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In-House but out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union Comment.

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COMMENT

IN-HOUSE BUT OUT IN THE COLD: A COMPARISON OF THE ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES AND EUROPEAN UNION

ANDREW R. NASH

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I. INTRODUCTION

One Monday morning, authorities of the European Commission arrive at the corporate office of a large Internet search company to investigate possible antitrust violations. As dictated by their governing regulations,¹ the authorities are able to enter the premises and seize documents for their investigation. Due to the incredibly rapid integration of new communications technology, the investigators decide to search the hard drives of the computers in the legal department, making electronic copies of the documents they deem most pertinent. Among the documents seized are memoranda from the general counsel in the United States to all in-house counsel in the European office addressing the issue of the complex algorithm used to rank search results. In particular, the memoranda address how the corporation's own services are ranked in the search results compared to similar services provided by other European Internet companies. Also copied are communications between the local in-house counsel and the European corporate leadership suggesting minor alterations to the application of the algorithm. The final e-mail that is copied notes that adopting the alterations will result in bringing the company back in compliance with the competition laws of the European Union (EU), and a failure to do so may result in the levy of fines, potentially costing tens of millions.²

With unparalleled swiftness, the European Commission reviews

1. See generally Commission Regulation 17/62, 1962 O.J. (13) 204 (EC), available at 1962 EUR-Lex CELEX LEXIS 31962R0017 (establishing the extensive "competition" or antitrust investigatory powers of the European Commission, including the power to raid corporate offices).

2. This hypothetical scenario is an amalgamation between actual events and potential future ones. The facts behind the pending investigation of the "large Internet search company" were taken from an ongoing competition law investigation of Google, Inc. by the EU's investigatory body, the European Commission. See Matt Rosoff, *Here's What Google Can Expect with EU Investigation, Says Microsoftie*, BUS. INSIDER (Nov. 20, 2010), <http://www.businessinsider.com/heres-what-google-can-expect-with-eu-investigatio-n-says-microsoftie-2010-11> (providing commentary on what result Google may expect in the wake of the European Commission's investigation).

the documents and concludes that the Internet search company had indeed been in violation of competition laws.³ The Commission concludes that the company has intentionally violated the laws, based largely on the contents of the communications between in-house counsel and the corporate managers advising changes to promote compliance with EU laws.⁴

Such an extreme hypothetical is almost certain to elicit equal reactions of shock and skepticism. Most pressing is the apparent disregard for the attorney–client privilege. Surely those communications between in-house counsel and corporate managers would be protected from discovery, absent a waiver of the privilege. However, this is not the result under the law of the EU.⁵ “While corporate investigations have globalized, privilege rules remain localized, with jurisdictions differing regarding whether the attorney–client privilege applies to . . . communications with in-house counsel,” and to communications with outside, independent attorneys.⁶ Though the United States recognizes the attorney–client privilege for communications with in-house counsel,⁷ many international jurisdictions do not, namely the EU.⁸ This notable difference was once of *de minimis*

3. See Commission Decision 85/79, 1985 O.J. (L 35) 58, 61, available at 1985 EUR-Lex CELEX LEXIS 31985D0079 (noting Deere and Company’s knowledge that it had violated EEC and national competition laws).

4. The shocking outcome of this hypothetical is indeed based upon real events, where the European Commission seized documents from Deere’s in-house counsel to company managers relating to compliance with dynamic competition laws. See *id.* (“Deere and Company knew that such conduct, . . . was contrary to [European Union] and national competition law. It was advised on this by its in-house counsel. Senior management of Deere and Company . . . was fully informed.”); see also Sue Bentsch, *Confidentiality, Corporate Counsel, and Competition Law: Representing Multi-national Corporations in the European Union*, 35 ST. MARY’S L.J. 1003, 1006–07 (2004) (relating the “Deere story” as part of a lecture given for the Third Annual Symposium on Legal Malpractice & Professional Responsibility).

5. See generally Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney–Client Privilege: A Re-examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1 (2008) (explaining the contours of the attorney–client privilege in the United States and abroad).

6. *Id.* at 4.

7. See *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (holding that attorney–client privilege in a corporate context applies to communications between employees and any in-house counsel on staff).

8. See Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 44 (Sept. 14, 2010) (ruling that documents seized during an investigatory raid were not subject to the attorney–client privilege because in-house counsel lack professional independence from their employers).

importance when corporate litigation was localized to a single jurisdiction. However, the explosive growth and ever-increasing reliance on transnational business suggests that corporate prosecutions in one jurisdiction may soon have corollary cases on another continent. As a result, the importance of maintaining the attorney–client privilege remains a paramount concern, yet the role of the in-house attorney is called into uncertainty. In a theoretical sense, does this mark the end of an era for in-house legal departments in the European Union? More practically, are documents produced in the course of a European case still protected if a parallel proceeding in the United States occurs? This Comment strives to provide answers to these pressing questions of international legal importance.

Part II of this Comment provides an overview of the attorney–client privilege from its roots under the common law, its application today in the United States, and its current use under the authority of the EU's supranational justice system. Part III navigates the current state of the law by presenting the most recent ruling from the EU on the attorney–client privilege, *Akzo Nobel Chemicals Ltd. v. Commission*,⁹ while analyzing and criticizing the continued exclusion of in-house counsel from the protections of the privilege. Part III also examines how some courts in the United States have applied the protections of the attorney–client privilege to communications made by foreign attorneys. Part IV then offers suggestions that should ensure a sustainable way for legal departments to continue to work under the tough European precedents. Furthermore, Part IV examines the possibility for judicial application of the doctrine of selective waiver to enable the reassertion of the attorney–client privilege in a parallel proceeding taking place in the United States.

II. BRIEF HISTORY OF THE ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES AND ABROAD

The attorney–client privilege is the oldest common law privilege pertaining to confidential communications.¹⁰ Indeed, as early as the sixteenth century, the privilege arose in response to Queen

9. Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX LEXIS 62007J0550 (Sept. 14, 2010).

10. *Upjohn*, 449 U.S. 383 at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

Elizabeth's Statute Against Perjury, which compelled witnesses to attend trials.¹¹ The expanding role of witnesses in establishing facts, coupled with the party's inability to testify, gave rise to attempts to discover what party-opponents had revealed to their legal advisors.¹² The necessity of safeguarding communications between clients and their legal counsel was recognized shortly thereafter.¹³ Interestingly though, in the sixteenth century the privilege belonged to the attorney.¹⁴ It was not until the following century, when the policy shifted from protecting the attorney's honor to securing freedom of action for the client that the privilege became the client's to assert or waive.¹⁵

A. *The Attorney-Client Privilege in the United States*

Moving ahead to current times, the modern formulation of the attorney-client privilege was summarily presented in *United States v. United Shoe Machinery Corp.*¹⁶ The court concluded that the privilege applies only when it is asserted by a current or potential client, communicating to a member of the bar or the bar member's subordinate who, in regard to the communication, "is acting as a lawyer."¹⁷ Furthermore, the communication must concern an issue disclosed to the attorney by the client in privacy for the purpose of obtaining the attorney's legal opinion on the law, legal services, or other legal assistance.¹⁸ Finally, the privilege will not attach if the client does not claim the privilege, waives the privilege, or seeks the legal services for the purpose of committing a crime or tort.¹⁹

11. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 12-13 (2d ed. 2011).

12. *Id.* at 10 n.6.

13. *See, e.g.,* Dennis v. Codrington, (1579) 21 Eng. Rep. 53 (Q.B.) 53 (ruling that the defendant's attorney "shall not be compelled . . . to be examined upon any matter . . . wherein he . . . was of counsel").

14. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 8-9 (2d ed. 2011) (discussing that preservation of the personal honor of the attorney was a motivating, if not paramount, concern in the earliest days of the attorney-client privilege).

15. *Id.* at 10 n.4. Indeed by 1712, the King's Bench ruled that "the attorney's privilege was likewise the client's privilege, . . . [the attorney] should not, be admitted by the law to betray his client." Lord Say & Seal's Case, (1712) 88 Eng. Rep. 617 (K.B.) 617.

16. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

17. *Id.* at 358.

18. *Id.*

19. *Id.* at 358-59. The requirements for privilege are reflected in the ABA Model Rules of Professional Conduct, which states more specifically that "[a] lawyer shall not

Though the attorney–client privilege springs from the common law, the American Bar Association (ABA) has taken the *United Shoe Machinery* holding as the basis for the attorney–client privilege in the Model Rules of Professional Conduct,²⁰ and many states have since codified the privilege in specific statutes.²¹

While the requirements of the attorney–client privilege are relatively straight forward,²² application of the privilege to corporate clients remains a more complex question. As early as 1915, the Supreme Court mused that the privilege would apply when the client was a corporation.²³ The Court acknowledged, but did not explicitly hold, that Congress would not have implied that a corporate discovery statute applied to all communications and documents without openly declaring that intent.²⁴ Courts accepted this general presumption²⁵ and subsequently struggled to find an appropriate test for the applicability of the attorney–client privilege to corporations.²⁶

reveal information relating to the representation of a client unless the client gives informed consent.” MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2010).

20. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010) (recognizing that a duty to preserve the privilege exists). The client is the sole person who may waive the privilege barring extenuating circumstances such as imminent death or substantial bodily harm, the prevention of a crime or fraud, or to comply with court order. *Id.*

21. See Nancy C. Cody, *The Attorney–Client Privilege and the Work Product Immunity Doctrine for the Corporate Client*, 15 U. BALT. L. REV. 251, 252 n.4 (1986) (listing the analogous local rules of evidence or other statutes codifying the attorney–client privilege in Alaska, Arizona, Arkansas, California, Delaware, Hawai'i, Maine, Michigan, Nevada, New Mexico, Oregon, Texas, Vermont, and Wisconsin).

22. See *United Shoe Mach. Corp.*, 89 F. Supp. at 358–59 (outlining when the attorney–client privilege applies); see also MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010) (indicating that the default rule is that communications between an attorney and client are privileged, and relating when an attorney may reveal information from such communications); Nancy C. Cody, *The Attorney–Client Privilege and the Work Product Immunity Doctrine for the Corporate Client*, 15 U. BALT. L. REV. 251, 252 (1986) (“Although the attorney–client privilege originated in the common law, it is codified in specific statutes in numerous jurisdictions.”).

23. *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915)).

24. *Louisville & Nashville R.R.*, 236 U.S. at 336.

25. See *Upjohn*, 449 U.S. at 390 (noting that the government did not challenge the general proposition made in *Louisville & Nashville R.R.*).

26. See *id.* (“The Court of Appeals, however, considered the application of the privilege in the corporate context to present a ‘different problem[.]’” (citing *United States v. Upjohn Co.*, 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383)); *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (espousing a control-group test as the best application of the attorney–client privilege); see also Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate*

At the federal level, many courts applied a so-called “control-group” test to determine whether clients, in these cases companies, could claim the privilege.²⁷ The control-group test based the applicability of the privilege not on any particular employee’s rank within a corporation, but on whether the employees were “in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney,” or if they were in a group duly authorized for that purpose.²⁸ The effect of this test portrayed the employee, or group of employees, as the personification of the corporation making a confidential disclosure to an attorney to secure legal advice.²⁹ However, other courts were critical of the particularly specific scope of the control-group test and applied a test based upon an employee’s duties and identity within the corporation.³⁰ By the 1980s, the confusion generated by competing tests, coupled with the unpredictability in their application, necessitated the Supreme Court to take action.³¹ Before addressing this concern, another doctrine closely related to the attorney–client privilege should be introduced and briefly examined—the work-product immunity doctrine.

Attorney–Client Privilege, 1997 ANN. SURV. AM. L. 629, 630 (“Among the fifty states, there are a number of competing tests for determining the applicability of the attorney–client privilege in the corporate context, and the issue, despite *Upjohn*, is far from settled.”).

27. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1237 (3d Cir. 1979) (holding that questionnaires and internal memoranda were not protected from discovery under the control-group theory when the employees questioned were not members of the control group); *Natta v. Hogan*, 392 F.2d 686, 692 (10th Cir. 1968) (determining that the meaning of “client” for corporate application of the attorney–client privilege was whether the person involved in the matter had authority to control or could substantially impact the decision based upon the advice of a lawyer, or was a member of a group so authorized); *Westinghouse*, 210 F. Supp. at 485 (asserting the control-group test for the first time, by analogizing that a person in a position of control is the personification of the corporation when speaking to an attorney).

28. *Westinghouse*, 210 F. Supp. at 483.

29. *Id.*

30. See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970) (per curiam) (holding that any employee is identified with the company to such an extent that, when he or she makes a communication to an attorney either at the direction of a supervisor or in regard to employment duties, the communication should be privileged), *aff’d*, 400 U.S. 348 (1971) (per curiam).

31. See generally *Upjohn*, 449 U.S. at 383 (presenting the Supreme Court an opportunity to clarify the applicability of the attorney–client privilege in a corporate setting).

In American jurisprudence, the work-product immunity doctrine was established by the landmark Supreme Court decision in *Hickman v. Taylor*.³² In *Hickman*, a tug boat accident resulted in the deaths of a substantial portion of the crew.³³ The attorney for the tug owners, anticipating the impending litigation, privately interviewed the survivors of the wreck.³⁴ The plaintiffs attempted to compel production of the materials generated by the interviews.³⁵ The Supreme Court found that “the memoranda, statements, and mental impressions in issue . . . [fell] outside the scope of the attorney–client privilege and hence [were] not protected from discovery on that basis.”³⁶ At the time of the Court’s holding in *Hickman*, the Federal Rules of Civil Procedure only limited discovery in a few particular instances.³⁷ Interpreting the existing rules, the Court found that the statements fell under a privilege justified by a public policy against invading the privacy of an attorney’s preparation for litigation, provided that there were no compelling reasons that outweighed the protection.³⁸ This qualified immunity from discovery was subsequently codified in Federal Rule of Civil Procedure 26(b)(3), which reemphasizes that a party seeking such materials must show a “substantial need for the materials” and that he would suffer undue hardship in obtaining the substantial equivalent of the materials by other means.³⁹

32. *Hickman v. Taylor*, 329 U.S. 495 (1947).

33. *Id.* at 498.

34. *Id.*

35. *Id.* at 498–99.

36. *Id.* at 508.

37. See Nancy C. Cody, *The Attorney–Client Privilege and the Work Product Immunity Doctrine for the Corporate Client*, 15 U. BALT. L. REV. 251, 253 n.10 (1986) (explaining that in 1938, discovery was only limited in instances where depositions were conducted in bad faith or a harassing manner and the sought-after information was irrelevant or encroached upon widely recognized domains of privilege).

38. *Hickman*, 329 U.S. at 511. More specifically, the Court stated:

Proper preparation . . . demands that [the attorney] . . . prepare his legal theories and plan his strategy without undue and needless interference. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency [and] unfairness . . . would inevitably develop The effect on the legal profession would be demoralizing. And the interests of the clients . . . would be poorly served.

Id.

39. FED. R. CIV. P. 26(b)(3)(A)(ii).

Nevertheless, while the work-product immunity doctrine and attorney–client privilege are closely related, there are some significant differences.⁴⁰ Most notably, the “work-product immunity applies only to documents prepared in anticipation of litigation, not to documents prepared for ordinary business purposes.”⁴¹ The role of in-house counsel as an advisor on compliance with the law throughout the ordinary course of business may exponentially complicate such distinctions.⁴² Ultimately, however, in-depth discussion of the nuances between the attorney–client privilege and the work-product immunity doctrine is beyond the scope of this Comment.

Without a doubt, the single most influential case pertaining to attorney–client privilege in the corporate world is *Upjohn Co. v. United States*.⁴³ Upjohn, a pharmaceutical company, conducted an internal investigation regarding suspicious payments made by a subsidiary to secure government business in a foreign country.⁴⁴ Gerard Thomas, the general counsel for Upjohn, prepared a set of questionnaires and sent them to the foreign general managers, as well as all area managers, with an attached letter from the chairman of the board instructing them to treat the responses to the questionnaire, and the investigation itself, as highly confidential.⁴⁵ The company subsequently prepared a report with the information and made a voluntary disclosure of the suspicious payments to the Securities Exchange Commission (SEC) and

40. See Nancy C. Cody, *The Attorney–Client Privilege and the Work Product Immunity Doctrine for the Corporate Client*, 15 U. BALT. L. REV. 251, 254–55 (1986) (discussing the broader scope of the work-product immunity doctrine compared with the attorney–client privilege).

41. *Id.*; see also *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (explaining that the work-product doctrine does not “come into play merely because there is a remote prospect of future litigation” (citing *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 795 (D. Del. 1954))); cf. *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (asserting that litigation does not have to be imminent, but it should be the motivating factor in the creation of the document or report (citing *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982))).

42. See E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 5–8 (2006) (explaining the various roles of the modern general counsel as everything from legal advisor, mediator, and disclosure gatekeeper, to business manager, department administrator, and corporate officer).

43. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

44. *Id.* at 386.

45. *Id.* at 386–87.

Internal Revenue Service (IRS).⁴⁶ An IRS investigation followed, and the special agents demanded production of the questionnaires, memoranda, and notes used in conjunction with the internal investigation.⁴⁷ Upjohn asserted the attorney–client privilege and claimed such documents as work product.⁴⁸ On appeal, the Sixth Circuit found “that the privilege did not apply” because it was not asserted by a “client” and remanded the case to the district court to apply the control-group test.⁴⁹ Furthermore, the appellate court cautioned that broadening the attorney–client privilege would create a “zone of silence,”⁵⁰ presumably referring to a questionable area of undiscoverable facts.

The Supreme Court recognized the shortcomings of the control-group test, highlighting that such a doctrine presents a dilemma for the attorney in complex legal scenarios.⁵¹ In the Court’s opinion, this “frustrate[d] the very purpose of the privilege[,]” as the advice given by the attorney may be of more use to personnel who can physically implement changes than to the board of directors or the corporation’s president.⁵² Turning to the Sixth Circuit’s concern of a zone of silence, the Court reiterated that the privilege does not prevent discovery of the facts that underlie the communications, rather it only protects the communications themselves.⁵³ Unfortunately for corporations across the country, the Supreme Court concluded that the control-group test was too narrow to govern the application of the privilege.⁵⁴ Yet, the Court did not adopt an accepted test, instead holding that a case-by-case basis was a better approach to determine the boundaries of the

46. *Id.* at 387.

47. *Id.* at 387–88.

48. *Id.* at 388.

49. *Id.* (citing *United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev’d*, 449 U.S. 383).

50. *Id.* at 388–89 (citing *Upjohn*, 600 F.2d at 1228).

51. *See id.* at 391–92 (demonstrating that under the control-group test, attorneys must choose between consulting only those senior employees with the authority to bind the corporation, and consulting with low- to mid-range employees who may have more accurate information pertaining to the legal issue (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608–09 (8th Cir. 1977))).

52. *Id.* at 392 (citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1164 (D.S.C. 1975)).

53. *Id.* at 395; *see also* *State ex rel. Dudek v. Circuit Court for Milwaukee Cnty.*, 150 N.W.2d 387, 399 (Wis. 1967) (explaining that a client may not conceal a fact solely by revealing that fact to his attorney).

54. *Upjohn*, 449 U.S. at 397.

attorney–client privilege in corporate scenarios.⁵⁵ The Court, citing *Hickman v. Taylor*, held that the work-product immunity doctrine applied to the notes and memoranda used by the general counsel in formulating the questionnaire and subsequent report.⁵⁶

While the result from *Upjohn* may not have been the anticipated panacea to all corporate attorney–client privilege woes, the holding was consistent with the traditional American views on the assertion of privileges, which, at least on a federal level, are not codified.⁵⁷ The Federal Rule of Evidence governing

55. See *id.* at 396–97 (reasoning that a case-by-case basis might undercut the desired certainty of the privilege, but comport more with the spirit of Federal Rule of Evidence 501). Rule 501 provides in part that, subject to limitation by the Constitution, Congress, or the Supreme Court, “the privilege of a witness [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” FED. R. EVID. 501. Thus, while *Upjohn* may provide an underlying precedent that the attorney–client privilege applies to corporations, the decision provides little clarity on how courts should determine such applicability.

56. *Upjohn*, 449 U.S. at 397–98 (citing *Hickman v. Taylor* 329 U.S. 495 (1947)). Additionally, the Court recognized “strong public policy” in support of the work-product doctrine. *Id.* at 398. The public policy referred to is the concept that the work-product doctrine shelters the mind of the attorney, allowing him to most effectively prepare advice or a case for the client. *Id.* This notion is of particular importance in the adversarial system of both criminal and civil litigation in the United States. *Id.* However, the protections of the privilege are not absolute. Cf. *United States v. Arthur Young & Co.*, 465 U.S. 805, 820–21 (1984) (holding that government agencies, namely the IRS and SEC, should have *full* access to certain documents necessary for their investigations).

57. See FED. R. EVID. 501 (establishing that as a general rule, privileges belong to witnesses and clients of any capacity—persons, corporations, or government entities—and are to be governed by judicial interpretation of the common law, based upon rational thought and experience). Interestingly, however, several proposed rules of evidence governing the codification of privileges were not enacted by Congress. See GEORGE FISHER, EVIDENCE: FEDERAL RULES OF EVIDENCE 2010–2011 STATUTORY AND CASE SUPPLEMENT 341–401 (2d ed. 2010) (setting out deleted, superseded, and not enacted materials in the Federal Rules of Evidence). One such rule, 503, regulated the application of the “Lawyer–Client” privilege. FED. R. EVID. 503 (proposed). The proposed rule clearly defined clients, lawyers, and their representatives, as well as when a communication is considered confidential. *Id.* R. 503(a)(1)–(4). The proposed rule also clearly articulated that it is the client who may claim the privilege, or the attorney—granted that he was acting on behalf of the client—to prevent the disclosure of confidential communications. *Id.* R. 503(b), (c). Furthermore, the advisory committee’s note on proposed rule 503 further clarifies that “[t]he definition of ‘client’ includes . . . corporations.” *Id.* R. 503 advisory committee note (citing *Radiant Burners, Inc. v. Am. Gas Ass’n*, 320 F.2d 314 (7th Cir. 1963)). Nevertheless, states may adopt their own rules of evidence and codify the attorney–client privilege. See, e.g., TEX. R. EVID. 503 (capturing the essence of proposed Federal Rule 503 for application in Texas civil cases). Additionally, in September of 2008, President George W. Bush signed a law creating Federal Rule of Evidence 502, which imposes certain limitations upon attorney–client privilege and work-product immunity waivers. Robert J. Anello, *Preserving the*

the assertion of privileges, Rule 501, simply defaults to judicial interpretation of the common law.⁵⁸ Thus, the safest way to not overstep the common law and rational interpretation bounds of Rule 501 may have been to avoid the adoption of a bright-line test. In fact, the reasoning in *Upjohn* fully embraces the common law tradition of Rule 501 by speaking not of a process for applying the privilege, but of a purpose for why the privilege should be asserted.⁵⁹ According to the Supreme Court, the purpose of the attorney–client privilege “is to encourage full and frank communication . . . and thereby promote broader public interests in the observance of law and administration of justice.”⁶⁰ This purpose strikes a balance between the availability of communications to be used as evidence and the need to promote an environment where clients may present their issues to attorneys without fear of subjecting themselves to criminal or civil liability.⁶¹ To date, *Upjohn* continues to be the leading United States precedent concerning the attorney–client privilege.⁶²

That is not to say that the attorney–client privilege has not been subject to critique and attack, particularly in the corporate setting.⁶³ Perhaps the most invasive attacks were the guidelines issued by the United States Department of Justice in a 1999 memorandum captioned “Bringing Criminal Charges Against

Corporate Attorney–Client Privilege: Here and Abroad, 27 PENN ST. INT’L L. REV. 291, 297 n.33 (2008). “When proposing the new rule, the Advisory Committee specifically expressed concern about the production of confidential or work[-]product material by a corporation subject to government investigation and the waiver implications of such disclosure.” *Id.* More analysis of Rule 502’s application can be found in Part IV of this Comment.

58. FED. R. EVID. 501.

59. *Upjohn*, 449 U.S. at 397–98.

60. *Id.* at 389.

61. *See id.* (reasoning that sound legal advice depends upon an attorney’s need to be fully informed); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (stating that the attorney–client privilege rests upon the attorney’s need “to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out”); *see also* U.S. CONST. amend. V (providing the right against self-incrimination).

62. *See generally* Katherine M. Weiss, Note, *Upjohn Co. v. United States as Support for Selective Waiver of the Attorney–Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV. 501, 501–06 (2007) (discussing the conflicts in lower court decisions that were resolved by the Court’s decision in *Upjohn*).

63. *See, e.g.*, Robert J. Anello, *Justice Under Attack: The Federal Government’s Assault on the Attorney–Client Privilege*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 9–12 (2003) (pointing to the language of the corporate setting as a hindrance to the limited attorney–client privilege).

Corporations,”⁶⁴ later supplanted in 2003 by another memorandum titled “Principles of Federal Prosecution of Business Organizations.”⁶⁵ These memoranda sought to encourage voluntary waivers of the attorney–client privilege by corporations in exchange for more lenient treatment by prosecutors when considering the possibility of indicting the corporation.⁶⁶ This coercive ultimatum went largely unchecked until *United States v. Stein*.⁶⁷

In *Stein*, the government allegedly urged KPMG to encourage its employees to participate in pre-indictment interviews with the government or risk losing KPMG paying for their legal fees.⁶⁸ The Department of Justice’s coercion techniques were judicially criticized as effectively chilling attorney–client communications

64. Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 293 (2008) (citing Memorandum from Eric Holder Jr., Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>).

65. *Id.* (citing Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (Jan. 20, 2003), available at www.justice.gov/dag/cftf/corporate_guidelines.htm).

66. *Id.* (citing Memorandum from Eric Holder Jr., Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>; Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (Jan. 20, 2003), available at www.justice.gov/dag/cftf/corporate_guidelines.htm). Indeed, the Holder Memorandum identified that “[o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including . . . a waiver of the attorney–client and work[-]product protections, both with respect to its internal investigation and with respect to communications between specific [individuals within the corporation] and counsel.” Memorandum from Eric Holder Jr., Deputy Att’y General, U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys § VI.B (June 16, 1999), available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>. *But see* Mark Filip, *Principles of Federal Prosecution of Business Organizations*, in UNITED STATES ATTORNEYS’ MANUAL § 9-28.720 (2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf> (providing that “[e]ligibility for cooperation credit is not predicated upon the waiver of attorney–client privilege Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation . . . is disclosure of the relevant facts concerning such misconduct”).

67. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

68. *See United States v. Stein*, 440 F. Supp. 2d 315, 320–21 (S.D.N.Y. 2006) (relating that KPMG was in the practice of paying for the legal fees of its employees, that there were concerns raised by the Thompson Memorandum, and that KPMG would not pay legal fees of employees who asserted a Fifth Amendment privilege or otherwise refused to cooperate with the government), *aff’d*, 541 F.3d 130.

within the corporate setting by forcing businesses to gamble a potentially more severe indictment on the risk of waiving the attorney–client privilege.⁶⁹ On appeal, the Second Circuit held that certain statements by corporate employees had been deliberately coerced by the government, and thus the statements were stricken from evidence.⁷⁰

As a result of judicial opinions and legislative action,⁷¹ the Department of Justice has tempered its tactics and guidelines.⁷² No longer may investigators or prosecutors request waivers of the attorney–client privilege or demand core work product.⁷³ Instead, the focus has shifted to the disclosure of relevant facts while providing appropriate channels for corporate counsel to raise concerns about any potential abuse of investigatory power.⁷⁴ Thus, despite some attacks, the attorney–client privilege remains healthy and alive in the United States, both on state and federal levels for individual and corporate clients. However, the next

69. See Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT'L L. REV. 291, 295 (2008) (arguing that while *Stein* focused primarily on relationships between corporations and employees, the opinion served to “re-focus the legal community on the issues surrounding the privilege and its deterioration under pressure by [the Department of Justice]” (citing *Stein*, 440 F. Supp. 2d at 337–38)).

70. *Stein*, 541 F.3d at 157. State courts have also expressed disdain for the coercive measures adopted from the Holder and Thompson Memoranda, holding that cooperating with prosecution should not amount to waiver of the attorney–client privilege. See, e.g., *Regents of the Univ. of Cal. v. Superior Court of San Diego Cnty.*, 81 Cal. Rptr. 3d 186, 194 (Ct. App. 2008) (reasoning that the government’s coercive methods are more powerful than court orders, leaving defendants “no means of asserting the [privilege]” without incurring increased consequences).

71. See Attorney–Client Privilege Protection Act of 2006, S. 30, 109th Cong. § 2(b) (imposing “clear and practical limits” upon agencies so that the attorney–client privilege will remain preserved); see also Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT'L L. REV. 291, 296–97 (2008) (introducing and summarizing Senator Arlen Specter’s Attorney–Client Privilege Protection Act). The Attorney–Client Privilege Protection Act of 2006 never became law; the Act expired at the end of that congressional session. *S. 30: Attorney–Client Privilege Protection Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-30> (last visited Sept. 25, 2011).

72. See generally Mark Filip, *Prosecution of Business Organizations*, in UNITED STATES ATTORNEYS’ MANUAL § 9-28.710 (2008), available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf> (setting out the Department’s revised policies on federal prosecution of corporate crimes and its policies specifically towards corporate attorney–client privilege).

73. *Id.* ¶ 3.

74. See *id.* § 9-28.760 (establishing that attorneys “who believe that prosecutors are violating such guidance . . . [may] raise their concerns with . . . the appropriate United States Attorney or Assistant Attorney General”).

section illustrates a much more limited interpretation and application of the attorney–client privilege in the EU.

B. *The Attorney–Client Privilege in the European Union*

Before delving into the attorney–client privilege and the European Court of Justice cases that have severely eroded it, a rudimentary foundation of the EU’s supranational court system must be laid down, along with and a few pieces of key legislation.

i. The European Court of Justice and the Court of First Instance

Under EU law, the European Court of Justice is the highest court in the land, outranking the various national supreme courts.⁷⁵ Having supranational jurisdiction established by treaty, judgments of the European Court of Justice can affect individuals, institutions, or entire member states.⁷⁶ The European Court of Justice was originally established in 1951 under the Treaty of Paris; however, with the formulation of the European Community in 1957 (the precursor to the EU), the European Court of Justice was adopted as the official court.⁷⁷ With the implementation of the EU in 1992 under the Maastricht Treaty, the powers and jurisdiction of the European Court of Justice have expanded, as has its caseload.⁷⁸ As a direct result, the Court of First Instance was established in 1989, with the original intention of dividing the

75. WAYNE IVES, CIVITAS INST. FOR THE STUDY OF CIVIL SOC’Y, COURT OF JUSTICE OF THE EUROPEAN UNION (rev. ed. 2011), available at <http://civitas.org.uk/eufacts/download/IN.5.ECJ.pdf>.

76. *Id.*; see *The Composition of the Community Jurisdictions and the Rights and Duties of Their Members*, CVCE (Aug. 11, 2011), <http://www.cvce.eu/viewer/-/content/cba4a215-45ab-4278-8a70-eb8aa8c66799/en> (explaining that the organization of jurisdictions is governed by the Founding Treaties, the Protocol on the Statute of the Court of Justice, the Rule of Procedure of the Court of Justice, the Court of First Instance, and the Civil Service Tribunal). For increased discussion and exploration on the underlying treaties and other jurisdiction providing documents, see generally CVCE, <http://www.cvce.eu> (last visited Oct. 28, 2011), which provides a unique and ergonomic multimedia tool for studying the history of the European Union.

77. See *Court of Justice for the European Union*, CIVITAS INST. FOR THE STUDY OF CIVIL SOC’Y, <http://civitas.org.uk/eufacts/FSINST/IN5.htm> (last updated July 21, 2011) (expounding that in 1951, the Court of Justice was originally intended to “implement the legal framework of the European Coal and Steel Community”).

78. See *id.* (“When the European Union was created under the Maastricht Treaty (1992), the [European Court of Justice]’s powers were again expanded to cover the broader legal remit of the EU.”).

workload.⁷⁹

The Court of Justice is comprised of “one judge per [m]ember [s]tate,” as introduced by the 2001 Treaty of Nice.⁸⁰ Since Bulgaria and Romania joined the EU in 2007, the number of judges on the court is currently at twenty-seven.⁸¹ As a result of such a large number of sitting judges, most cases are heard in three or five judge panels, with plenary sessions reserved only for the most exceptional cases.⁸² Additionally, there are currently eight supporting “Advocates-General, who deliver legal opinions on each case.”⁸³ As we will see in the discussion of *Akzo Nobel Chemicals Ltd. v. Commission*, the opinion of the Advocate-General may or may not be adopted by the court.⁸⁴ Regardless, opinions of the Advocate-General are beneficial in fleshing out the official legal opinions of the Court of Justice, which some commentators have criticized as conclusory.⁸⁵

79. See *id.* (explaining that the number of cases before the Court of Justice has grown exponentially from 1970 to 2009). Though not explicitly found while conducting research, the nature of the operative case studied, *Akzo Nobel Chems. Ltd. v. Comm'n*, suggests that the Court of First Instance is a court whose judgments may be appealed to the Court of Justice. See CVCE, THE COMPOSITION OF THE COMMUNITY JURISDICTIONS AND THE RIGHTS AND DUTIES OF THEIR MEMBERS (2011), available at http://www.cvce.eu/obj/the_composition_of_the_community_jurisdictions_and_the_rights_and_duties_of_their_members-en-cba4a215-45ab-4278-8a70-eb8aa8c66799.html (discussing the requirement for election to the Court of First Instance in a tone that suggests that the Court of First Instance is inferior to the European Court of Justice). However, any formal appeal procedure is beyond the scope of this Comment.

80. CVCE, THE COMPOSITION OF THE COMMUNITY JURISDICTIONS AND THE RIGHTS AND DUTIES OF THEIR MEMBERS (2011), available at http://www.cvce.eu/obj/the_composition_of_the_community_jurisdictions_and_the_rights_and_duties_of_their_members-en-cba4a215-45ab-4278-8a70-eb8aa8c66799.html; see Treaty of Nice art. 2, Feb. 26, 2001, 2001 O.J. (C80) 1, 22 (mandating that “[t]he Court of Justice shall consist of one judge per Member State”).

81. *Id.*

82. WAYNE IVES, CIVITAS INST. FOR THE STUDY OF CIVIL SOC'Y, COURT OF JUSTICE OF THE EUROPEAN UNION (rev. ed. 2011), available at <http://civitas.org.uk/eufacts/download/IN.5.ECJ.pdf>.

83. *Id.*; see also *The Role of the Advocate General of the Court of Justice*, CVCE (Aug. 17, 2011), <http://www.cvce.eu/viewer/-/content/2a224d07-199f-4a44-b975-eddff2f48ea2/en> (commenting that the role of the Advocate General is neither like judge nor prosecutor, but rather “he closely follows the progress of the case, . . . and draws up his conclusions. He then presents those conclusions in open court and proposes a solution to the case”).

84. See Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 1 (Sep. 14, 2010) (suggesting that judgments of the Court of First Instance may be appealed to the Court of Justice).

85. See Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client*

ii. The European Commission and Regulation 17/62

The European Commission is perhaps best described as the executive branch of the EU. It is the body responsible for proposing new laws affecting the entire EU, and is also responsible for enforcing those laws.⁸⁶ The Commission was established in 1957 under the Treaty of Rome, and since then its powers and authority have grown and adjusted with the evolution of the EU.⁸⁷ Articles 85 and 86 of the Treaty of Rome grant the Commission broad investigatory powers not commonly found in other instances of European justice, whether national or supranational.⁸⁸ However, it should be noted that the scope of these investigatory powers is limited to examining corporations to ensure compliance with EU laws.⁸⁹

Undoubtedly, the most dramatic of these investigatory powers stems from Article 14(1) of Regulation 17/62, which authorizes practically spontaneous on-site investigations without the warrant of judicial authority.⁹⁰ Commentators have subsequently described these investigations as “dawn raids” due to their

Privilege for Inside Lawyers, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), http://www.law.harvard.edu/programs/plp/pdf/European_Rejection_of_Atorney-Client_Privilege_for_Inside_Lawyers.pdf (lamenting that in *Akzo*, the Court of Justice offered little support for its sweeping conclusions on limiting the attorney-client privilege for in-house counsel).

86. WIL JAMES, CIVITAS INST. FOR THE STUDY OF CIVIL SOC’Y, THE EUROPEAN COMMISSION (rev. ed. 2011), available at <http://civitas.org.uk/eufacts/download/IN.1.Commission.pdf>. Interestingly, in the spirit of supranational authority, “[w]hile [commissioners] are in the post they must show no allegiance to their home country.” *Id.*

87. *Id.* See generally *EU Institutions and Other Bodies*, EUROPA, http://europa.eu/about-eu/institutions-bodies/index_en.htm (last visited Oct. 1, 2011) (explaining the composition, purpose, and everyday functions of the European Commission).

88. Treaty of Rome arts. 85–86, Mar. 25, 1957, 298 U.N.T.S. 11; see also Theofanis Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 9 FORDHAM INT’L L.J. 1, 1 (1985) (asserting that the Commission may make all necessary investigations into corporations and the subsidiaries operating within the jurisdiction of the EU). But see Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT’L L.J. 967, 971 (2005) (qualifying that “the Commission possesses limited power to compel production of business records and documents” (emphasis added)).

89. See Treaty of Rome arts. 85–86, Mar. 25, 1957, 298 U.N.T.S. 11 (titled the chapter and section “Rules on Competition” and “Rules Applying to Undertakings,” respectively).

90. Commission Regulation 17/62, art. 14(1), 1962 O.J. (13) 204 (EC), available at 1962 EUR-Lex CELEX LEXIS 31962R0017.

unannounced and invasive nature.⁹¹ Post-investigation, the Commission may file complaints, conduct hearings, and ultimately issue a decision that may impose a combination of fines and injunctions.⁹² Not surprisingly, the sweeping authority granted by Regulation 17/62 has earned the Commission the criticism of being “the investigator, prosecutor, judge[,] and jury, all in one.”⁹³ In-house counsel in the EU, concerned with the integrity and confidentiality of their internally generated documents and memoranda, questioned the limits imposed upon the Commission under Regulation 17/62.⁹⁴ Finally, in 1982, the Court of Justice was presented with an opportunity to rule on the scope of the attorney–client privilege for corporations operating in the EU.

iii. Troubling Thoughts on the Attorney–Client Privilege

On national levels, nearly all member states have some derivation of the privilege.⁹⁵ Yet, the 1982 case of *AM & S Europe Ltd. v. Commission*⁹⁶ essentially “forced the hand” of the Court of Justice to determine the supranational applicability of the attorney–client privilege to in-house counsel.⁹⁷ *AM & S*, a mining corporation from the United Kingdom, brought suit against the European Commission and asked the Court of Justice to void a

91. Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 238 (2008) (citing Peter H. Burkard, *Attorney–Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW. 677, 679 (1986)).

92. Peter H. Burkard, *Attorney–Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW. 677, 679 (1986).

93. *Id.*

94. See Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 238–39 (2008) (explaining that the Commission intended to recognize the attorney–client privilege by not collecting any purely legal documents opining on points of law or preparing the defense of a case).

95. See Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney–Client Privilege: A Re-examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1, 15–16 (2008) (categorizing common law systems, like the United Kingdom, as recognizing the attorney–client privilege for all attorneys, and civil law systems, such as Belgium and France, as generally excluding in-house counsel from the benefits of the privilege (citing JAMES E. MOLITERNO & GEORGE C. HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 115 (2007))).

96. Case 155/79, *AM & S Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575, available at 1982 EUR-Lex CELEX LEXIS 61979J0155.

97. Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 239 (2008).

decision by the Commission ordering production of documents claimed to be protected “on the grounds of legal confidence.”⁹⁸ The Court of Justice briefly examined the purpose of Regulation 17/62 and held that, despite providing the Commission with the authority to determine which documents it requires, the rules “do not exclude the possibility of recognizing . . . that certain business records are of a confidential nature.”⁹⁹ The court then proceeded to define the scope of the privilege while attempting to account for common principles and concepts of member states to ensure uniform transnational application.¹⁰⁰

First, the Court of Justice held that to be protected, corporate communications must be “made for the purposes . . . of the client’s rights of defen[s]e.”¹⁰¹ Therefore, the protection applies only if the communications in question were exchanged between attorney and client after the Regulation 17 investigation has begun. The court also noted that it would be possible for the protection to apply earlier if the communications relate to the subject matter of a Commission investigation.¹⁰²

More importantly, the Court of Justice’s second requirement, that communications “emanate from independent lawyers . . . not bound to the client by a relationship of employment[,]” stands for the proposition that in the European Union, the privilege does not extend to communications between a corporation and its in-house counsel.¹⁰³ The court explained the independence requirement on the basis of “the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, . . . such legal assistance as the client

98. *AM & S*, 1982 E.C.R. at 1606–07. *AM & S* was not contesting whether the Commission recognized the attorney–client privilege, but rather the procedures for which the Commission determined which documents were privileged. *See id.* at 1606 (stating that *AM & S* “contends that it is a denial of the [privilege] to permit an authority seeking information . . . to inspect protected documents in breach of their confidential nature. However, . . . ‘the Commission has a prima facie right to see the documents . . . in the possession of a [corporation]’ by virtue of . . . Regulation No[.] 17”). *AM & S* argued that instead of being required to surrender the documents in their entirety to the Commission, showing the Commission “‘parts of the documents’, without disclosing the contents for which protection is claimed” should be sufficient to satisfy the Commission that the documents are indeed protected. *Id.*

99. *Id.* at 1610.

100. *Id.* at 1610–11.

101. *Id.* at 1611.

102. *Id.*

103. *Id.*

needs.”¹⁰⁴ The *AM & S* court focused on “structural” independence and subscribed to the belief that in-house counsel cannot be sufficiently structurally independent from his or her employer to meet a minimum threshold.¹⁰⁵ Thus, the struggle is between serving the corporate employer and proving a difficult independence standard in a manner recognized both under the national standards of the particular member state in which the corporation is located, as well as the supranational standard.

III. SURVEY OF THE CURRENT SITUATION

A. *American Courts Addressing Transnational Attorney–Client Issues*

The *AM & S* decision essentially cast suspicion on the attorney–client relationship in corporate settings in the EU.¹⁰⁶ The very nature of the Court of Justice’s jurisdiction provokes international concern, and it is not an attenuated possibility that a Commission investigation could spill across the Atlantic and involve communications prepared by in-house attorneys both in the EU and the United States. In the EU, the protections of the attorney–client privilege would likely not even apply to in-house attorneys in the United States.¹⁰⁷ Domestically, however, some

104. *Id.* at 1611–12.

105. Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 FORDHAM INT’L L.J. 967, 1011 (2005).

106. See Peter H. Burkard, *Attorney–Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT’L LAW. 677, 684–85 (1986) (noting varying degrees of dissatisfaction throughout Europe, and expressing concern that the outcome of *AM & S* will have a “chilling effect” on dealings among corporate counsel and multinational companies in the EU).

107. See *AM & S*, 1982 E.C.R. at 1612 (limiting further the scope of the privilege by requiring that it “must apply without distinction to any lawyer entitled to practi[c]e his profession in one of the [m]ember [s]tates, regardless of the [m]ember [s]tate in which the client lives”). Commentators are in agreement that the Court of Justice’s express statement likely indicates that the privilege would not apply to foreign lawyers not entitled to practice law in the European Union. See Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 FORDHAM INT’L L.J. 967, 1007–08 (2005) (noting explicitly that “there is consensus that these qualifications exclude third-country attorneys from the benefit of legal privilege”); see also Stephen A. Calhoun, Note, *Globalization’s Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 241 (2008) (interpreting the language of *AM & S* to exclude foreign attorneys as well as in-house counsel from the benefit of the attorney–client privilege).

case law addresses how international attorney–client privilege standards are weighed when a conflict allows or requires disclosure in one country but is protected in another.¹⁰⁸

In *Renfield Corp. v. E. Remy Martin & Co.*,¹⁰⁹ a dispute over international discovery was settled by holding that if a protection privilege was recognized under either foreign or domestic law, parties were entitled to invoke it.¹¹⁰ The basis for such a conclusion rested upon a “functional-equivalence” test that looked to the training, skill, and certification of the attorneys in the foreign country.¹¹¹ By concluding that French in-house counsel

108. See *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 443–44 (D. Del. 1982) (concluding that if the attorney–client privilege is recognized in either country’s law, then the parties are able to invoke the privilege); cf. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316 RMB MHD, 2006 WL 3476735, at *17–18 (S.D.N.Y. Nov. 30, 2006) (holding that communications between a client and in-house counsel were not privileged where the law of either country in the dispute did not give rise to a privilege); *Honeywell, Inc. v. Minolta Camera Co.*, No. 87-4847, 1990 WL 66182, at *3 (D.N.J. May 15, 1990) (finding that because a foreign representative was not a de facto attorney, he could not invoke the attorney–client privilege).

109. *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982).

110. *Id.* at 444. The court based its reasoning on the Hague Evidence Convention documents and the documented intent of both France and the United States to create a privilege rather than limit one. *Id.* at 443 n.3.

111. *Id.* at 444. The court noted that the French organization of the legal profession is notably different from that of the United States. *Id.* There are “*avocats*” who are entitled to provide legal advice and appear in court, “*counsel juridique*” who may provide advice but not appear in court, and, finally, those with legal education who, by way of being employed by a corporation, cannot be *avocats* or *counsel juridique*. *Id.* Nevertheless, all three categories are competent and certified to provide legal advice. *Id.* The conflict with the above-described terminology may be due in part to the differences in attaining a legal education and becoming a licensed attorney between the United States and countries within the European Union. “Other than the United States, the legal curriculum in most jurisdictions is part of an undergraduate study. To be admitted to the bar in most countries, a supervised apprenticeship and passage of . . . [a] bar exam must follow this designated undergraduate course work.” Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 302 (2008) (quoting Louise L. Hill, *Disparate Positions on Confidentiality and Privilege Across National Boundaries Create Danger and Uncertainty for In-House Counsel and Their Clients*, in BNA CORPORATE PRACTICE SERIES: LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL 2 (2008)) (internal quotation marks omitted). Anello goes on to note that legal studies graduates who opt not to pursue an apprenticeship “may serve as in-house counsel, negotiating and interpreting contracts and advising on regulatory and liability issues[,] . . . [although] these individuals are not necessarily members of the bar” *Id.* Other commentators are critical of apprentice training, arguing that it “misses the mark” and cannot replace certain knowledge gained in graduate level law courses. Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 519 (1989).

were functionally equivalent to an American attorney in the rendition of legal advice, the communications were granted the benefit of the privilege.¹¹² If widely adopted, such a broad and mutual respect for the slightly different variations of the privilege could potentially double the ability to protect certain alleged confidential communications.¹¹³

Yet the functional-equivalence test suffers from a weak foundation. In comparing functionality between domestic and foreign attorneys, there is not a set template for the test, and courts must attempt to decipher an unfamiliar organizational structure of the legal profession in a foreign country. *Renfield* notes that a bar admission standard would be beneficial, but the foreign analog does not always neatly measure up.¹¹⁴ Thus, a long-term solution may be sought in creating and implementing a new transnational bar or professional association of in-house counsel that would mirror American bar associations while also asserting the independence of counsel necessary to ensure the protection of confidential communications from Commission investigations.

B. *A Transnational Standard for Professional Independence? Blocked by Akzo*

Looking toward a transnational association of in-house counsel, or at least a transnational standard for asserting professional independence, is appealing because such a creation would conform to the EU's desire for uniform application. The underlying regulations¹¹⁵ make unequivocally clear that they are to apply in a

112. See *Renfield*, 98 F.R.D. at 444 (explaining that "if a privilege is recognized by either French or United States law, the defendants may invoke it").

113. But see *Louis Vuitton Malletier*, 2006 WL 3476735, at *17 (admitting that *Renfield* has not been applied elsewhere); *Honeywell, Inc.*, 1990 WL 66182, at *2-3 (criticizing the *Renfield* analysis and pointing out that the Third Circuit has not officially adopted the functional-equivalence test, instead relying on the traditional attorney-client privilege test found in *United Shoe Machinery*).

114. See *Renfield*, 98 F.R.D. at 444 (acknowledging that "[b]ecause there is no clear French equivalent to the American 'bar' . . . membership in a 'bar' cannot be the relevant criterion").

115. Compare Commission Regulation 17/62, 1962 O.J. (13) 204 (EC), available at 1962 EUR-Lex CELEX LEXIS 31962R0017 (authorizing the Commission to exercise broad investigatory powers including unannounced inspections and massive document seizures), with Council Regulation 1/2003, 2003 O.J. (L 1) 1, 5 (EC), available at 2003 EUR-Lex CELEX LEXIS 32003R0001 (updating and slightly modifying the investigatory

uniform manner.¹¹⁶ Currently, making the privilege contingent upon membership of a local or statewide bar association or subscription to a national standard of legal ethics would result in two classes of in-house attorneys: those from countries where in-house attorneys are members of the bar and those from countries where in-house attorneys are not.¹¹⁷ A separate international association, however, could solve this bifurcation; yet, the concept is undercut severely by the recent decision of *Akzo Nobel Chemicals Ltd. v. Commission*.¹¹⁸

In mid-September of 2010, the European Court of Justice was presented with an opportunity to refine the transnational *AM & S* standard for the attorney–client privilege in corporate settings.¹¹⁹ In *Akzo*, the Court of Justice was presented with the key issue of “whether written communications between a Dutch-employed lawyer . . . who is a member of the Bar . . . and his employer[–] client are protected by the EU rule.”¹²⁰

powers of the Commission, the most novel or arguably invasive of which include the power to inspect the private property of corporate managers).

116. See Jonathan Faull, *In-House Lawyers and Legal Professional Privilege: A Problem Revisited*, 4 COLUM. J. EUR. L. 139, 142 (1998) (noting that the preamble of Regulation 17/62 appeals frequently “to the need for Articles 85 and 86 of the Treaty [of Rome] to be applied in a uniform manner, . . . specifically in relation to the Commission’s powers to undertake investigations” (citing Case 155/79, *AM & S Eur. Ltd. v. Comm’n*, 1982 E.C.R. 1575, 1610–12, available at 1982 EUR-Lex CELEX LEXIS 61979J0155)).

117. *Id.*; cf. Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 517–18 (1989) (suggesting that “[a] requirement of some reasonable period of study in the legal education system of a host country . . . would provide a useful assurance that the foreign lawyer has some specific knowledge in key areas of the host country’s law and in the statutory or case system and common research tools[.]” and thus be qualified for admittance into the local legal community).

118. Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX LEXIS 62007J0550 (Sept. 14, 2010).

119. The decision of the Court of First Instance may be found at the following citation: Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2007 E.C.R. II-3532, 3577, 3591, available at 2007 EUR-Lex CELEX LEXIS 62003A0125, *aff’d*, Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX LEXIS 62007J0550 (Sept. 14, 2010). The court reiterated the criterion of “full independence” and elaborated that the privilege only applies to a lawyer “who . . . is a third party in relation to the [corporation] receiving that advice.” *Id.*

120. Cleary Gottlieb Steen & Hamilton LLP, *The European Court of Justice Denies Professional Legal Privilege to Employed Lawyers*, CLEARY GOTTLIEB, 2 (Sept. 16, 2010), <http://www.cgsh.com/files/News/f64c51f6-858e-4761-865b-3bab6e7bc490/Presentation/NewsAttachment/f7b355f9-076a-4e9e-abc1-3ccd3c70d7f0/CGSH%20Alert%20-%20Akzo%20LPP.pdf>; see *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶¶ 14–15 (describing the general subject matter of the appeal).

Akzo and Akcros, the appellants, challenged the *AM & S* standard, arguing that independence cannot be interpreted to exclude in-house lawyers.¹²¹ The appellants based their argument on the premise that in-house counsel may be enrolled and bound by obligations of professional conduct and discipline in the same fashion as external lawyers.¹²² Numerous parties intervening on behalf of Akzo, Akcros, and the attorney–client privilege in general broadly supported this argument.¹²³ Even *Conseil des Barreaux Européen*, promulgators of the Code of Conduct for European Lawyers, the European equivalent to the ABA Model Rules of Professional Conduct, are of the impression that in-house counsel should be granted the protections of attorney–client privilege because the Code of Conduct for European Lawyers explicitly provides a provision for professional independence without distinguishing between in-house and outside counsel.¹²⁴

The Court of Justice, however, was not swayed by the appellants' reliance upon governing ethical standards and membership in a bar society as the sole criterion for establishing independence. Instead, the court focused primarily on the nature of the in-house lawyer's employment relationship as the impediment to

121. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 34.

122. *Id.*

123. *See id.* ¶¶ 6–13 (recounting the numerous interveners in the case on behalf of appellants, including the *Conseil des Barreaux Européen* (promulgators of the Code of Conduct for European Lawyers), the *Algemene Raad van de Nederlandse Orde van Advocaten* (Dutch Bar Association), the European Company Lawyers Association, the Association of Corporate Council–European Chapter, the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of the Netherlands). *See generally* Statement in Intervention for European Company Lawyers' Association in Support of Applicants, *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, available at http://www.ecla.org/wp-content/uploads/Statement_in_Intervention.pdf (providing far greater detail into the similarities of various national bar associations, and arguing that this should be the determinative factor in analyzing professional independence of in-house lawyers).

124. CODE OF CONDUCT FOR EUROPEAN LAWYERS art. 2.1.1 (2008). More explicitly, the Code provides that:

The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise . . . professional standards . . .

Id.; *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7–1.10 (2010) (mandating generalized behavioral rules to follow concerning potential conflicts of interest between past, present, and future conduct).

professional independence.¹²⁵ The court recounted the *AM & S* holding and deduced that “the requirement of independence means the absence of any employment relationship between the lawyer and his client.”¹²⁶ Advocate-General Kokott explained the nuances of the court’s stance on professional independence as being a two-pronged standard—not only positive, by way of compliance with professional ethics, but also negative, by the absence of an employment relationship.¹²⁷ The very nature of the in-house lawyer’s employment, working for a corporation, curtails the effectiveness of dealing “with any conflicts between his professional obligations and the aims of [the] client.”¹²⁸ According to the Court of Justice’s interpretation, the varied nature of exact services provided, the close ties that in-house counsel maintains with the business entity, and the counsel’s knowledge of commercial strategies negatively impact the attorney’s professional independence.¹²⁹

C. *An Opportunity to Reassert Criticisms*

Due to the recent nature of the Court of Justice’s *Akzo* opinion, there has been little opportunity for formal academic debate on the merits of the holding. However, by essentially reaffirming the *AM & S* opinion, many of the earlier critiques and criticisms still hold true. The most scathing of which lambasts the *Akzo* decision as “poorly reasoned and poorly supported[,]”¹³⁰ an unfortunate label with some truth.

According to *Akzo*, in-house counsel is less effective at dealing appropriately with conflicts between professional obligations and aims of the client.¹³¹ However, the court fails to clarify the point by suggesting in any specificity which “professional obligations”

125. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 44.

126. *Id.*

127. Opinion of Advocate General Kokott, Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX LEXIS 62007CC0550, ¶¶ 60–61 (Apr. 29, 2010); see *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 45 (adopting the reasoning of Advocate General Kokott as the court’s own).

128. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 45.

129. *Id.* ¶ 47.

130. Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), http://www.law.harvard.edu/programs/plp/pdf/European_Rejection_of_Attorney-Client_Privilege_for_Inside_Lawyers.pdf.

131. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 42.

would be placed at risk by in-house lawyers, as opposed to “independent” lawyers who must also serve the client.¹³² Consider, for example, the broad goal of a lawyer’s duty not to interfere with the administration of justice.¹³³ There is nothing to suggest that this task, and the obligation underlying a lawyer’s work, is any less important to those attorneys working in-house for a corporation than to those attorneys who work in private or “independent” firms.¹³⁴ Furthermore, the availability of sanctions is just as prevalent a risk for in-house attorneys as independent ones.¹³⁵

The conclusory nature of the most recent *Akzo* decision may be due in part to the fact that it affirmed the Court of First Instance’s original decision.¹³⁶ Regardless, both courts were so concerned

132. Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), http://www.law.harvard.edu/programs/plp/pdf/European_Rejection_of_Attorney-Client_Privilege_for_Inside_Lawyers.pdf.

133. See MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2010) (prohibiting a lawyer from engaging “in conduct that is prejudicial to the administration of justice”); see also CODE OF CONDUCT FOR EUROPEAN LAWYERS arts. 2.3.1, 2.5.1 (2006) (mandating that the duty of confidentiality is paramount to the administration of justice, and limiting incompatible occupations that may interfere with the proper administration of justice).

134. Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), http://www.law.harvard.edu/programs/plp/pdf/European_Rejection_of_Attorney-Client_Privilege_for_Inside_Lawyers.pdf.

135. See *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (holding that “retained counsel [and] in-house counsel are [both] officers of the court, are bound by the same Code of Professional Responsibility, and [both] are subject to the same sanctions”). The preamble of the ABA Model Rules of Professional Conduct notes that “a lawyer should be competent, prompt and diligent” in any and all professional functions. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 4 (2010). This would presumably include being the general counsel for a corporation. In the United States, attorneys may be sanctioned for official misconduct under Federal Rule of Civil Procedure 11, analogous state or local rules, or by the “inherent power” of the court. Gerald W. Heller, *Sanctioning Attorney Misconduct: Playing by the Rules*, FED. LAW., Jan. 1998, at 38, 38. Rule 11 requires attorneys to certify that an official filing is not presented for an improper purpose, is not frivolous, and is likely to be supported by evidence. FED. R. CIV. P. 11(b). A failure to comply with rule 11(b) may result in a sanction, monetary or otherwise, “limited to what suffices to deter repetition of the conduct or comparable conduct by others.” *Id.* R. 11(c)(4); see also Gerald W. Heller, *Sanctioning Attorney Misconduct: Playing by the Rules*, FED. LAW., Jan. 1998, at 38, 39 (observing that non-cooperative discovery practices are perhaps the most common basis for sanctions, and advising attorneys to consult local rules for the precise discovery limitations).

136. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶¶ 61, 108, 122, *aff’g* Joined Cases T-125/03 & T-253/03, 2007 E.C.R. II-3532, available at 2007 EUR-Lex CELEX LEXIS 62003A0125.

with improper uses of the privilege due to the integration of in-house counsel with their corporate employers¹³⁷ that they failed to grant any flexibility to the attorney–client privilege.¹³⁸ Indeed, it seems that if *Akzo* had consulted “independent” or outside counsel regarding the issue, the documents would likely be ruled privileged, and the present in-house crisis would not have arisen. Alternatively, application of some sort of functional equivalent of the underlying fact rule would have produced a similar result without denying the attorney–client privilege to in-house counsel working in the EU.¹³⁹ Applying such a doctrine to the facts of *Akzo*, the “manager’s notes taken during conversations with his staff would [remain] discoverable . . . even if the memorandum [later sent] to counsel . . . would not because [the manager’s] conversations with . . . staff were not a . . . privileged communication with a lawyer.”¹⁴⁰ Nevertheless, the Court of Justice overlooked such a practical consideration and denied the privilege entirely to in-house counsel.¹⁴¹

Another shortcoming of the *Akzo* decision is a reliance on “nation counting” for establishing a uniform transnational rule,

137. See *id.* (noting the “functional, structural[,] and hierarchical integration of in-house lawyers” and its impact upon the legal professional privilege).

138. *Contra* Eugene Skonicki, Current Development, *Building a Wall Where a Fence Will Do: A Critique of the European Union’s Denial of Attorney–Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045, 1057–58 (2008) (noting that in the United States, the privilege is more flexible in that it “protects only the content of the communication between privileged persons, not . . . the facts themselves” (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (2000)) (internal quotation marks omitted)).

139. *Id.* The underlying fact rule refers to the desire to permit discovery of underlying facts surrounding work product and other attorney–client communications when the facts may not be discovered through less intrusive means without undue hardship. FED. R. CIV. P. 26(b)(3). Comparatively, the Freedom of Information Act requires public agencies to disclose their business practices. Freedom of Information Act, 5 U.S.C. § 552(a) (2006). However, the Supreme Court has found that intra-agency “memoranda prepared by an attorney in contemplation of litigation which set forth the attorney’s theory of the case and his litigation strategy” is exempt from disclosure, as it clearly falls within the protective penumbra of the attorney–client privilege. *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). While these acts and cases are outside of the scope of this Comment, they nevertheless address interesting concerns for in-house counsel representing the government.

140. Eugene Skonicki, Current Development, *Building a Wall Where a Fence Will Do: A Critique of the European Union’s Denial of Attorney–Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045, 1058 (2008).

141. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007CJ0550, ¶ 122.

rather than reasoned analysis.¹⁴² The Court of Justice examined a comparison made by the Court of First Instance, which revealed that many member states excluded documentation from in-house attorneys from the privilege, and that in-house attorneys were not allowed admission to a bar society.¹⁴³ From this analysis, the Court of Justice concluded that “no predominant trend towards protection . . . within a company or group with in-house lawyers may be discerned” from simply tallying the privilege laws of the twenty-seven member states.¹⁴⁴ In the context of a growing and changing European Union, trend analysis offers no certainty or predictability because it fails to account for the possibility that member states may alter their own laws.¹⁴⁵ Ultimately, continued reliance on such trend analysis will necessitate continuous review and reapplication in the interest of uniformity, but at the expense of predictability.¹⁴⁶

Furthermore, there are criticisms of the privilege in a theoretical sense. Some believe that the underlying purpose of the attorney–client privilege does “not translate well [into] the corporate context.”¹⁴⁷ These critics argue that the element of secrecy is not possible for corporate entities comprised of multiple individuals, “but only in . . . personal exchange[s] between individuals.”¹⁴⁸ Though conceding that corporations are treated as persons for legal purposes,¹⁴⁹ opponents firmly maintain that

142. See Eugene Skonicki, Current Development, *Building a Wall Where a Fence Will Do: A Critique of the European Union's Denial of Attorney–Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045, 1053 (2008) (arguing that determining the independence of in-house attorneys by counting the standards of European Union member states leads to an unpredictable and unstable regime).

143. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶¶ 71–72 (citing Joined Cases T-125/03 R & T-253/03 R, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2007 E.C.R. II-3532, 3592, available at 2007 EUR-Lex CELEX LEXIS 62003A0125).

144. *Id.* ¶ 74.

145. See Eugene Skonicki, Current Development, *Building a Wall Where a Fence Will Do: A Critique of the European Union's Denial of Attorney–Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045, 1055 (2008) (concluding that “[a]lthough EU courts have buttressed their decisions as consistent with [the laws of member states], those principles are always contextualized by the particular country’s legal system, not that of the EU”).

146. *Id.* at 1056.

147. Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 300 (2008) (citing *Radiant Burners, Inc. v. Am. Gas Ass’n*, 207 F. Supp. 771, 775 (N.D. Ill. 1962), *rev’d*, 320 F.2d 314 (7th Cir. 1963)).

148. *Id.*

149. See, e.g., *Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 611 (S.D.N.Y.

corporations are not, in fact, persons.¹⁵⁰ Thus, critics argue that there is an identity disconnect in believing that personal confidentiality, required for the privilege, can easily transfer to a corporate client.¹⁵¹ Additionally, broad interpretations of privileges may dilute the truth-seeking function of a judicial system.¹⁵² The result is that, in claiming the privilege, “the cost of [the] potentially harmful information [shifts] from the client withholding . . . to the party harmed by the non-disclosure and the system in general.”¹⁵³

Returning to the nuances of the privilege in the EU, fears are also generated by the effects of the Court of Justice’s *Akzo* opinion.¹⁵⁴ As the hypothetical from the introduction illustrates, it is hardly farfetched to imagine a scenario where documents that one might expect to be confidential communications become subjected to disclosure, and how such documents could potentially be used as damaging evidence. One commentator, though, has defended the conclusions of the Court of Justice by distinguishing how attorneys in the United States and the EU define the privilege.¹⁵⁵ While *Akzo* may be a broad and bright-lined ruling on corporate attorney–client privilege, the decision may not serve as the herald for further encroachments upon an already fragile standard.

2010) (“[T]he law treats corporations as legal persons[,] not simply agents for shareholders” (citing *Primavera Familienstiftung v. Askin*, No. 95 Civ. 8905, 1996 WL 494904, at *9 (S.D.N.Y. Aug. 30, 1996)) (internal quotation marks omitted)).

150. Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney–Client Privilege*, 69 NOTRE DAME L. REV. 157, 186 (1993).

151. *Id.* at 192–98.

152. *Cf.* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 366 (1989) (cautioning that “[b]y encouraging client disclosure through secrecy guarantees,” clients are protected by the law from disclosing otherwise harmful information).

153. Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 301 (2008).

154. *See* Eugene Skonicki, Current Development, *Building a Wall Where a Fence Will Do: A Critique of the European Union’s Denial of Attorney–Client Privilege to In-House Counsel*, 21 GEO. J. LEGAL ETHICS 1045, 1046 (2008) (noting that the Court of Justice’s reasoning in the *Akzo* case could lead “to uncertainty in an area of law where the court seeks to promote reliance and predictability”).

155. *See generally* Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 FORDHAM INT’L L.J. 967 (2005) (distinguishing between “legal privilege” and “attorney–client privilege” as a means of rationalizing the Court of Justice’s *AM & S* decision).

D. *Re-evaluating the Scope of Akzo from a Linguistic Perspective*

Throughout this Comment, the terms “attorney–client privilege” and “in-house counsel” have been defined and utilized from a traditional American perspective.¹⁵⁶ Recall briefly the *Renfield* analysis, which wrestled with the various levels of French legal practice, the *avocats*, *conseil juridique*, and those precluded from being classified due to their employment by a corporation.¹⁵⁷ Perhaps the single greatest reason why the practice of law can become so complex so quickly is due to the precision demanded by the proper terminology.¹⁵⁸ A particular group of words or phrases that may seem similar, if not identical, to a lay-person could contain nuances that may make or break an attorney’s case.¹⁵⁹ There are distinctions between legal practice in the United States and the EU, or a particular member state, which must be explored so that the *Akzo* decision may be properly understood from a definitional perspective. One such distinction,

156. See Jerold S. Solovy et al., *Protecting Confidential Legal Information*, in 675 PRACTICING LAW INSTITUTE: LITIGATION & ADMINISTRATIVE PRACTICE HANDBOOK 7 § B(1)(b)(1), (4) (2002) (defining organizational clients and summarizing how individual states define them, generally in accordance with *Upjohn*). Generally, in-house counsel may enjoy the same attorney–client privilege protections as outside counsel, but there are exceptions. *Id.* § B(2)(a).

157. *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 444 (D. Del. 1982). The differences between the nomenclature of legal professionals in other countries and what obligations and privileges may attach are illustrative of another concern dealing with international corporate attorney–client privilege: language barriers. See Martine A. Petetin & Willard K. Tom, *European Commission Hostility to Attorney–Client Privilege Creates Trap for Unwary*, 20 No. 6 ACCA DOCKET 74, 84 (2002) (observing that the current state of the attorney–client privilege in the European Union discourages the dissemination of useful information, and the reduction of said information to writing oftentimes exacerbates communication barriers if all parties are not corresponding in the same language).

158. See Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT’L L.J. 967, 974 (2005) (commenting on the fact that “[t]he different scope, nature, and legal effects of confidentiality obligations and evidentiary privileges can be illustrated by examples taken from virtually every jurisdiction”).

159. For example, consider the distinction between an act with knowledge and an act with intent. Though an elementary legal distinction, a layperson may easily conclude that if one knew what he was doing, then he must have intended to do it. However, in Texas, acting with knowledge refers to an awareness of the actor’s conduct, or that certain circumstances exist. TEX. PENAL CODE ANN. § 6.03(b) (West 2011). Acting with intent occurs when a person has the “conscious objective or desire to engage in the conduct or cause the result.” *Id.* § 6.03(a).

as offered by formidable authority,¹⁶⁰ attempts to temper the stinging nature of the *AM & S* and *Akzo* decisions to a more easily accepted potency.

Eric Gippini-Fournier defines the “legal privilege” as “a rule of law according to which certain lawyer–client communications cannot be subject to compelled disclosure in legal proceedings,’ and ‘[i]f disclosed against the will of the client... [the communications] [will be] inadmissible as evidence in the proceedings[.]” whether they be judicial or administrative, such as the European Commission’s power to compel production of documents.¹⁶¹ Notably absent from this definition are any clarifications on the meaning of “lawyer–client communications,” or even on the meaning of “lawyer.” From this absence, however, Gippini-Fournier’s critical distinction emerges. This austere and minimalistic definition serves to roughly delineate the legal privilege as a concept distinguishable “from [the closely] related rules governing the confidentiality of communications between lawyer and client.”¹⁶² The related rules of confidentiality are by and large governed directly by national law and the Code of Conduct for European Lawyers, and are only indirectly affected by the supranational opinions of the Court of Justice.¹⁶³ This

160. See Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 *FORDHAM INT’L L.J.* 967, 967 n.* (2005) (establishing the credibility of the author to comment on the European Commission’s understanding of the assertion of privileges to protect evidence). Gippini-Fournier worked with the European Commission in an official capacity and clerked for the European Court of Justice, though not while the cases he discusses were being decided. *Id.*

161. *Id.* at 970–71.

162. *Id.* at 972.

163. *Id.* at 971–72; see CODE OF CONDUCT FOR EUROPEAN LAWYERS art. 2.3 (2006) (establishing and fleshing out confidentiality as a general principle of European legal practice). More specifically, the Code of Conduct for European Lawyers provides:

It is of the essence of a lawyer’s function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality[,] there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the [member] [s]tate.

CODE OF CONDUCT FOR EUROPEAN LAWYERS art. 2.3.1 (2006); see also JONATHAN AUBURN, *LEGAL PROFESSIONAL PRIVILEGE—LAW AND THEORY* 1 (2000) (noting that the privilege “is sometimes driven by goals which are slightly different from these other rules”); Charles W. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an*

distinction is particularly helpful because when the Court of Justice issues an opinion defining the scope of legal privilege in Commission investigation cases,¹⁶⁴ it is only speaking to the compellability and admissibility of the seized documents and not the scope of any obligation an attorney may have relating to confidentiality.¹⁶⁵ Thus, Gippini-Fournier advocates that his definitional distinction between privilege and confidentiality helps to limit the impact of *AM & S* and *Akzo* on the corporate attorney–client privilege.¹⁶⁶

However, defining terminology with vagueness, while depending upon the definitions for academic pursuits, is not a generally accepted way of establishing a major distinction between theories in the legal field.¹⁶⁷ Though the Court of Justice in *Akzo* may have only ruled on the admissibility and compellability of documents to be used as evidence and not the scope of any confidentiality duties,¹⁶⁸ United States Supreme Court cases, like *Upjohn*, accomplish the same without separating the attorney–client privilege from the broader concept of

International Perspective, 15 FORDHAM INT'L L.J. 529, 544–46 (1992) (describing how breaches of confidentiality may result in a private action against the attorney, and such suits are based on “the agency law of confidentiality”).

164. *E.g.*, Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 44 (Sept. 14, 2010) (reinforcing the interpretation that the attorney–client privilege does not apply to communications from in-house counsel).

165. Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT'L L.J. 967, 972–73 (2005).

166. *Id.* at 974–75.

167. *See generally* AUSTIN J. FREELEY & DAVID L. STEINBERG, ARGUMENTATION AND DEBATE: CRITICAL THINKING FOR REASONED DECISION MAKING 61 (Monica Eckman et al. eds., 12th ed. 2009) (instructing that defining terms is an essential foundational point for any debate). Arguably, in the grand scheme of legal academic writings, agreeing on standard definitions is essential for the advancement and development of legal theories. While Gippini-Fournier does define “legal privilege” for his own purpose, the definition’s incomplete nature leaves gaps in his argument. *See* Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT'L L.J. 967, 972 (2005) (laying out his definition for the purpose of his paper, and admitting that it is indeed austere).

168. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶ 42; *see also* Case 155/79, *AM & S Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575, 1612, *available at* 1982 EUR-Lex CELEX LEXIS 61979J0155 (limiting the scope of the privilege by requiring that it apply only to those attorneys who qualify as “independent,” or in other words, free from the fetters of an employment relationship).

confidentiality.¹⁶⁹ So, while Gippini-Fournier may have set out to alleviate in-house counsel fears, little solace may be taken from attempting to distinguish “legal privilege” from “attorney–client privilege” when considering whether certain communications emanating from the legal department will be privileged.¹⁷⁰

In the similar vein of linguistic nuances, the language barrier poses a potential problem in a case involving in-house counsel both in the United States and the EU.¹⁷¹ While English is listed as an official language of the EU, twenty-two others are as well.¹⁷² As a result of such a potentially diverse language of business, it seems imperative that complex information is reduced to writing to ensure accurate communications through more precise translations.¹⁷³ However, given the current status of the corporate attorney–client privilege at the EU level, “in-house counsel must pay attention to . . . the possibility that material in question may be subject to seizure and to being used” as

169. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (detailing that the purpose of the attorney–client privilege is to provide the client an opportunity for full and frank disclosure, including confidential information, so that the attorney may best perform his duties).

170. Admittedly, Gippini-Fournier points out that *AM & S* and *Akzo* do not directly control admissibility of evidence in European national court systems. Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 *FORDHAM INT’L L.J.* 967, 972. (2005). The Court of Justice’s decisions may be influential on the standard applicable in the respective national courts of member states. *Id.*

171. Cf. Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TUL. L. REV.* 443, 451 (1989) (asserting that Americans have been known to commonly assume that a foreign attorney or businessman would speak English proficiently enough to conduct complex business actions).

172. See *Official EU Languages*, EUROPA (Aug. 8, 2011), http://ec.europa.eu/languages/languages-of-europe/eu-languages_en.htm (listing Bulgarian, Czech, Danish, Dutch, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, and Swedish as official languages of the EU, in addition to English). The certification as an “official and working” language of the European Union entails that correspondence sent to any supranational institution will be replied to in that same official language, and that all legislative documents and the Official Journal, will be published in each of the twenty-three languages. *Id.*

173. See John Blenkinsopp & Maryam Shademan Pajouh, *Lost in Translation? Culture, Language and the Role of the Translator in International Business*, 6 *CRITICAL PERSP. ON INT’L BUS.* 1, 3–4 (2005), available at <http://tees.openrepository.com/tees/bitstream/10149/95649/2/95649.pdf> (providing examples of certain translations that show the difficulties of “cross cultural communications”).

evidence.¹⁷⁴ The risk of a potentially damaging result under this current system encourages in-house attorneys to resort to hedged assertiveness in their communications, “even at some cost in clarity and effectiveness.”¹⁷⁵

IV. WORKING UNDER THE PRECEDENT

The necessity of legal advice in complex corporate business actions, coupled with the lack of attorney–client privilege for in-house counsel within the EU, yields a dilemma from a practical perspective. The final section of this Comment will outline some practical actions for in-house attorneys to maximize the chances of preserving the privilege, and also provide some judicial possibilities that may prevent the attorney–client privilege from being waived in a corollary case filed in the United States.

A. *Practical Considerations for In-House Counsel*

Akzo has essentially left in-house counsel out in the cold, unable to assert the attorney–client privilege. The “independence” requirement and fundamental distrust of the employer–employee relationship could serve as the death knell for full time in-house legal staff, especially for smaller corporations. Indeed, it may be that corporations operating within the jurisdictional confines of the EU shift to almost exclusively relying on outside “independent” counsel to handle their legal concerns.¹⁷⁶

However, proper structuring of a legal department may lend some defense to allegations that in-house counsel is not sufficiently independent. “[G]eneral counsel should carefully consider the structure of the legal department and evaluate whether the department’s organization is optimal for serving the client’s legal needs.”¹⁷⁷ Ideally, the legal department should be partially

174. Martine A. Petetin & Willard K. Tom, *European Commission Hostility to Attorney–Client Privilege Creates Trap for Unwary*, 20 NO. 6 ACCA DOCKET 74, 88 (2002).

175. *Id.*

176. *Cf. European Limitations on Attorney–Client Privilege for Inside Counsel–Akzo Nobel Chemicals & Akros Chemicals–ECJ Case C-550/07 P*, DORSEY & WHITNEY LLP (Sept. 16, 2010), http://www.dorsey.com/eu_lit_akzonobel_091610/ (stating that “the [*Akzo*] decision may well *encourage* regulators to seek production . . . of communications from in-house legal departments” (emphasis added)).

177. E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 33

centralized. The partial centralization can be satisfied by a general counsel who would serve primarily as an administrator, as a liaison between the legal community and the corporation, and as a go-to team of attorneys not associated with the company.¹⁷⁸ The general counsel also serves to “back up’ the independence” of other attorneys.¹⁷⁹ Outside lawyers, who have more opportunity to develop a specialty, can be used in conjunction with the general counsel to achieve a solution or to provide advice concerning a specific problem.¹⁸⁰ This hierarchical structure and increased consultation with outside lawyers enables the general counsel to ensure that professional independence is maintained.¹⁸¹ However, “the best organizational solution will often be determined only after experimentation with several work[-] allocation and attorney assignment strategies,”¹⁸² leaving small and mid-sized corporations unable to bear the financial burden of continued restructuring of their legal departments. Thus, other considerations should also be examined.

In general, for corporations that may not have the means to experiment with various legal department structures, the best approach is to keep attorney–client communications simple and clearly assert the privilege when necessary. On one extreme end of the spectrum, there is the option of limiting communications with the corporate leaders to strictly oral communications.¹⁸³ However, such an austere measure would be not only impractical but also horrifically inefficient.¹⁸⁴ More realistically, exclusive reliance on oral communication should be used to identify issues

(2006).

178. *See id.* at 34 (explaining that the general counsel’s duties include managing tenure, compensation, and assignments for subordinate lawyers and outside counsel).

179. *Id.*

180. *See id.* at 33–34 (discussing how an individual or team of lawyers is assigned a single complex deal by corporate managers who are compartmentalizing legal work because of a desire to seek particular legal expertise).

181. *See id.* at 35 (explaining how general counsel must stand up for outside attorneys in order to maintain their professional independence).

182. *Id.* (quoting Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1149 (1997)).

183. Martine A. Petetin & Willard K. Tom, *European Commission Hostility to Attorney–Client Privilege Creates Trap for Unwary*, 20 NO. 6 ACCA DOCKET 74, 88 (2002).

184. *See id.* (identifying “[r]educed efficiency and increased costs” as problems to be coped with under the current state of the privilege, but a strict ban on writings would be impractical due to language barriers).

initially, and then should only be resorted to for discussion of “things that are best not said in writing.”¹⁸⁵ A more functional middle ground can be found by carefully drafting communications, using simple language, and narrowing circulation.¹⁸⁶ Indeed, the tendency to formulate elaborate and complex communications, full of overlapping boilerplate clauses, should be eschewed for simpler communications that may be more readily translated and interpreted by other parties.¹⁸⁷ Additionally, any communications for which the privilege would be asserted should be clearly marked with the label “CONFIDENTIAL ATTORNEY–CLIENT COMMUNICATION,” so that objectively, the privilege is asserted from the initial drafting.¹⁸⁸ Ultimately, it may behoove in-house counsel to essentially operate with the assumption that a worst-case scenario would result. By curtailing the written correspondence to exclude information that would be especially helpful to a European Commission investigation, the effects of *AM & S* and *Akzo* can be minimized.¹⁸⁹

185. See *id.* at 89 (proposing that sometimes individuals prefer not to put certain matters into writing out of fear of adverse consequences, such as the writing being used against them in an investigation).

186. See *id.* at 88 (suggesting that as an additional safeguard, the communications should be circulated only between the corporation, the legal department, and an independent firm); cf. *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992) (noting that “any communications touching base with the United States will be governed by the federal discovery rules . . .” (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1169–70 (D.S.C. 1975)) (internal quotation marks omitted)).

187. See Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 449–50 (1989) (commenting that many lawyers who draft such complex agreements take a sense of personal pride in their complexity, but lower echelon attorneys and businessmen may have problems interpreting such complexity).

188. See J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT’L LAW. 35, 53 (2004) (advising attorneys to label written reports “Privileged Attorney–Client Communication” or “Privileged Work Product of Attorney” to establish an aggressive invocation of the privilege). *But see* Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney–Client Privilege: A Re-examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1, 29–32 (2008) (asserting that a harmonized approach to the attorney–client privilege should draw a distinction between pre- and post-dispute communications, and that only those communications prepared post-dispute would be eligible for protection by the privilege).

189. See Martine A. Petetin & Willard K. Tom, *European Commission Hostility to Attorney–Client Privilege Creates Trap for Unwary*, 20 NO. 6 ACCA DOCKET 74, 88 (2002) (suggesting such a mindset and drafting maneuver as a relevant consideration under the assumption that the privilege will ultimately not attach to documents produced

B. *Judicial Options for United States Corollary Cases*

Aside from making certain modifications to the organization and practices of a corporation's EU legal department, there is still the possibility that a parallel proceeding in the United States could take place as a result of a Commission investigation. The inapplicability of the privilege in an EU proceeding could be interpreted as a waiver of the privilege in a corollary case in the United States. This subsection briefly discusses some arguments that could be raised before a United States court in an effort to preserve the attorney-client privilege.

Generally, "voluntary disclosure coupled with intent to waive a privilege" is the accepted definition of waiver.¹⁹⁰ However, one court has alluded to the use of waiver to actually engender different specific problems.¹⁹¹ Nevertheless, a transnational corporation deprived of the attorney-client privilege in the EU proceeding may have success arguing that the disclosure was involuntary¹⁹² and by arguing for the application of the doctrine of selective waiver.¹⁹³ The concept of selective waiver¹⁹³ was

by in-house counsel).

190. Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 255 (2008) (claiming this is the "universally" accepted definition of waiver (citing 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE 418 n.4 (6th ed. 2006))); see *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (explaining that a voluntary disclosure waives the privilege (citing *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989))).

191. See *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997) (listing "express and voluntary surrender of the privilege, partial disclosure of a privileged document, selective disclosure to some outsiders[,] . . . and inadvertent overhearing or disclosures" as various problems generally referred to as a waiver).

192. See Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client Privilege: A Re-examination of the Privilege and a Proposal for Harmonization*, 76 TENN. L. REV. 1, 26-27 (2008) (noting that in a case where twenty defendants each argued that disclosure of privileged material was compelled, only one instance of compulsion was found (citing *In re Vitamin Antitrust Litig.*, Misc. No. 99-197 (TFH), MDL No. 1285, 2002 U.S. Dist. LEXIS 26490, at *105 (D.D.C. Jan. 23, 2002))). Cummings goes on to argue that the *In re Vitamin* opinion may suggest that compelled disclosure to a foreign government must be supported with "adequate proof that a severe and definite penalty would be levied" on the company for failing to comply with the demand. *Id.* at 27-28.

193. See Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 258 n.144 (2008) (differentiating between selective waiver and limited waiver, the latter of which may refer to a partial waiver, and the former being defined as a waiver that "permits the client who has disclosed privileged communications to one party to continue asserting the

created in *Diversified Industries, Inc. v. Meredith*,¹⁹⁴ albeit briefly.¹⁹⁵ In an effort to encourage open communications between corporations and their attorneys, the court held that the privilege applied despite a previous disclosure pursuant to a government investigation.¹⁹⁶ In a single paragraph the court stated that because “*Diversified* disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred.”¹⁹⁷ In most other scenarios, the majority of circuits have refused to adopt the concept of selective waiver.¹⁹⁸ The D.C. Circuit refused to distinguish between keeping communications confidential from the request of a private litigant and the request of a government agency.¹⁹⁹ The court continued by concluding that a client may not “pick and choose” to waive the privilege in one case, and then renew the privilege in another once confidentiality has already been compromised.²⁰⁰ Likewise, the First, Second, Third, Fourth, Sixth and Tenth Circuits have used similar reasoning to concur with the D.C. Circuit.²⁰¹

privilege against other parties” (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991)) (citation omitted)).

194. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

195. *See id.* at 611 (concluding that only a limited waiver of the attorney–client privilege occurred (citing *Bucks Cnty. Bank & Trust Co. v. Storck*, 297 F. Supp. 1122, 1123 (D. Haw. 1969))).

196. Stephen A. Calhoun, Note, *Globalization’s Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 259 (2008) (citing *Diversified*, 572 F.2d at 611).

197. *Diversified*, 572 F.2d at 611.

198. *See* Stephen A. Calhoun, Note, *Globalization’s Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 259 (2008) (explaining that to the extent that the concept of selective waiver was applied in *Diversified*, no other circuit court and only a few federal district courts have adopted the broad exception of selective waiver).

199. *See Permian Corp. v. Unites States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (refusing to allow the petitioner to provide “privileged” information to one entity while relying on attorney–client privilege to refuse access to the same information to another entity).

200. *Compare id.* (refusing to extend the doctrine of “limited waiver” as applied in *Diversified*), with *Diversified*, 572 F.2d at 611 (applying a “limited waiver” to uphold an attorney–client privilege).

201. *See In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1191, 1192 (10th Cir. 2006) (considering the purposes of the attorney–client privilege and the opinions of other courts in choosing not to adopt the doctrine of selective waiver); *see also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302 (6th Cir. 2002) (criticizing selective waiver as another tool that attorneys may manipulate “to gain tactical or

However, under the appropriate circumstances, the concept of selective waiver is not totally foreclosed. In 2008, Congress passed Federal Rule of Evidence 502, which codifies some limitations on waiver of the attorney–client privilege.²⁰² Rule 502 states that “[w]hen the disclosure is made . . . to a [f]ederal office or agency . . . the waiver extends to an undisclosed communication or information in a [f]ederal or [s]tate proceeding only if . . . the waiver is intentional.”²⁰³ At least one court has interpreted Rule 502 to mean that there is no waiver “when the disclosure occurs in a federal proceeding”²⁰⁴ Thus, it is a logical connection of the law to contend that a disclosure made in an official investigation by the European Commission is comparable to a disclosure in a United States federal proceeding. However, the language of Rule 502 does not seem to endorse selective waiver.²⁰⁵ While it appears that attorney–client privilege will be preserved for inadvertent disclosures in response to a government

strategic advantage” (quoting *In re Steinhardt Partners*, 9 F.3d 230, 235 (2d Cir. 1993)) (internal quotation marks omitted); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997) (reasoning that “[a]nyone who chooses to disclose a privileged document . . . has an incentive to do so, whether for gain or to avoid disadvantage”); *Westinghouse Elec., Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) (attacking selective waiver explicitly in that “it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose”); *In re Martin Marietta Corp.*, 856 F.2d 619, 623–24 (4th Cir. 1988) (“The Fourth Circuit has not embraced the concept of limited waiver of the attorney[–]client privilege.”); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (“A claim that a need for confidentiality must be respected . . . is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.”). Nevertheless, commentators have argued that the rationales for rejecting selective waiver are not as applicable in the context of disclosures abroad. “Applying selective waiver in those situations will allow the question of privilege in U.S. courts to be dictated by U.S. rules as opposed to those of [the European Union].” Stephen A. Calhoun, Note, *Globalization’s Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 261 (2008).

202. See Lisa C. Wood & Ara B. Gershengorn, *Rule 502: Does It Deliver on Its Promise?*, 24 ANTITRUST 84, 84 (2010) (stating that Rule 502 was enacted in 2008 and explaining the basics of the rule); see also Robert J. Anello, *Preserving the Corporate Attorney–Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 297 n.33 (2008) (describing the enactment of Rule 502 in 2008).

203. FED. R. EVID. 502.

204. *Soc’y of Prof’l Eng’g Emps. in Aerospace v. Boeing Co.*, Nos. 05-1251-MLB, 07-1043-MLB, 2010 WL 1141269, at *5 (D. Kan. Mar. 22, 2010).

205. See Lisa C. Wood & Ara B. Gershengorn, *Rule 502: Does It Deliver on Its Promise?*, 24 ANTITRUST 84, 87 (2010) (admitting that there was “hope that Rule 502 might endorse selective waiver Congress, however, declined to address this issue in the rule”).

investigation, intentional disclosures may likely still be treated as waiver of the privilege.²⁰⁶

Thus, at this point, the debate for parallel cases in the United States becomes whether complying with the European Commission's broad investigatory power amounts to an intentional disclosure laid out in Rule 502—a debate that will have to be resolved judicially.²⁰⁷ Before a resolution is reached, corporations should attempt to formulate agreements with the investigating agency so that the documents may be returned to the corporation without the privilege being deemed waived in the United States.²⁰⁸ Additionally, corporations may find it beneficial to seek protective orders in the United States to ensure the return of the documents seized by the European Commission and retain grounds for asserting the privilege.²⁰⁹

V. CONCLUSION

The European interpretation of the attorney–client privilege will most likely remain the status quo for years to come.²¹⁰ Consequently, a method for providing knowledgeable and efficient legal advice to business entities operating within the EU will have to adapt to the dramatic alteration of an important privilege. For corporations operating on both sides of the Atlantic Ocean, there

206. *See id.* (stating that Rule 502 does not protect against waiver when the documents at issue are deemed to be an intentional disclosure, as compared to an inadvertent disclosure).

207. One commentator has pondered the problem of disclosure and suggests that compliance with foreign disclosure requirements would not be intentional. *See* Stephen A. Calhoun, Note, *Globalization's Erosion of the Attorney–Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX. L. REV. 235, 262 (2008) (arguing that application of selective waiver in such scenarios “simply allow[s] the party to assert a privilege equal in scope to that enjoyed by a . . . corporation acting wholly within the United States”).

208. *Cf.* Lisa C. Wood & Ara B. Gershengorn, *Rule 502: Does It Deliver on Its Promise?*, 24 ANTITRUST 84, 87 (2010) (suggesting an agreement between a party and an investigating agency or government as a possible solution to preventing total waiver in strictly U.S. cases).

209. *Cf. id.* at 85 (noting that obtaining a protective order is an effective method for maximizing the protection of Rule 502 at the outset of litigation).

210. The *AM & S* decision was delivered in 1982, and the scope of the attorney–client privilege was not addressed again for nearly thirty years until *Akzo* in 2010. Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX LEXIS 62007J0550 (Sept. 14, 2010); *see* Case 155/79, *AM & S Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575, available at 1982 EUR-Lex CELEX LEXIS 61979J0155 (addressing attorney–client privilege).

appears little value in maintaining large in-house legal departments in any European offices. In light of *Akzo* in September of 2010, if a corporation is able to bear the costs of hiring independent attorneys, it should do so, as this is currently the safest way to ensure the applicability of the attorney–client privilege.²¹¹ For the in-house counsel stateside, this most likely will translate into increased cooperation with independent international law firms to handle a growing proportion of legal work accruing in the EU.

As Justice Cardozo described, the process of modifying the law is a gradual one.²¹² “It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and pressure of the moving glacier.”²¹³ The laws governing attorney–client privilege are by no means an exception. In fact, the more fundamental a legal concept is, the more massive and slower the metaphorical glacier. Despite the criticism, *Akzo* is the law and has severely limited the scope of the attorney–client privilege.²¹⁴ Undoubtedly, legal groups such as the ABA and *Conseil des Barreaux Européen* will continue their advocacy efforts on the European front to reshape the scope of the attorney–client privilege, but any major change in the stance of the Court of Justice seems far off at the present time. Meanwhile, in the United States, the extent that *Akzo* will impact the attorney–client privilege in corollary cases will soon become apparent. While always striving to promote completely candid communications between legal advisors and business entities, all in-house attorneys who have professional relationships within the EU should prepare for the worst and expect a restructuring of their positions as business oriented legal advisors.

211. *See Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶¶ 62–108 (stressing the importance of independence between the attorney and the client, and stating that an employment relationship, such as that of in-house counsel, will destroy the attorney–client privilege because such a privilege does not protect exchanges within a company with in-house lawyers).

212. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 24 (1921).

213. *Id.*

214. *Akzo*, 2010 EUR-Lex CELEX LEXIS 62007J0550, ¶¶ 61, 108, 122.

