Andreas L. Meier

Dr. Andreas L. Meier is the Group General Counsel of Straumann, a medical device company, headquartered in Basel, Switzerland. Besides his position as General Counsel, heading Straumann's international legal team, he also serves as Secretary of the board of Straumann Holding AG, the group's parent company listed at the Swiss Stock Exchange. He is also a member of the local subsidiaries' boards of directors.

Prior to joining Straumann in 2005, Dr. Meier worked for several years with Vischer Attorneys at law in Basel and Zurich and with Cravath, Swaine & Moore LLP in New York. In his practice, he focused on securities laws, mergers & acquisitions, license agreements and complex international litigations and arbitrations. He is currently heading the litigation group of the economiesuisse task force "document retention" and is involved in the political initiatives to introduce an attorney client privilege for in-house lawyers in Switzerland.

Dr. Meier graduated from the University Basel School of Law, where he also obtained his PhD with a doctoral thesis about the Hague Evidence Convention. He also graduated with an LL.M. from New York University School of Law.

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Biography

Chris Groves is the Vice President – Legal Affairs for Turner Broadcasting in Europe, the Middle East and Africa. Based in London he heads a team of seven lawyers, and has responsibility for all legal matters in the region affecting all of Turner's channels or operations.

Prior to joining Turner, Chris was Deputy General Counsel at Orange S.A., where he had particular responsibility for international and commercial matters for the Orange Group, and headed a team of lawyers based in both London and Paris.

Chris received an MA from Edinburgh University, and completed CPEs and Law Society finals at the College of Law in Chancery Lane, and his articles at Norton Rose in the City of London.

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Understanding and maximizing the protection of legal professional privilege

Dr. Andreas L. Meier

ACC Europe 2007 Annual Conference: The Growing Role of In-house Counsel: Lawyers as Business Partners

3-5 June 2007 Bayerischer Hof Hotel, Munich, Germany

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Current Situation in Europe – Switzerland as an example

- In-house counsel have no legal privilege and (in the view of the Swiss Supreme Court) also no professional secrecy obligations
- Outside counsel who are admitted to the Swiss bar are bound by professional secrecy obligations. No privilege if documents with legal advice are collected in the offices of the client (e.g. the Legal Department of a Corporation)

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Increasing Importance of the Legal Privilege for In-house Counsel

- Evolving Role of In-house Counsel
  - Increasing density of regulations
  - Society expects that companies fully understand and comply with the law
  - Companies expect guidance from In-house Counsel
  - In-house Counsel must be pro-active issue-spotters
- Avoid potential disadvantage for Swiss multinational corporations with its headquarters in Switzerland

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Increasing Importance of the Legal Privilege for In-house Counsel II

- Communications per e-mail facilitate the fact finding of governmental authorities and discoveries of counterparties in U.S. litigations

- E – Discovery without legal privilege deprives in-house counsel of a „bug-proof“ room and may hinder the fulfillment of their tasks

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Disadvantages due to inconsistent conflict of laws analysis by some U.S. Courts

- No protection under the Hague Evidence Convention for European companies as defendants in U.S. courts (→ U.S. law)
- Communications with European in-house counsel may not be protected (→ law of the place where the privileged relationship was entered into)

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Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
(Hague Evidence Convention)

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; **or**

b) **under the law of the State of origin**, and the privilege or duty has been specified in the Letter, or, […]

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Specific Relevance for European Corporations

- U.S. courts apply the Hague Evidence Convention to independent third parties only (Aérospatiale, 482 U.S. 522)
- Inconsistent decisions in the U.S. with respect to legal advice of foreign In-house Counsel and patent agents (Saxholm AS v. Dynal Inc. (164 F.R.D. 331, 339, E.D.N.Y. 1996); Reified Corp. vs. Remy Martin (98 F.R.D. 442))
- European corporations often lack a comprehensive document retention program (especially for e-mails)

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Switzerland's Approach to amend the current situation

- Draft Code of Criminal Procedure shall include an Attorney Client Privilege
- Reasoning:
  - Encourage open, honest communication between in-house counsel and their corporate client
  - avoid that governmental authorities have easy access to relevant information in dawn raids
  - avoid that U.S. Courts refuse to award the attorney client privilege to European Inhouse Counsels

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Thank You.

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What is Legal Professional Privilege?

- Protection awarded to certain communications between a lawyer and their client
- Across Europe the level of protection varies, particularly with respect to the treatment of in-house counsel. Why is it important to in-house counsel?
- Allows clients to be honest when seeking advice and allows lawyers to be fearless when giving their advice
- BUT even in jurisdictions like the UK that have traditionally had a high level of protection, privilege is under attack.
- In-house counsel need to understand and educate their businesses on the scope of privilege and how to maintain it

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In-house Lawyers and Privilege in the UK

- Under English law, privilege can apply provided communication is in capacity of legal adviser, not in an executive capacity
- Covers all members of the legal profession, solicitors and barristers. Privilege extends to trainees and paralegals (so long as properly supervised)
- No need for a current practising certificate (what benefit do in-house counsel derive from holding practising certificates anyway?)

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Outline of Legal Professional Privilege in the UK

Legal Advice Privilege

- confidential communications between lawyer and client
- for the dominant purpose of seeking or giving legal advice
- lawyers must be acting in their legal professional capacity
- no need for litigation to be anticipated

Litigation Privilege

- confidential communications
- between lawyer and client, or between either and third party
- dominant purpose of giving/seeking legal advice or gathering evidence
- There must be a "real likelihood" of litigation or litigation is actually underway
- Applies to proceedings in court, employment tribunals and arbitrations
- Investigations and inquiries? Depends whether adversarial or merely fact-gathering

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Three Rivers - Background

- Following the collapse of BCCI the UK government set up an inquiry to investigate the supervision of BCCI by the Bank of England.
- Bank had set up committee of three Bank officials (the "Bingham Inquiry Unit") which was responsible for communications with the Inquiry and external lawyers
- Claims by BCCI creditors against Bank of England including the Three Rivers Council for the little known tort of “misfeasance in a public office”.
- Claimants applied for disclosure of documents that had been created during Bingham Inquiry into the supervision of BCCI by the relevant UK authorities
- It was accepted that litigation privilege did not apply (as the Inquiry was non-adversarial) so the judgements were strictly concerned with legal advice privilege

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Three Rivers – Points to Note

- Not all employees of an organisation will be "the client" for the purposes of privilege. Where lawyers collate information from sources around an organisation there is a risk, (where litigation privilege doesn't apply) that non-privileged material and communications will be created.

- Under litigation privilege, at least for the moment, communications with the necessary connection to the litigation between lawyers and "non client" employees will usually be protected under litigation privilege.

- The judgments make clear that in order for litigation privilege to apply, the relevant proceedings must be overtly adversarial in their nature; in essence, they must exercise a judicial or quasi-judicial function. The Bingham Inquiry was an ad hoc inquiry initiated by the UK Parliament and did not fall within the definition of adversarial proceedings.

- The Lords made clear that advice need not relate to legal rights and obligations as such to be covered by legal advice privilege. If the advice relates to the presentation of evidence so as to avoid unfair criticisms being made in inquisitorial proceedings it will be covered.

- If lawyers provide "practical advice" to their clients about basic business issues, that advice is unlikely to be protected by legal advice privilege

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Issues common to both forms of Legal Professional Privilege

- Loss of privilege: communication ceases to be privileged if no longer confidential:
  - if document enters public domain cannot be privileged
  - if document disclosed in confidence to a particular party, privilege can still be claimed against "the rest of the world"
- Waiver of privilege: if privileged material is put before the court in litigation, can result in wider waiver of privilege – court won't allow party to "cherrypick"
- Part privileged documents: if document as a whole not privileged but it refers to privileged matters (e.g. board minute recording legal advice received), it may be possible to blank out the privileged part of the document on disclosure

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EU Law

- Confidentiality between external lawyers and clients is protected ("legal privilege") on the basis of the following principles:
  - Communications must be with external legal counsel admitted to practice in a Member State of the EEA
  - Communications are made for the purposes of and in the interests of the client's rights of defence, i.e. for the purposes of legal advice on the subject matter of the investigation/proceedings.
  - Internal notes reporting text or content of external advice are also covered
  - Privilege may be lost if internal note contains additional information, comments, mark-ups etc.
  - Advice before investigation starts can be covered if strictly related to the investigation

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EU Law - Background

- The Commission have doggedly claimed that in-house counsel are not capable of providing are independent legal service (since the AM + S case in 1982)
- This ignores professional obligations of all lawyers, and hinders effective compliance programmes
- Double standards, the Carson case in 1998, where the Commission sought to establish privilege over communications with their own in-house counsel
- Change may be on the way

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EU Law – Recent Developments

- The Akzo Nobel case:
  - Case still pending but interim orders issued at CFI and ECJ level
  - Substance:
    - Privilege for internal company memos in connection with compliance programme
    - Privilege for communications with in-house counsel
    - Procedure for privileged documents during a dawn raid
  - Interim measures proceedings
    - CFI granted interim measures
    - ECJ quashed CFI order on the basis that no urgency (Commission had cursorily read documents during dawn raid and in any event would be prevented from using them if in the end they were found to be privileged so no serious and irreparable harm)

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EU Law - "Dawn Raids" Practical Tips

- Do not obstruct the inspection.
- However, companies can claim privilege.
- Enough evidence should be produced to the Commission to show that the documents are indeed privileged (e.g. that they emanate from external counsel).
- US lawyers' advice should be signed off by an EEA lawyer
- If there is a dispute:
  - Insist documents be put in a sealed envelope and obtain an undertaking from the Commission not to read them
  - Make a formal record of the dispute. Making a claim for privilege does not amount to obstruction
  - Commission will need to adopt reasoned decision ordering disclosure which can be challenged before the CFI

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Practical Points for In-house Counsel

- Minimise all written communication on sensitive matters: Be aware of the dangers of e-mail

- As soon as there is a hint of a legal inquiry, investigation or dispute, ensure employees involved in the matter are informed:

  - of obligations to retain and disclose documents (including electronic documents, regardless of format) relating to the dispute
  - to be extremely careful in creating new documents in connection with the dispute, as these may be disclosable
  - to address queries on any matter relating to the dispute to the legal team rather than other employees
  - not to obtain documents from third parties relating to the dispute without first consulting the legal team
  - if in doubt, use the phone, not e-mail!

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Practical Points for In-house Counsel

- Limit dissemination of legal advice (both internally and externally) to only those who need to see it
- Be particularly careful in copying legal advice out of the jurisdiction – same rules will not apply everywhere
- If privileged documents need to be shared with third parties put confidentiality arrangements in place
- Educate employees about legal privilege / confidentiality and the need to ensure privileged material not widely disseminated
- If legal advice sent by e-mail, consider including express instruction to recipients not to forward it on without approval
- Keep separate files for privileged and non-privileged material, where possible
- Avoid dealing with privileged and non-privileged matters in the same document
- Avoid making manuscript notes on privileged documents after the event

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Practical Points for In-house Counsel

- Helpful to use the label "Privileged and confidential"
- If litigation in contemplation use "Privileged and confidential: in contemplation of litigation"
- Label does not necessarily mean something is privileged, but has some advantages:
  - evidence of whether communication intended to provide legal advice or whether litigation contemplated
  - helps to limit inadvertent disclosure/loss of confidentiality
- If advice is being sought from external counsel the following labels can be used:
  - "Communication with external legal counsel" OR "Reporting advice from external legal counsel"

Therese L. Miller

Terry Miller is the General Counsel of The London Organising Committee of the Olympic Games and Paralympic Games ("LOCOG"). LOCOG is responsible for the staging and operation of the 2012 Games in London. As General Counsel, she heads an internal legal team responsible for providing advice on all aspects of LOCOG's operations, including compliance with contractual obligations under the Host City Contract with the International Olympic Committee, implementation of sponsorship and supply contracts, and protection of the Games brand.

Before joining LOCOG in October 2006, Terry spent much of her career beginning in August 1989 with Goldman Sachs, where she was Managing Director and International General Counsel for Goldman Sachs International, located in London. Before that, she was a partner in the firm of Kirkpatrick and Lockhart (now Kirkpatrick Lockhart Nicholson Graham), specialising in matters relating to investment companies. She began her career with the U.S. Securities and Exchange Commission, where she was a Branch Chief in the Enforcement Division.

Terry has a B.A. from the University of Michigan, a J.D. from the University of Dayton, and a L.L.M from Georgetown University. She is married with two children, and is an amateur rider and member of British Eventing.

Protection of Privilege
In Communications with Corporate Counsel

I. Across the globe, the extent of legal professional privilege varies.

A. Attorney-client privilege is recognised almost universally in those countries with a tradition of upholding the rule of law.

Common law countries treat this as a fundamental rule of law as well as a rule of evidence.

In civil law countries, where there tends to be less disclosure in litigation, the protection of client confidence is primarily a matter of professional duty imposed by statute or professional conduct rules, enforceable by criminal penalties as well as disciplinary sanctions.

Legal professional privilege is recognised as a fundamental human right by the European Court of Human Rights and by national courts in the European Union.

B. Emerging countries such as China and Russia, where legal systems traditionally have not accorded much respect to the rule of law, have much less developed privilege doctrines.

In China a lawyer must disclose confidential information pursuant to any request from a governmental authority

In Russia only communications with "advocates" (not including in-house counsel) are sheltered to any extent

C. In most civil law jurisdictions, in-house counsel are treated differently than external counsel, such that there is no recognition of an evidentiary privilege for communications with in-house counsel alone.

No in-house lawyer privilege is recognised in Austria, Cyprus, The Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg and Switzerland.

Belgium, the Netherlands and Germany have adopted laws recognising protection for advice from in-house counsel

D. The European Union currently does not recognise that in-house counsel are entitled to any privilege in their communications with their corporate clients,

in the context of investigations or inquiries by the European Commission. This position is currently under review in the *Akzo Nobel* case.

II. Following the 2005 House of Lords decision in *Three Rivers District Council v. Bank of England*, l**egal professional privilege** continues to protects confidential communications between a lawyer and his/her client in the UK. There are two categories:

A. **Litigation privilege** protects communications between lawyer and client made for the purpose of existing or contemplated litigation

"Litigation" means adversarial proceedings, not fact-finding inquiries – query whether it covers regulatory investigations

Communications with third parties (e.g., experts or witnesses) are also covered

B. Legal **advice privilege** protects communications between lawyer and client created for the purpose of seeking or giving legal advice.

It does not protect documents sent to or from a third party – so the definition of "client" is critical

It does not cover all communications – so the definition of "legal advice" is critical

C. Communications with in-house lawyers are protected, where the lawyer is qualified to act as such and is not performing a commercial role

D. In *Three Rivers*, the House of Lords:

Confirmed that "legal advice is not confided to telling the client the law; it must include advice about what should prudently and sensibly be done in the relevant legal context" – where the lawyer has put on his or her "legal spectacles"

Failed to address who the client is, meaning that in an non-litigious corporate context it is not safe to assume the privilege extends beyond a specified group of employees selected to give instructions to a lawyer and receive advice from him or her —communications from employees outside this group, even if the intention is to provide directly or indirectly to lawyers, may not be covered

III. Practical steps for corporate counsel in the UK to enhance ability to claim legal advice privilege after *Three Rivers*

A. Before the start of any internal inquiry, determine all those employees likely to be involved. Identify those within the group who will liaise with in-house counsel as the "client", and record this in a message to the entire group and to all in-house and external lawyers.

B. No advice should be provided by any lawyer to an employee outside the client group, and the note of any advice given should record the identify of the specific employee involved.

C. Creation of any new documentation should be limited, and where it is necessary to do so should be addressed to a lawyer by a member of the client group, marked "confidential and privileged, created for purposes of obtaining legal advice."

D. Take steps to ensure that lawyers do not make secondary comments on the situation, either within emails or memoranda or by scribbling comments on privileged documents – any such secondary commentary is unlikely to be privileged.

E. If it is necessary to engage experts, they should report orally to a lawyer, as written communications between employees and experts, or between non-employee experts and lawyers, will not be privileged.

IV. The widespread use of email has significant legal and practical implications for the ability to protect legal professional privilege