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## IN-HOUSE

# In the Vault?

### Challenges of Preserving Cross-Border Attorney-Client Privilege

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**CONSIDER THE FOLLOWING** scenarios: Your multinational-corporation employer undertakes a comprehensive internal investigation in the wake of alleged violations of the Foreign Corrupt Practices Act. In-house lawyers in several countries are involved, and email messages, memoranda and other highly confidential information are exchanged between attorneys and company executives. Later, a foreign regulatory authority seeks these documents as evidence against the company in its anticorruption investigation.

Or your global company gets sued in a Texas court, and the plaintiff's lawyer, perhaps savvy in in-house attorney-client privilege abroad, seeks a memo on the subject of the litigation drafted by an in-house attorney based in France and circulated to in-house lawyers stateside and elsewhere.

In both instances, the communications are protected by the in-house attorney-client privilege, right? Frighteningly, maybe not.

The question of whether privilege attaches to communications with in-house counsel is not as clear-cut in some international jurisdictions as it is in the United States. And in an increasingly globalized practice of law—where disputes involving multiple countries on multiple continents are not uncommon, as are companies unaccustomed to operating in legal systems outside the United States—the “very serious issue is cause and pause for concern” for companies engaged in cross-border business, says Jordan Cowman, a shareholder



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in the Dallas office of Greenberg Traurig.

In-house attorney-client privilege is “complicated enough, but when you start doing business and legal work across borders, it becomes like 3-D chess on five continents,” Cowman says. “The scary takeaway is that identical information can receive different privilege status in different

jurisdictions. And in-house counsel especially need to pay attention to this because they are the ones who stand between those who want the information and the information.”

*Texas Lawyer* spoke to Cowman and other practitioners about in-house privilege and cross-border issues and what corporate legal departments can do to help preserve it in a multinational legal landscape.

### **IN-HOUSE PRIVILEGE AT HOME AND ABROAD**

As most in-house lawyers likely know, the attorney-client privilege has long been held to apply in the corporate context. It generally protects an in-house lawyer’s communication, so long as it was made for the purpose of providing legal advice to the client and was made and kept confidential. However, only in-house lawyers’ communications in their legal role, as opposed to those relating to the attorneys’ business function, are subject to the protection.

And it is this dual function on the part of an in-house lawyer as both an attorney and

attorney-client privilege does not apply, at least in the context of EU competition matters, to lawyers employed by their clients due to the economic closeness of the relationship.

“In some jurisdictions, in-house lawyers are considered not independent enough from the company to be deemed an acting attorney so there is no attorney-client relationship,” says Mark Taylor, a partner in the Dallas office of Baker & McKenzie. “Instead, it’s deemed more of a client-client relationship in which there is no privilege.”

Complicating matters further is the fact that there is a general divide between common and civil law jurisdictions on whether the attorney-client privilege applies to in-house lawyers. Like the United States, common-law jurisdictions such as Canada and the United Kingdom extend the privilege to lawyers who work in-house, while there is no uniformity among civil law countries such as France regarding privilege.

“In many jurisdictions where a lawyer in cross-border litigation,

A couple of examples prove instructive: In Russia, for instance, the attorney-client privilege is afforded only to lawyers who have been admitted to the Russian Bar, and such admitted lawyers cannot be employed by companies. And in Sweden, in-house counsel are not members of the Swedish Bar Association and thus not advocates protected by the privilege.

Thus, the admitted status of in-house counsel in foreign countries should be confirmed “because if they’re not licensed and admitted to practice in that jurisdiction, the attorney-client privilege may not attach” to their communications, Taylor says.

### **OTHER TIPS FOR IN-HOUSE COUNSEL**

Taking proactive steps can go a long way toward maintaining attorney-client privilege in the cross-border context, the experts say.

For starters, they say to train your in-house lawyers to recognize the issue, ensuring that they do not assume that the privilege they recognize and enjoy in the United States likewise applies in international jurisdictions, says Luis Gomar, a partner in the Dallas and Mexico City offices of Thompson & Knight. And implement company-wide, global policies that will maximize confidentiality generally and privilege specifically across borders, he adds.

“You shouldn’t assume that [all] your lawyers will have the same understanding or the same

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business adviser to his or her employer that seems to inform some foreign courts’ analysis. That is, the European Court of Justice, the highest court to adjudicate cases under the laws of the European Union, has held that the

for example, recognizes that the privilege doesn’t exist, then the lawyer may be able to compel production under foreign law of what would otherwise be privileged information in the United States,” Taylor says.

appreciation of attorney-client privilege,” Gomar says. “The rules are different across borders, and it’s better to be proactive and put in place a company-wide policy that addresses the specific [confidentiality] concerns.”

This training should include familiarizing members of the corporate legal department with variations in the scope of the privilege available for in-house counsel in the jurisdictions where your company does business and you advise the corporate client, Taylor says. Similarly, the question of whether the privilege applies to legal staff such as paralegals also needs to be assessed in each particular jurisdiction because in some, even legal staffers acting on behalf of the lawyer—the standard for protection in the United States—may not enjoy the same privilege, he adds.

“Understand the law of the applicable jurisdiction,” Taylor says. “Ask yourself, ‘Is this a common-law country or is this a civil-law jurisdiction’ because obviously the rule can be substantially different. You have to look at the different sources” of the privilege.

In addition to educating the lawyers about the circumstances under which communications likely would be privileged in various jurisdictions, they also must be informed of the risks involved when they are not, Cowman adds.

He suggests appointing an individual lawyer to “be in

charge of” an individual relevant jurisdiction.

“Identify one lawyer to follow the policies unique to the country,” Cowman says. “Ask, ‘Who’s going to do it for Peru or Hong Kong, for example?’”

Encouraging in-house lawyers’ use of phone calls or in-person meetings over email or other written correspondence also greatly increases the likelihood that sensitive information will be protected from unwanted disclosure.

“If the information is not in a hard copy, it is harder to get,” Cowman says. “Let’s pick up the frickin’ telephone! Always ask yourself, ‘Does this really need to be written down, or can this be done over the telephone?’”

But in making these phone calls, in-house lawyers also need to guard against the presence of third parties in the room on the other end of the conversation that could waive any applicable privilege, Taylor adds.

When written communication cannot be avoided, the experts suggest that in-house counsel:

- Tightly restrict its distribution to only those employees “with a need to know” and discourage recipients from forwarding or otherwise further disseminating the information.
- Explicitly label the information “for the purpose of giving legal advice” or similar wording and include confidentiality messages in emails.

- Do not mix legal and business advice in the same writing.
- Be mindful of what communications are sent overseas and minimize the amount of information sent between in-house counsel and foreign offices.
- Mark, separate and store privileged documents separately.
- Consider storing the information in a secure database, access to which from a foreign office or offices is limited.
- Avoid, where possible, commenting on specific legal and compliance issues in detail.
- Limit the storage of records in locations where the privilege does not exist or is not strong.

Finally, because most, if not all, jurisdictions recognize the confidentiality of communications between outside counsel and their corporate clients, hiring and communicating through local outside counsel likely will protect sensitive legal communications, the experts say. And the sooner, the better in cases where litigation appears likely or the EU competition authorities are conducting a regulatory probe.

“In-house counsel should not be committing critical analysis of competition issues to writing,” Taylor says. “The analysis of the issue should be done through outside counsel, and, to the extent possible, the document relating to the issue should be stored in places other than where they can be seized.” ■