

The Role of In-House Counsel: Global Distinctions

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👤 By ACC Legal Staff

Overview

Outside of the U.S., the [role of in-house counsel](#) has not always been part of the corporate business model. However, in both Canada and Europe, the role is evolving and expanding. While there are some differences with their counterparts in the U.S., in-house counsel in both Canada and Europe are increasingly viewed as an essential component of any corporation aiming to successfully navigate the dynamic legal landscape of the global economy.

United States

In-house counsel in the United States are responsible for a [wide range of legal and business duties](#). The scope of legal work is broader than in private practice and involves both straightforward legal tasks as well as proactive risk management. It often requires familiarity with a variety of areas of the law, including contracts, intellectual property, labor/employment, litigation, tax, antitrust, ERISA, corporate/securities and privacy matters, among others.

The position also requires business acumen. By using their knowledge of a company's business and its corporate culture, in-house counsel operate at a lower cost than outside attorneys. They proactively assess and manage risks and deal with the routine legal matters a corporation confronts. Then, when necessary, in-house counsel leverage the use of outside attorneys by focusing the scope of outside research and work.

In the U.S., the communication between an attorney and a client, [including a corporation](#), is privileged and protected from discovery when the purpose of the communication is to seek or receive legal advice. The rule applies whether the communication is with in-house counsel or an outside attorney. (This contrasts with [the approach used in many European countries](#), discussed below, where communications with in-house counsel are generally not entitled to the same protection as communications with outside legal advisors.) However, the privilege exists only when a communication is made for the purpose of obtaining legal advice; communications for any other reason are not privileged. This can create confusion because in-house counsel are often involved in business tasks that extend beyond pure legal duties. Accordingly, in-house counsel should be familiar with when the privilege applies and educate the management and other employees of their company about when it may not apply and how it can be lost.

Canada

Although the role and work of in-house counsel in Canada has not always been considered the same as that of outside counsel, today, in-house counsel in Canada are viewed as equally capable of performing, and are often required to carry out, the same complex legal work as outside counsel. In fact, many Canadian companies prefer that all core legal work be done in-house and only send highly specialized legal work, or matters involving an outside jurisdiction, to outside counsel. While the work of in-house counsel in Canada is similar to that in the U.S., there are some differences.

Culture of Collegiality

In-house attorneys in Canada note that there is a strong culture of collegiality that exists within the Canadian in-house community. This culture is likely a result of the [smaller population](#), which is roughly one tenth of the [U.S. population](#), and the relatively fewer companies that operate there. The friendly culture that accompanies the limited size of the community has obvious benefits: Canadian in-house counsel frequently supplement their professional development by

taking advantage of the network of Canadian in-house attorneys to share best practices and other useful information and ideas.

This collegiality is mirrored in the relationship between Canadian in-house counsel and the Canadian regulatory authorities. The dynamic is considered less adversarial than in the U.S. and there is a focus on working with government regulators to ensure corporate regulatory compliance. The favorable relationship may be a product of necessity, as there are more regulators to work with. Notably, instead of one federal securities regulatory agency, like the [U.S. Securities and Exchange Commission](#), Canadian companies are governed by a variety of provincial and territorial multijurisdictional filing systems. Significant regulators include the [Ontario Securities Commission](#), the [British Columbia Securities Commission](#), the [Alberta Securities Commission](#), and the [Autorité des marchés financiers](#), which regulates securities in Québec. Canadian in-house counsel are not limited to dealing solely with Canadian regulators, however, as many Canadian companies are publicly listed in the U.S. and are directly governed by U.S. securities laws.

Canadian Legal Framework and Multijurisdictional Practice

For the most part, the Canadian legal system is based on the common law tradition of the United Kingdom and relies on legal principles similar to those of the United States and the UK. However, the Province of Québec is an exception, as its legal framework evolved from the French civil law system. In Québec, civil law still applies to private law situations, while the common law governs public law situations. Accordingly, Québec has different [training and admittance requirements](#) and Canadian companies frequently retain outside counsel to deal with legal matters that arise in Québec.

The [Federation of Law Societies of Canada](#), the national coordinating body for the law societies of Canada's provinces and territories, has recognized [rules for multijurisdictional qualification](#). The rules allow in-house counsel to provide legal advice, without taking a transfer exam, across all provinces except Quebec. To qualify in another common law jurisdiction, a lawyer must meet their home jurisdiction's requirements to practice law and certify that they have reviewed and understand reading materials required by the new jurisdiction. Because Québec is a civil law jurisdiction, there are separate requirements for practicing civil law, which can include [additional education, testing and evaluation](#). However, attorneys from common law jurisdictions can apply to work in Québec on [a specific case](#), or as a "[Canadian Legal Advisor](#)," which is a special position that permits them to practice federal law, the law of their home province or territory and public international law.

Attorney-Client Privilege in Canada

The Canadian rules governing attorney-client privilege are similar to those in the U.S. The communication between an attorney and a client, including a corporation, is privileged and protected from discovery when the purpose of the communication is to seek or receive legal advice. The rule is the same whether the communication is with in-house counsel or an outside attorney and contrasts with the [approach taken in Europe](#), where communications with in-house counsel are generally not entitled to the same protection as communications with outside legal advisors.

Europe

In recent years, the role of in-house counsel has become increasingly crucial to the success of corporations operating in Europe, as the [European Union](#) undertook to transform its member states into a cohesive economic bloc. While the role of in-house counsel has become more established in Europe, there are differences from the American version of the position. Notable differences, which are addressed below, include a professional divide that exists in some countries between in-house and outside counsel, different rules of attorney-client privilege, and a focus on hiring individuals with diverse, international backgrounds and a familiarity with multiple languages.

A Different Professional Status

In the United States, in-house counsel have always been viewed as attorneys in the same general regard as those who practice in law firms. This is not the case in many European countries, where there is a clear professional divide between the role of in-house counsel and external attorneys who practice as independent legal advisors. In European countries where this division exists, there are different educational and qualification requirements. An individual may serve as an

in-house legal advisor without receiving training in an apprentice program and without taking a Bar exam or being a member of the Bar in their jurisdiction.

For example, in France, there are [different professionals](#) who handle different types of legal work. An “[avocat](#)” is considered the most credentialed type of attorney and is permitted to plead matters before the courts. A “[juriste d’entreprise](#)” is an in-house attorney who may provide legal advice to their company, but may not be a member of the Bar and generally may not appear in court. Furthermore, communications with a juriste d’entreprise do not receive the protection of the attorney-client privilege. Although avocats and juristes d’entreprise may receive a Master of Laws degree from the [same universities](#), avocats must complete roughly 18 months of additional training at one of the “Centres Régionaux de Formation Professionnelle d’Avocat” (CRFPA) to receive a “Certificat d’Aptitude à la Profession d’Avocat” (CAPA), which is a professional certification required to become a member of the Bar.

European Legal Framework

Even in European countries that do not have this professional divide, historically in Europe, the role of in-house was often not regarded in the same way as the role of outside attorneys. However, any perception that in-house counsel are less capable has changed. Today, an increasing number of European in-house counsel are responsible for providing their corporation with expert guidance on a variety of legal matters, including compliance, governance, IP protection, human resources and litigation.

One reason for the change is the new legal landscape associated with the establishment of the European Union. The EU was created to promote economic progress and regional integration through a single market with standardized laws in a [variety of policy areas](#), implemented through EU legislative acts known as directives. [EU directives](#) establish certain goals, but permit each member nation to meet these goals in the way it sees fit. As a consequence, in-house counsel in Europe must be aware of the differing standards of implementation of EU directives by each EU member nation. Furthermore, because of the variety of European languages and cultures, even among EU member states, in-house counsel cite the need for “international” experience within a legal department. While English is recognized as the “lingua franca” (working language) of business in the global marketplace, European corporations benefit from in-house counsel with knowledge of multiple languages and cultures, and to the extent possible, aim to hire counsel with those skills.

The increased importance of in-house counsel in Europe can also be attributed to new corporate compliance regulations that followed, among others, the [Enron](#), [WorldCom](#) and [Parmalat](#) corporate scandals. Such prominent corporate downfalls, and the new legal requirements that came in their wake, further highlighted to many European companies the value of a robust in-house legal department. Now more than ever, in-house counsel are viewed by European companies as an essential aspect of their business.

Attorney-Client Privilege in Europe

In the U.S., communications with in-house counsel receive the same protections as communications with outside attorneys. The protection afforded by attorney-client privilege is considered fundamental to the U.S. legal system, permitting a client to speak frankly with an attorney so that the attorney can provide effective, informed advice about the law. However, the European view of attorney-client privilege contrasts starkly with the U.S. approach. In Europe, communication with in-house counsel is generally not protected by attorney-client privilege. This approach is used by all but seven of the twenty-seven member nations of the European Union. (The exceptions are [Denmark](#), [Germany](#), [Ireland](#), [the Netherlands](#), [Portugal](#), [Spain](#) and [the United Kingdom](#).)

In a recent case before the [European Court of Justice](#) (“ECJ”), the highest court of the European Union in matters of EU law, the court issued a [decision](#) consistent with this limited view of attorney-client privilege. The opinion is based on the notion that in-house counsel do not exercise the same level of independent judgment as outside attorneys because they are salaried employees of a corporation and are more likely to be loyal to their employers than to the law. ACC and its European chapter intervened in the case, *Akzo Nobel Chemicals Ltd v. EU* (Case-550/07), and were [disappointed](#) by the court’s decision.

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