANGLER, *supra* note 170, at 71 (citation omitted).

²¹⁴ "In general, it is estimated that the cost of legal work done in-house is 35 to 50 percent less than the cost of comparable work referred out." SPANGLER, *supra* note 170, at 71 (citation omitted).

²¹⁵ This is not to say that attorneys with law firms cannot be familiar with all the workings of a particular client corporation; however, in-house counsel work with the corporation on a daily basis and do not have other clients or matters which may take priority or take focus away from the needs of the business. "[T]he choice between using in-house and outside legal talent is often not a choice between loyalty and independence. . . . Frequently the choice is made on a more mundane basis: the cost of in-house lawyers is substantially lower than that of the independent law firm." SPANGLER, *supra* note 170, at 101.

²¹⁶ Vollmer, *supra* note 50, at 17.

privilege in their country and who are bound by a code of ethics that requires independence and compliance with the law.

If in-house counsel who remain members of the bar or law society in their country and are subject to discipline for failure to uphold the law are given the attorney-client privilege, and lawyers who are not members of the bar are not given the privilege, then the concern that in-house counsel will be influenced by the company to the detriment of justice will be decreased. In this way, those who are acting as attorneys are given the attorney-client privilege and those who are not acting as attorneys are not given the privilege. It seems that corporations have found a way to ensure that their interests are represented and looked after in a cost-effective manner but this solution can only be effective if in-house counsel is still a member of the bar and permitted to invoke the attorney-client privilege.

V. CONCLUSIONS

One major goal of any legal system is to efficiently administer justice. In order for corporations to exist within the legal system, and for justice to occur when one of the parties is a corporation, lawyers need to be involved. It seems unnecessary and even unjust to penalize a corporation for choosing to have lawyers on the payroll, rather than employing them through an independent firm. The attorney-client privilege has been recognized in both the U.S. and the EC as an important part of the relationship between a lawyer and his clients. However, the distinction between in-house and independent attorneys in the EC with respect to the attorney-client privilege is not found in the U.S. The EC and its individual Member States should reconsider its exclusion of in-house counsel because the underlying assumption, that in-house counsel cannot remain free from influence by their client, is not necessarily true. It is possible and perhaps even likely, that in-house counsel can influence the behavior of the client more easily than independent lawyers, and that they actually may be as independent in their actions as lawyers who are not employed by a corporation. Thus allowing in-house counsel and their client company the attorney-client privilege would allow the benefits that flow from the existence of the privilege to occur in these additional situations. For these reasons, the EC should reconsider its decision to prevent the application of the attorney-client privilege to communications with in-house counsel who remain members of the bar.