

Are Communications of In-House Lawyers Protected From Disclosure?

France Proposes a New and Interesting Law

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The rapid globalization of the legal profession means that many of us deal with legal systems not our own. A classic problem in multijurisdictional matters is whether communications between a client and a lawyer are protected from disclosure to a third party by what in the United States is known as the “attorney/client privilege.”

The applicable principles in other countries are often quite different, causing the risk that a communication considered to be safely protected turns out to be vulnerable to forced disclosure when challenged abroad, or that parties face unequal treatment in international arbitration proceedings.

One well-known example relates to “in-house counsel,” that is, lawyers employed by a corporation or other entity. In the United States, legal advice and related conversations between in-house counsel and the corporate “client” are covered by the privilege, in Europe they are often not.

Very recently, France introduced proposed legislation that would give a measure of protection to the work of in-house lawyers. While the proposal has some strict requirements and major limits, it takes a significant step toward a broader recognition of the value of such lawyers.



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The Current Situation in the US, Europe and France

In the United States, the applicability of the attorney/client privilege to in-house attorneys is clear. As the Supreme Court recognized in its milestone ruling *Upjohn Co. v. United States*, 449 U.S. 383 (1981), a company is entitled not only to have the help of “corporate attorneys to formulate sound advice when their client is faced with a specific legal problem,” but also rely on “the valuable efforts of corporate counsel to ensure their client’s compliance with the law.” *Id.* at 392-93.

It’s ruling that communications by such attorneys is covered by the same professional rules as

other attorneys left open questions often explored on a case-by-case basis—such as whether a communication from an internal attorney truly related to legal advice or compliance, rather than unprotected business decisions albeit made by an attorney. But it was unambiguous that legal communications were not deprived of protection simply because of the in-house status of the attorney. This ruling and subsequent decisions recognize the strategic role of in-house counsel, as lawyers who have deep and broad knowledge of the corporation and are able to advise it well before anyone would think to hire a law firm.

Equally clear, however, is that in many EU Member States the communications of attorneys employed by a corporate entity are not protected by confidentiality principles akin to the American attorney/client privilege. This was amply stated in a decision of the European Court of Justice in 2010, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*, Case C-550/07 P.

In a ruling that did not bind the local courts in Europe but reflected a consensus there, the Court reasoned that a key requirement for an ethical legal practice was a commitment to “independence,” from which “It follows that the requirement of independence means that there should exist no employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.” Despite significant lobbying by American and other multinational corporations, this ruling remains good law.

Until very recently, it has certainly been the approach in France. By law, the obligation to maintain and respect confidentiality has been restricted to communications involving “*avocats*,” a word generally translated to mean “lawyers” but in fact denoting a quite precise profession,

namely, individuals with specified legal training who become formal members of a local “*barreau*.”

And while the word *barreau* may be generally translated to mean the “Bar,” it refers not to voluntary associations with which Americans are familiar, but to official structures created by law in each of 164 different geographical jurisdictions that have quasi-administrative powers to supervise the legal profession in their district.

A person having satisfied the education eligibility requirements, and in most cases having served as an intern with an existing lawyer, must formally pledge “independence” in order to be admitted.

As a result, attorneys employed by a corporate structure are systematically ineligible; a practicing attorney who decides to take such employment must resign (or at least temporarily suspend) membership in the *barreau*, and thus their status as an *avocat*. In-house lawyers, known in France as “*jurists d’entreprise*,” are not without significance, including a group called “The French Association of Corporate Counsel” (*Association Française des Juristes d’Entreprise*) whose roughly 7,000 members have regularly lobbied for increased recognition, including confidentiality protection for their communications.

Cercle Montesquieu, a prominent association of *directeurs juridiques* (general counsel), has engaged in similar advocacy. These efforts have generally been opposed by the members of the *barreaux* eager to maintain the professional advantage the confidentiality provision gives them. These efforts have also been opposed by French regulators and some French judges who have expressed the view that extending confidentiality protection to in-house lawyers could lead to abuse and make it much more difficult to investigate. As a result of these oppositions, efforts to extend confidentiality have until recently been unsuccessful.

New Proposed Legislation

On Jan. 14, 2026, after ten years of legislative ups and down, including a successful challenge to the Constitutional Court, the French Parliament adopted a proposed law, entitled “The confidentiality of consultations by in-house lawyers,” that will go into effect at the latest in the next twelve months.

Its core provision is that “consultations by corporate attorneys, or by staff under their direction, are confidential,” and that such consultations may not be seized or produced under compulsion in any proceeding.

This important general principle is, however, subject to a number of specific restrictions, exceptions, and procedures for enforcement. Among the restrictions are that the corporate attorney must have an eligible law degree (whether from a French school or elsewhere); that the communications consist of “intellectual work product relative to furnishing legal advice”; and that the communication be to a member of the decision-making staff of the employing entity.

Even more broadly, the new protection does not apply at all in criminal or tax matters, which an explanatory report notes is because such procedures “are the first protection of the public economic safety.” Usefully, the proposed law provides a number of specific procedures for the implementation of the new protection, including procedures for review of any attempt by authorities to seize confidential information.

The proposed law also provides that “the company that employs the corporate attorney can waive the confidentiality of documents.” This provision addresses an aspect of the protection afforded to members of the Bar that Americans find a bit odd: at least in principle, a client in France cannot “waive” the equivalent of the attorney/client privilege (known as “*le secret professionnel*”) and direct an attorney to share

confidential information with an adversary, which is often done in the United States to the extent useful and necessary to negotiate a settlement with an adversary.

In a conceptual sense, in France the confidentiality obligation is not viewed so much as a “property” of the client as a mandatory principle to protect the profession itself by barring attorneys from the risk of becoming witnesses.

Effect of the New Law

It will take a while for this new law to fully come into effect; it envisions the development of specific guidelines, on which companies, lawyers, and the corporate counsel themselves will be heard.

The provisions will certainly affect how companies staff their internal decision-making processes and their staffing for commercial, civil and administrative proceedings: to the extent that many companies felt compelled to turn to independent attorneys in order to protect sensitive discussions from forced disclosure, they are likely to increase their in-house staffs to diminish those expenses.

It will be interesting to see how this new rule is applied in international arbitration proceedings. Few arbitration rules provide guidance on the law applicable to privilege issues. Domestic arbitration statutes, such as the Federal Arbitration Act or NY CPLR Article 75, are silent on the subject of privilege.

Given the significant differences in national laws described above, arbitral tribunals are often called upon, and have broad discretion, to decide which law governs privilege questions, including which law governs the confidentiality of the communications between a corporation and its in-house lawyers.

As described in a report of the International Commercial Disputes Committee of the NY City Bar Association, arbitral tribunals have often followed a range of different approaches in

deciding which law governs the question of privilege, including (1) applying the law of the jurisdiction with the “closest connection” to the communication at issue; (2) applying the “most protective” potentially applicable privilege rule; or (3) attempting to distill autonomous standards in international arbitration.

Many arbitral tribunals and parties agree to be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration. The IBA Rules encourage arbitrators to consider fairness-related issues; that is, to take into account “the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.”

For instance, if the arbitration involves a New York claimant and a French respondent, the law of the “closest connection” between the claimant and its in-house lawyers is likely NY law, which will afford broad protection to the legal advice of in-house counsel.

In contrast, the law of the “closest connection” between the French respondent and its in-house lawyers is likely French law, which so far does not protect the same type of documents. That creates a problem of equality of treatment between the parties in the arbitration.

The “most protective” approach applies the same privilege rule to all parties, giving preference to the rule that provides the highest level of protection. In addition to the IBA, certain arbitration rules, such as those of the AAA-ICDR, have adopted the same “most protective” approach.

Once the new French law goes into effect, it will likely provide increased protection to certain communications of in-house lawyers. That is particularly the case when France has the “closest connection” to the communication at

issue, or when principles of equal treatment of the parties point to the application of the new French law. That is a helpful first step in the recognition of the strategic role of in-house lawyers in France.

The categorical inapplicability of the new law to criminal or tax matters means that independent attorneys will continue have a monopoly to exploit strategic advantages in their quest for work in those areas.

Significantly, doing an American-style “internal investigation” in the context of the threat of a criminal investigation is becoming increasingly common in France, where after years of hostility the general approach of doing an internal investigation as a prequel to negotiations with a prosecutor is now officially welcomed by prosecutors, and the various Bars and other groups have developed some interesting procedures to develop the practice.

While welcome news to such lawyers, the exclusion of competition for this work from in-house counsel will raise risks for companies wishing to use their own in-house lawyers in a civil or administrative matter, knowing that if the case later turns out to have led to a criminal investigation the work product of its in-house lawyers may be seized or ordered to be produced.

The law nonetheless represents a significant recognition of the strategic role of in-house lawyers, and it will be interesting to see if other countries in Europe follow.

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