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Clients in Cross-Border Investigations

Considerations Relating to Privilege

By Robert J. Anello

This era of instantaneous cross-border communication and commerce has brought with it a corresponding increase in the application of the white-collar criminal laws of various countries to companies' international operations. It also has necessitated increased cooperation among investigating authorities of different nations, including regulators from the U.S., European countries, Eurojust and the European Commission, which coordinate investigations and prosecutions in the EU. In response, multinational corporations have been compelled to increase their diligence in policing fraud and corruption in their international operations. This new reality requires attorneys advising companies and executives doing business in the international arena to anticipate the unique issues that arise in cross-border investigations. Particular concern must be given in advance to whether communications with in-house attorneys and attorneys from foreign nations will be deemed privileged in the country in which they occur and elsewhere.

Robert J. Anello is a partner in the firm of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., specializing in the defense of white-collar criminal cases, securities litigation, other civil litigation, and the representation of attorneys and accountants. He is a Fellow of the American College of Trial Lawyers, a Fellow of the American Bar Foundation and the President-elect of the Federal Bar Council.

Privilege Issues

In regard to international representations, lawyers are not created equal. Nearly every country in the world recognizes some form of the attorney-client privilege or the concept of "professional secrets" between a corporate entity and its attorney. Under U.S. law, in-house lawyers are treated the same as outside lawyers with respect to the attorney-client privilege. The application of the privilege to in-house counsel abroad, however, is not as clear-cut.

Law in the EU and Abroad

For many years, a debate has been waged in the European Union as to the application of the attorney-client privilege to attorneys employed by a company. In 2010, the European Union Court of Justice, the highest court in matters of EU law, despite strong disapproval from bar organizations, reaffirmed its holding that communications between company executives and in-house lawyers are not protected by the legal professional privilege, the EU equivalent of the U.S. attorney-client privilege. *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*, Case No. 550/07, 2010 E.C.R. 00000. The court noted that the privilege exists as a basic right where the client-attorney communications: 1) are made for the purposes and in the interests of a client's defense; and 2) emanate from an "independent lawyer." *AM&S Europe Ltd. v. Commission*, Case No. 155/79, 1982 E.C.R. 1575. In *Akzo Nobel*, the Court of Justice pointedly interpreted the independence requirement as the absence of any employment relationship between the lawyer and his client. The court was not persuaded that the ethical obligations imposed on in-house counsel due to membership in a bar or legal society provided the required independence. Although the EU decision arises in the context of a civil antitrust investigation, its implications apply equally in the criminal context, where the stakes of losing privilege protection can be much higher.

The EU court's holding stands in direct opposition to the laws of certain EU member states, including the UK, Ireland, Norway, Spain, Portugal and The Netherlands, all of which recognize the privilege for in-house counsel. Thus, although communications and documents may be privileged in a national context, they will not be privileged in the context of an investigation conducted by the European Commission, the EU's executive branch.

How EU and other foreign courts will resolve the question of privilege in cases involving attorneys from nations outside the jurisdiction of the court is even less clear. Although the Court's ruling in *Akzo Nobel* is silent on the issue, an advisory opinion rendered by Advocate General Juliane Kokott, one of eight advocates-general appointed to offer impartial, reasoned and non-binding opinions on cases brought before the Court of Justice, suggests that the extension of the legal professional privilege to lawyers from non-EU countries is never justified. Although the "independence" requirement arguably is satisfied in these instances, Advocate General Kokott's opinion reasons that the Commission and courts of the EU cannot be expected

to verify that the country in which the attorney is licensed "has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required." Case No. 550/07, 2010 E.C.R. 00000 at ¶¶ 189-190. Thus, the only attorney-client communications guaranteed protection in EU cases are those with an outside attorney qualified to practice in the EU.

Law in the United States

Little law exists that directly instructs one on the rules for application of the privilege in U.S. cases with international dimensions. United States federal courts addressing the application of the attorney-client privilege in these cases are likely to ask two questions: first, whether foreign or domestic law applies to the privilege question; and second, whether under the applicable law, the privilege protects the communication in question. To resolve the first question, in instances where the alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, courts defer to the law of the country that has the "'predominant' or 'the most direct and compelling interest' in whether those communications should remain confidential." *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002). In the instance where a foreign country's interests are found to be predominant, a U.S. court will apply the privilege law of that country, which in many instances may be narrower than U.S. privilege law.

Where U.S. interests are found to be predominant, U.S. privilege law will apply. United States courts that have considered whether communications with foreign counsel are privileged under U.S. law have focused on the qualifications of the foreign attorneys by U.S. standards, including their legal education and bar memberships. S*ee, e.g., Honeywell v. Minolta Camera Co.*,1990 WL 66182, at *3 (D.N.J. May 15, 1990) (reversing the magistrate's decision that the Japanese in-house counsel was a "*de facto* attorney" for the purposes of privilege determinations, stating that the actor was not a member of an organized legal bar and possessed only a bachelor's degree, rather than a law degree).

Strategies for Maintaining Privilege

Attorneys representing clients who operate internationally should adequately prepare their clients for the possibility that communications privileged in one context may not be protected in other contexts. For this reason, in-house counsel should be vigilant in monitoring the privilege and disclosure laws of foreign jurisdictions in which their company does business to guarantee current law is followed. In addition, corporations can take steps to ensure client confidences receive the maximum protection in the forum most likely to assert jurisdiction.

Maximizing Privilege Protection Abroad

Where a corporation seeks to ensure the limited privilege protection in the EU or other jurisdictions that do not recognize the application of the privilege to communications with in-house counsel, external or "independent" lawyers qualified to practice in those jurisdictions always should be involved in communicating confidential information. The involvement of independent lawyers improves the likelihood that a document will be protected by the privilege. This is especially important in the EU, where prosecuting authorities have been known to take it upon themselves to make privilege determinations with respect to documents seized during unannounced dawn raids, preventing corporations from affirmatively asserting any applicable privilege. Additional precautions may include the following:

- To the extent possible, business transactions should be structured to establish a "connection" with the EU or jurisdiction whose privilege protection is preferred.
- Contact with non-legal experts should be maintained through external counsel qualified to practice in the jurisdiction. In addition, reports and documents prepared by non-legal experts should be reviewed and signed off on by external counsel to ensure privilege protection.
- Documents and communications from external lawyers should be clearly marked confidential and should only be circulated on an as-needed basis. Recipients of such information should be informed that the documents are to be treated as confidential.

Maximizing Privilege Protection in the U.S.

Where a corporation operating internationally seeks to maximize the more extensive privilege protection in the U.S., in-house counsel should strive to involve outside United States attorneys as much as possible. Other steps that can be taken to best maintain privilege protection may include:

- To the extent possible, business transactions should be structured to establish a "connection" to the U.S.
- When a crisis arises, retainer letters and documents defining the attorney-client relationship with outside counsel should refer to potential investigations or litigation in the U.S. as one of the bases for undertaking representation.
- To the extent possible, confidential communications occurring outside the U.S. should include an outside attorney qualified to practice in that country, to guarantee privilege protection is not waived.