

PRACTICAL RECOMMENDATIONS

What should in-house counsel do to best protect confidentiality of their communication?
Here follow some practical suggestions.

Identify jurisdictions of concern and understand their rules on privilege

Companies operating in different countries will want to be well aware of the different rules that may apply and to diligently assess whether in-house advice is protected and to what extent in the jurisdictions in which they do business.

The differences in regulations and approach need to be addressed and handled, and the documents and communication flow has to be governed, otherwise one may find out too late that too much has taken the wrong path.

In order to benefit from legal privilege and not to lose it, corporate counsel should have institutional knowledge of attorney-client privilege rules for every country in the world that their company does business in and arrange to update such knowledge regularly. ACC offers members resources on the practice and privilege rules of more than 150 jurisdictions internationally.

Priority should be given to understand the regime applicable in:

- Countries where discovery is contemplated in litigation proceedings. Consider that the lack of privilege may not be that important in countries that do not have a wide-ranging discovery process and thus litigants are required to produce only those documents on which they intend to rely. In these countries, having to protect

documents from disclosure in possible future litigation is not as important as in those jurisdictions where discovery plays a key role in litigation proceedings;

- Countries that have judicial cooperation treaties with the home country or other key countries where group subsidiaries are based. As explained above, judicial cooperation treaties or conventions significantly increase the risk of “leakage” of privilege;
- All EU Member States, Iceland, Lichtenstein and Norway (together, the 30 countries forming the EEA), particularly by those companies that are potentially exposed to competition investigations.

Define a policy to operate in those jurisdictions

Once the countries that can pose a problem are identified, and their privilege regimes are understood, define an appropriate policy to handle communications between in-house counsel and internal clients based in those countries. ACC has prepared summaries describing how some multinational companies have adopted such policies, and offering samples. See the related Sample Practices found on the ACC Akzo webpages at <http://www.acc.com/advocacy/professional-privilege-in-the-eu.cfm>

Operate as if privilege did not exist

A safe (but potentially inefficient) approach for in-house counsel and corporate management is to operate as if each internal communication between them could be seized by the enforcement authorities or become available to counterparties in a litigation, and the in-house attorney himself could be called as a witness in a proceeding. This approach involves limiting written communications, and being very careful about what can be put in writing. It is not an optimal or even advisable practice to suggest that legal analysis and communication should be less robust, but we recognize that for companies concerned about privilege matters, this is a practical reality.

Use IT infrastructure

Multinationals often have integrated legal departments which communicate on a worldwide basis, without any importance granted to geographic location of other members of the legal department or internal clients. It is not uncommon for (originally) privileged communications to be disseminated – for example, through the legal department’s intranet or document management systems – in several countries without a thought as to whether the communications risk losing their privileged status by “crossing the border” into a jurisdiction where that status is not recognized.

Servers storing communications can be based in a totally different jurisdiction from the one where the sender and the recipient are based (often without the user’s knowledge). An in-house counsel, operating in a jurisdiction that protects his privilege, may therefore see his communications become accessible in the country where the server is based, or where the recipient of his advice is located.

For example, documents on your company’s legal intranet or communications prepared by a lawyer protected by privilege are potentially subject to seizure by the EU Commission or a national authority in a dawn raid, if that authority can have access to your IT infrastructure.

In consequence, it is important to understand how the IT infrastructure of a corporation is organized, and the jurisdictions involved. Once this is understood, measures can be taken to preserve legal professional privilege and not to lose it unreasonably. Talk to your IT department about how it can help safeguard privileged files by organizing and housing them in jurisdictionally distinct “packages.” Thus, companies may consider segregating files of privilege-protected counsel and housing them exclusively in parts of the company’s IT infrastructure that are outside the reach of the enforcement agencies of those countries that would not acknowledge their privileged nature.

In a recent major investigation and litigation in Europe, an international bank was able to shield privileged information from the enforcement agencies of another country by organizing its IT systems in a way that obliged the enforcement agencies to seek the documentation through an international rogatory, in the context of which the bank was able to defend the privileged nature of certain communications (which would not have been recognized by the investigating country).

IT infrastructure can also be a very valuable tool to clearly identify (and centralize) documents that the company deems to be protected by privilege.

Selectively use outside lawyers

Practically all countries recognize the privileged nature of communications between outside lawyers and their clients or protect them through other means, such as the so-called professional secrecy.

Companies should assess when the nature and the content of a particular communication (*e.g.*, advice given in preparation of a litigation or in connection of a potential enforcement action) justifies involving outside counsel and asking them to provide a written document. In selecting outside counsel, the company should be mindful of the strength of the protection afforded in the relevant jurisdictions, and limit the dissemination of the written advice to individuals located in countries that will recognize that protection.

When the volume of sensitive issues justifies it, corporations may consider creating “help desk” relationships with law firms for matters where the protection of privilege is paramount importance, so that legal advice – even when given in consultation and under the direction of corporate counsel - is routed through external lawyers.

Protect communications with non-legal consultants (e.g. forensic accountants, financial advisors, etc.)

Legal professional privilege normally does not apply to communications with non-legal consultants. This is particularly relevant in the context of internal investigations (e.g., on violations of anti-bribery statutes), where forensic accountants are often involved. Specific precautions (which vary from country to country) must be adopted in order to extend the protection of privilege also to work product of such consultants, for example by assuring that such communications are always primarily addressed to an external lawyer.

One should be mindful that these situations often involve more than one jurisdiction (e.g., a criminal investigation in the country where the recipient of a bribe is based, another in the country where the subsidiary making the payment is registered, and criminal and securities law investigation in the country where the parent company is headquartered and/or listed), so that the precautions to be adopted must be determined on the basis of a plurality of legal standards.

Further recommendations

Corporate counsel and compliance officers should consider whether compliance programs and internal procedures should be reviewed to take into account privilege issues, as highlighted by the Decision.

Consider supervisory relationships between lawyers. It is common for lawyers working on any client matter who are not locally admitted or recognized in the relevant jurisdiction to work under the supervision of a lawyer who is – and who may be included on all communications to increase the likelihood that the privilege is maintained.

Due consideration should also be given to educating in-house counsel, the company's management and board, internal clients, (particularly in sensitive areas such as audit and

compliance), consultants and external lawyers on privilege issues as they affect your company. A specific duty of a lawyer is to assure that the client is well informed, not just of the law, but also of expectations that are incidental to the relationship. If the client is not advised of possible privilege concerns and believes that privilege applies to conversations with counsel, it is the lawyer's duty to inform the client and better shape the client's expectations. In some jurisdictions, it could be seen as a professional breach to not do so.

On sensitive issues, appropriate guidelines on the handling of communications should be given to all employees and consultants involved. In some circumstances, the individuals involved should be structured as the "client" of the legal (internal or external) counsel.

Great care should always be taken in the drafting of legal documents and internal communications between corporate management and in-house counsel (including non legal consultants). The appropriate header (such as "Privileged and Confidential/Attorney Client Privileged and Work Product Protected" – but different or other precautions are necessary in certain countries) should always be used in such communications/documents. Moreover, the distribution of such documents should be as limited as possible; it could be useful to keep privileged documents in folders that are different from the non privileged documents and clearly mark the separate files as 'privileged.'

Create documents only as they are necessary and in all cases confine drafting documents for the purpose of obtaining legal advice to few people within the company, and to in-house lawyers as much as possible.

When a dawn raid takes place and there are arguments about privilege, try to get the disputed documents segregated in a sealed envelope that will not be reviewed until the issue of privilege is resolved. There are also ideas that some companies have deployed to minimize the likelihood that privileged information will be divulged through employee interviews conducted by regulators who have just stormed the offices – some companies have a regular policy of sending all employees home the moment the enforcement officials

arrive, so as to minimize often uninformed “admissions” by terrified and bullied employees facing a gaggle angry government officials in black suits.

For examples of how some legal departments of multinationals implement policies and practices designed to both navigate these issues and protect their clients’ rights, see the linked Sample Practices on ACC’s Akzo pages.