Will Globalization be the Death Knell for the Corporate Attorney-Client Privilege in the U.S.? An Opportunity to Re-Examine the Privilege as it Applies to In-House Counsel

Lawton P Cummings
Abstract: Increasingly, enforcement authorities from around the world are engaging in multinational cooperation to investigate and prosecute companies suspected of competition law violations. While corporate investigations have globalized, privilege rules remain localized. While the U.S. recognizes the attorney-client privilege for communications with in-house counsel, several jurisdictions that cooperate with the U.S. in multi-national investigations do not recognize the privilege for such communications. This results in identical evidence receiving unequal privilege status in parallel proceedings around the globe. Currently, the U.S. is more protective of communications with in-house counsel than many other jurisdictions, disadvantaging U.S. prosecuting authorities as well as civil plaintiffs in the U.S., relative to their counterparts around the globe. Given the lack of evidence that the privilege as it applies to communications with in-house counsel is necessary to achieve corporate compliance, U.S. courts should abolish the privilege as it applies to in-house counsel.

The ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

--Justice Oliver Wendell Holmes, Jr. 2

1 Visiting Associate Professor of Law, George Washington University Law School; Assistant Professor of Law, Washington and Lee University School of Law. This Article was written with the assistance of a grant from the Frances Lewis Law Center at Washington and Lee University School of Law and was presented at the Southeastern Association of Law Schools New Scholar Workshop. I would like to thank my co-panelists at the 2008 American Bar Association Annual Antitrust Meeting in Washington, D.C., conversations with whom inspired me to write this Article. I would also like to thank Professors Thomas D. Morgan, Bruce Green, Richard E. Myers, II, Lyman P. Q. Johnson, David Millon, and Mark H. Grunewald who provided valuable insights and comments on drafts of this Article. Thanks also to my research assistants Joshua Cannon, Aurora Kaiser, and Sarah Mielke. Finally, my utmost gratitude to Craig, Addison, and Cooper Cummings, whose constant support make all of my endeavors possible.

2 Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).
I. INTRODUCTION

It’s a whole new world for corporate investigations: corporate investigations have “globalized.” Several years ago, when the United States (“U.S.”) Department of Justice “began detecting international cartels,” foreign jurisdictions generally refused to respond to the U.S.’s foreign assistance requests. However, in the past several years, “multinational cooperation has made a 180-degree turn.” This “sea change” in multinational cooperation has resulted in multiple jurisdictions around the globe cooperating to investigate suspected competition law violations, share information regarding the target companies, and pursue parallel litigation against those companies. For example, in one recent high-profile example of cooperation among jurisdictions, authorities in the U.S., the European Union (“E.U.”), Japan, Korea, Canada, and several E.U. member states, cooperated to investigate possible competition law violations by various companies within the air cargo industry by coordinating surprise investigations and


4 The U.S. federal criminal law directed at cartel activity, the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7, does not define the term “cartel.” However, federal case law has interpreted the term as “a combination of producers or sellers that join together to control a product's production or price.” Freedom Holdings, Inc. v. Spitzer, 447 F.Supp.2d 230, 251 (S.D.N.Y. 2004). The Department of Justice provides additional support for this definition, see the Antitrust Division’s policy speeches located at http://www.usdoj.gov/atr/public/speeches/speech_criminal.htm , as does the International Competition Network, see http://www.internationalcompetitionnetwork.org/media/archive0611/cartels/USTemplateResponse.pdf (“collusive agreements among horizontal competitors to fix prices, rig bids or allocate markets.”).

5 See id.

6 See id.

7 See Hammond Remarks 2006 (describing the “sea change in international cooperation,” which has caused the “fight against cartels [to become] globalized”).
subpoena deliveries at various business locations around the world on a pre-determined schedule that “followed the sun,” and was completed within an 18-hour period.⁸

While corporate investigations have globalized, privilege rules remain localized. While the U.S. recognizes the attorney-client privilege for communications with in-house counsel,⁹ several jurisdictions that cooperate with the U.S. in multi-national investigations, such as Japan,¹⁰ France,¹¹ and the European Union,¹² do not recognize the privilege for such communications. This results in identical evidence receiving un-equal privilege status in parallel proceedings around the globe.

Currently, the U.S. is more protective of communications with in-house counsel than many other jurisdictions, disadvantaging U.S. prosecuting authorities as well as civil plaintiffs in the U.S., relative to their counterparts around the globe. This article re-considers the corporate

---


⁹ See Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981) (holding that under federal common law, the corporate attorney-client privilege is applicable to communications between corporate employees and corporate in-house attorney).


¹² Joined Cases T-125/03 & T-253/03, Akzo Nobel Chemicals and Akross Chemicals v. Comm’n, 2007 O.J. (C 269) 43, at ¶ 166 (Sept. 17, 2007) (ruling on the privileged status of documents seized in the course of a surprise morning investigation in England, and holding that communications between company executives and their in-house counsel were not privileged, because in-house counsel are not independent of their employers).
attorney-client privilege in the U.S. and argues that U.S. courts should abolish the privilege as it applies to communications with in-house counsel.

Part II of this article will provide an overview of the history and rationales supporting the corporate attorney-client privilege rules in the U.S.. Part III will demonstrate that evidence seized in multi-national corporate investigations may be used more liberally by foreign jurisdictions than it may be used under the current U.S. privilege rules. Part IV argues that the attorney-client privilege should be abolished as it applies to communications with in-house counsel. Part V concludes the article.

II. THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IN THE U.S.

A. Theoretical Justifications for the Privilege

The attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law,”13 dating back at least to the Sixteenth Century.14 The privilege applies (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relat[e] to that purpose, (4)[were] made in confidence, (5) by the client, [(6)] except the protection be waived.”15 While this definition describes communications flowing from a client to an attorney, the attorney-client privilege

---

13 See Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that under federal common law, the corporate attorney-client privilege is not limited to communications between an attorney and the “control group” of the corporation, id. at 389, and that communications between the corporate attorney and employees at lower levels of the corporate hierarchy are also eligible for protection) (citing Hogan v. Zletz, 43 F.R.D. 308, 315-316 (N.D. Okl. 1967)).


15 See id. at 554.
protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”

Because the attorney-client privilege impedes the search for the truth and “contravene(s) the fundamental principle that the public has a right to every man’s evidence,” it is “construed narrowly.” Originally, the attorney-client privilege belonged to the attorney and was justified as “a privilege designed to protect a gentleman of honor from being forced to compromise his integrity.” However, by the eighteenth century, “the privilege began to shift from the attorney to the client.”

Utilitarian rationales, which do not focus on whether an individual action is morally correct, but rather on whether the consequence “bring[s] greater happiness to a greater number of individuals,” are most often cited by the Supreme Court to justify the attorney-client privilege.

---

16 Upjohn, 449 U.S. at 389-90.


18 See, e.g., Trammel v. United States, 445 U.S. 40, 50 (stating that testimonial exclusionary rules and privileges “must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’” (quoting Elkins v. United States 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))); Fisher v. United States, 425 U.S. 391, 403 (1976) (“[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.”)); Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991) (“Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly.”)); 8 Wigmore, supra note 19, at 554 (stating that the attorney-client privilege should be “strictly confined within the narrowest possible limits consistent with the logic of its principle.”).


20 Rosenfeld, supra note 24, at 496.

21 Id. at 507.
As early as 1888, the Court explained that the privilege is “founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or apprehension of disclosure.”22

While non-instrumental rationales have also been offered for the attorney-client privilege in the individual client context, rights-based rationales are not generally offered and have never been accepted in the corporate context.23 Rather, in *Upjohn Co. v. United States*,24 the seminal case affirming the corporate attorney-client privilege, Justice Rehnquist cited a utilitarian justification for the corporate attorney-client privilege, explaining that the purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”25 The *Upjohn* Court stressed the importance of the corporate attorney-client privilege to assure corporate compliance with the law, stating that “[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law.’”26

---


25 *Id.* at 389. *See also Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985) (“[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice.”).

Court’s assumption that corporate clients would not be forthcoming without the privilege, Justice Rehnquist stated that “[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”

**B. An Uncertain Privilege**

The “attorney-client privilege’s utilitarian rationale depends on the certainty of the rule,” because as Justice Rehnquist explained in *Upjohn*, “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.” Yet, the application of the corporate attorney-client privilege to communications involving in-house counsel remains uncertain.

The *Upjohn* decision itself was limited to its facts and left lower courts to apply an uncertain privilege. While the *Upjohn* Court rejected the “control group test” for the attorney-client privilege for cases in federal court, holding that communications between a corporate

---


28 Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1186 (1997) (explaining that “[i]f the privilege is to encourage disclosure, the client must be able to predict that the communicated disclosure will enjoy the privilege in any possible future legal proceeding.”).


30 Because *Upjohn* only applies in federal courts, some states continue to apply the “control group test,” which adds to uncertainty facing corporations. See, e.g., Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 Hofstra L. Rev. 897, 934 and notes 182-84 (providing examples of jurisdictions rejecting the Upjohn approach). However, because antitrust violations are enforced on the federal level, the *Upjohn* test is the applicable approach.
attorney and employees at lower levels of the corporate hierarchy, who are not in the group of individual actors that “control” the corporation, are also eligible for protection, it declined to define the contours of the privilege, leaving privilege determinations to be conducted on a “case-by-case basis.”  

The uncertainty surrounding the application of the corporate attorney-client privilege has grown as the legal profession has experienced an increase in the amount of corporate work being conducted by in-house attorneys. Beginning in the 1970s, “large corporations internalized a legal staff capable of handling most recurring matters, and the outside corporate lawyer increasingly came to be hired on a transaction-specific basis.”  This shift towards increased corporate reliance on in-house counsel has led to an “evolution of roles and duties” of corporate counsel, to include giving advice on issues “some of which may be clearly legal issues, some of which may be clearly business issues, and some that are a jumble of both.”

The increase in the number of corporate communications occurring in the context of the in-house counsel relationship, in conjunction with the evolution in the roles of corporate counsel, have led to the increased number of communications that include a mix of legal and business advice. Given this new environment, courts have struggled to apply the requirement that the communication be for the purpose of giving or obtaining legal advice, and the result has been

---


33 Giesel, supra note __, at 1170.
inconsistent application of the privilege. Further, some courts have imposed heightened scrutiny to analyze claims of privilege for communications involving in-house counsel.

Additional uncertainty regarding the eventual applicability of the privilege to any given communication in the corporate context has been brought about by the practice in recent years of corporations waiving the attorney-client privilege in order to gain leniency from the government. In the past several years, the legal academy and the legal profession as a whole have been engaged in “an intense public debate” regarding the erosion of the corporate attorney-privilege due to waiver demands by the federal law enforcement agencies in exchange for leniency.

In response to an ABA Task Force Report on the Attorney-Client Privilege, in April of 2006, the United States Sentencing Commission eliminated the provision in the Sentencing Guidelines that allowed privilege waiver to be considered as a mitigating factor in sentencing. However, federal law enforcement agencies continue to demand privilege waivers in exchange for favorable treatment, such as in exchange for a “deferred prosecution agreement,” which is the

---

34 See Giesel, supra note __, at 1190-1202 (detailing the uncertainty that exists due to courts’ inconsistent attempts to limit the privilege to communications that are predominantly legal in nature). See also Amber Stevens, Comment, An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege, 23 HAMLIN L. REV. 289, 303-08 (1999).

35 See Carol A. Needham, When is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations, 38 S. TEX. L. REV. 681, 690-91 (1997) (criticizing cases refusing to apply the attorney-client privilege to cases where the attorney negotiated on the client’s behalf). See also Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996) (holding that attorney-client privilege did not apply to communications with in-house counsel relating to company’s acquisition negotiations, because attorney was acting as negotiator, rather than in his capacity as attorney); see also Giesel, supra note 33, at 1206-13 (analyzing cases demonstrating “anti-in-house counsel bias” by some courts).

36 Duggin, supra note __, at 301. See also Lonnie T. Brown, Jr., Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox, 34 HOFSTRA L. REV. 897, 938 (2006) (providing an overview of the debate, observing that “many view compelled-voluntary waiver as the death knell to the privilege in the corporate context,” and suggesting a modified, more limited corporate attorney-client privilege).

37 See Duggin, supra note __, at 308-326 (detailing the events leading up to the decision by the Commission to delete the provision).
prosecutor’s “agree[ment] to defer prosecution of the corporation for, typically, twelve to eighteen months and to dismiss charges after that period of the corporation has complied with the terms of the agreement.”

Once otherwise privileged communications are disclosed to the government, the attorney-client privilege is usually waived as to third parties, and may result in

---


39 While the Eighth Circuit has recognized the doctrine known as “selective” or “limited” waiver, holding that voluntary disclosure in cooperation with an SEC investigation does not constitute waiver of the privilege as it relates to third parties, see Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (“As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred.”), the majority of circuits have rejected the doctrine. See, e.g., Permian Corp. v. U.S., 665 F.2d 1214, 1220 (D.C. Cir. 1981) (finding the doctrine “wholly unpersuasive,” explaining that “[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.”); U.S. v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997) (“Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path—which has no logical terminus—and we join in this reluctance.”); In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (“The Permian] Court rejected a ‘pick and choose’ theory of attorney-client privilege. We agree with the sentiment and note that the case before us is somewhat stronger since it does not involve an agreement with a governmental agency purporting to protect the privilege so far as other agencies are concerned.”); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991) (“Our rejection of the selective waiver rule does not depend, however, on the second reason the D.C. Circuit gave in Permian for rejecting Diversified [Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)]. . . . We need not find unfairness to the Republic in order to find waiver because we have concluded already that the attorney-client privilege protects only those disclosures necessary to encourage clients to seek informed legal advice and that Westinghouse’s disclosures were not made for this purpose.”); In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (“The Fourth Circuit has previously rejected the limited waiver concept as to the attorney-client privilege and as to non-opinion work-product.”); In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 302 (6th Cir. 2002) (“[W]e reject the concept of selective waiver, in any of its various forms.”); In re Qwest Comm. Intern. Inc, 450 F.3d 1179, 1192 (10th Cir. 2006) (“[W]e conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.”).

Other courts have applied this same standard to disclosures to foreign governments. See, e.g., Reinfeld v. Riklis, 1991 WL 41659 (S.D.N.Y. Mar. 21, 1991) (finding waiver of the attorney-client privilege where communications were disclosed to English investigators). Some courts have recognized selective waiver where the Government agrees to a confidentiality order. See, e.g., In re M&L Bus. Mach. Co., Inc., 161 B.R. 689, 696 (D. Colo. 1993) (holding that the attorney client privilege was not waived when a bank disclosed information to the Office of the United States Attorney pursuant to a confidentiality agreement); Lawrence E. Jaffe Pension Plan v. Household Intern., Inc. 244 F.R.D. 412, 431 (N.D. Ill. 2006) (“Some have found that selective waiver is always permissible; some have found that selective waiver is never permissible; and others have found that selective waiver is permissible when the government has signed a confidentiality agreement. The court finds this last approach most persuasive in this case.”); Fox v. Cal. Sierra Fin. Services, 120 F.R.D. 520, 526-27 (N.D. Cal. 1988) (“[W]here, as here, information has been voluntarily and selectively disclosed to the SEC without steps to protect the privileged nature of such information, fairness requires a finding that the attorney-client privilege has been waived as to the disclosed information and all information on the same subject.”); Teachers Ins. and Annuity Assoc. of Am. v. Shamrock Broad. Co., Inc., 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981) (“I am of the opinion that disclosure to the
subject-matter waiver as well.\textsuperscript{40} Furthermore, because the corporation as an entity, rather than any individual actor within the corporation, holds the privilege,\textsuperscript{41} the corporation may waive the privilege for communications between its employees and corporate counsel, even over the individual communicator’s protest.\textsuperscript{42} Therefore, no individual corporate actor may be certain that her communications with corporate counsel will be privileged.

III. MULTI-NATIONAL CORPORATE INVESTIGATIONS AND DIFFERING TREATMENT OF EVIDENCE

A. Multi-National Cooperation and Coordination

SEC should be deemed to be a complete waiver of the attorney-client privilege unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time the disclosure is made.”).

\textsuperscript{40} See, e.g., In re Sealed Case, 877 F.2d 976, 981 (D.C. Cir. 1982) (“waiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter.”); In re Martin Marietta Corp., 856 F.2d 619, 623-624 (4th Cir. 1988) (holding that, regarding documents disclosed to the Department of Defense, “all the materials at issue in the present case are either information revealed to others or details underlying the data that was published. Accordingly, they do not enjoy an attorney-client privilege from disclosure under a Rule 17(c) subpoena.”); In re Royal Ahold N.V. Sec. & ERISA Litig., 230 F.R.D. 433, 436 (D. Md. 2005) (holding that, by its disclosure of certain documents to the SEC, “Royal Ahold has therefore waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the [documents]”) (citing In re Martin Marietta Corp., 856 F.2d 619).

\textsuperscript{41} See MODEL RULES OF PROF’L CONDUCT R. 1.13 (2004) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”). See also Upjohn, 449 U.S. at ____.

\textsuperscript{42} Some circuits hold that individual employees may not prevent the disclosure of corporate communications with corporate counsel, even if the employees reasonably believed they were making the disclosures within the attorney-client context, and even if the attorney misled them. See In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001); United States v. Int’l Bhd. of Teamsters, 119 F.3d 210 (2d Cir. 1997); In re Bevill Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3d Cir. 1986); In re Grand Jury Subpoena: Under Seal, 415 F.3d 333 (4th Cir. 2005). Other circuits hold that an individual’s assertion of the attorney-client privilege can prevent the disclosure of corporate communications with corporate counsel if the employee had a reasonable belief that he was communicating within a personal attorney-client relationship. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); United States v. Keplinger, 776 F.2d 678 (7th Cir. 1985); Wylie v. Marley Co., 891 F.2d 1463, 1471-72 (10th Cir. 1989); Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041 (10th Cir. 1998). For further discussion, see Lawton P. Cummings, The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege, 109 W. VA. L. REV. 669, 671-74 (2007) (analyzing courts’ contradictory approaches to ruling on individual assertions of the attorney-client privilege when the employer-corporation waives the privilege).
According to the U.S. Department of Justice, in the past several years, multinational cooperation has “made a 180-degree turn,” moving from an environment where foreign jurisdictions refused to aid the U.S. in investigations to foreign “authorities hav[ing] a ‘pick-up-the-phone’ attitude and [] searching for ways to cooperate with each other.”\(^\text{43}\) This rapid globalization of corporate investigations and prosecutions has been brought about via two main channels: through formal multinational cooperation agreements and through informal working relationships forged through international workshops that are attended by all major enforcement agencies from around the globe.

To ease their ability to coordinate investigations, many countries have entered into formal antitrust cooperation agreements through which signatories share information. The U.S. has entered into such cooperation agreements with Australia, Canada, the European Communities, Germany, Brazil, Israel, Japan, and Mexico.\(^\text{44}\) A significant feature of some such agreements is that they are not subject to a foreign discoverability requirement; therefore, a party seeking documents is not limited to documents that would be discoverable in their home jurisdiction.\(^\text{45}\)

Similarly, the E.U. recently significantly increased its ability to share evidence with national competition authorities of its Member States through the European Competition

\(^{43}\) See Hammond Remarks 2006, supra at note__. See also Hunting in Packs, supra note 8, at 803 (referring to a speech by Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't. of Justice, Presentation to Post-Annual Meeting of the Antitrust Section of the ABA (August 17, 2007), wherein Barnett “invoked the colorful image of a pack of Orca killer whiles coordinating their efforts in hunting seals” to describe this new world of coordinated investigations by multinational agencies).

\(^{44}\) See Hammond Remarks 2006, supra at note__. See also Council of the European Union, Agreements on Extradition and on Mutual Legal Assistance between the European Union and the United States of America, Legislative Acts and Other Instruments, 0153/03; CATS 28 (June 3, 2003).

\(^{45}\) See, e.g., In re Erato, 2 F.3d 11, 15-16 (2d Cir. 1993).
Through the ECN, a jurisdiction that recognizes a privilege for in-house attorneys and could not collect such privileged documents for itself, can request, receive, and subsequently use the otherwise privileged documents from another Member State that does not recognize the privilege and is able to collect such information.\(^\text{47}\)

In addition to formal cooperation agreements, antitrust enforcement agency officials engage in cooperation through the International Competition Network ("ICN"), which is comprised of senior antitrust officials from over one hundred competition authorities from 88 countries, representing 90% of the world’s gross domestic product,\(^\text{48}\) including the European Commission from the E.U. and the Department of Justice and the Federal Trade Commission from the U.S..\(^\text{49}\) In 2004, the ICN established the “Cartel Working Group” to “enhance the effectiveness of anti-cartel enforcement through information exchange and fostering of inter-agency collaboration to help competition agencies improve their capacity to combat international cartels.”\(^\text{50}\)

This international cooperation, in conjunction with a new “worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers

\(^{46}\) See Council Regulation (EC) 1/2003, art. 12(1), 2003 O.J. (L 1) 1 (providing that “for the purpose of applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.”). See also Commission Notice on Cooperation within the Network of Competition Authorities, 2004 O.J. C101/43, ¶ 16 (discussing the free flow of information allowable under Regulation 1/2003).

\(^{47}\) See Lisa M. Cannon, Comparative Approaches to the Attorney-Client Privilege in the US, Canada, UK & EU, 8 SEDONA CONF. J. 125, 131 (2007).


\(^{49}\) For current membership, see http://www.internationalcompetitionnetwork.org/index.php/en/members (last accessed June 18, 2008).

\(^{50}\) See http://www.internationalcompetitionnetwork.org/media/library/Cartels/ManualIntro-2006.pdf (last accessed June 18, 2008). See also Hammond Remarks 2006 (“In 2004, the fight against cartels became even more globalized when the International Competition Network joined the effort by establishing a Cartel Working Group.”).
everywhere,“\(^{51}\) has led to record-breaking levels of grand jury investigations, fines, and jail terms by the U.S. Department of Justice Antitrust Division (the “Division”),\(^{52}\) as well as record levels of investigations, prosecutions, and fines by the Division’s sister agencies around the world.\(^{53}\) As of March, 2008, the Division had “over 50 sitting grand juries investigating suspected international cartel activity, [with] [i]nternational cartel investigations account[ing] for over 40% of the Division’s grand jury investigations.”\(^{54}\) In 2007, the Division “obtained over $630 million in criminal fines,” with “[t]he bulk” of the fines resulting from multinational investigations coordinated with sister agencies around the world.\(^{55}\)


\(^{53}\) See Hunting in Packs, supra note 8, at 803 (“The grave consequences to individuals and corporations that result from an antitrust violation are far more significant now than they were just a few years ago.”); see id. at 825 (documenting the dramatic increase in fines both on an individual level, and collectively, imposed by the U.S. and other agencies. For example, in 2004, the European Commission imposed €369 million in fines in cartel cases, growing to €683 million in 2005, €1.846 billion in 2006, and €3.334 billion in 2007. A similar pattern exists in the U.S.). See also “Anti-Cartel Enforcement: The Core Antitrust Mission,” Remarks by R. HEWITT PATE, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Before the British Institute of International and Comparative Law, Third Annual Conference on International and Comparative Competition Law, The Transatlantic Antitrust Dialogue, London, England, May 16, 2003, Available at: http://www.usdoj.gov/atr/public/speeches/201199.htm (“while the United States and the United Kingdom have not always seen eye-to-eye on the subject of cartels,” since 2002, “the United Kingdom, the British government recently has taken significant steps to increase the braking power of its antitrust laws.”).

\(^{54}\) See Hammond Remarks 2008, supra at note __.

\(^{55}\) See id.
Similarly, in the past four years, the European Commission significantly increased cartel investigation and fining of multinational companies conducting business in the E.U.  

A recent publication by the American Bar Association stated that “[t]he single most striking feature of Commissioner Kroes’s tenure has been the stepping up of enforcement action against cartels.”

In the past three years, the fines imposed by the Commission in cartel cases have increased exponentially. In 2004, the Commission imposed €369 million Euros in fines in cartel cases, in 2005, €683 million Euros, in 2006, €1 billion,846 million Euros, and in 2007, it imposed €3 billion,334 million Euros in fines in such cases. Commissioner Kroes has recently “given priority to sector inquiries, which the Commission can launch when trade patterns, price rigidity, or other circumstances suggest that competition may be restricted or distorted within the EU.”

Pursuant to these sector inquiries, in period of 2005 to 2007, the Commission has conducted surprise morning investigations of companies in the retail banking, business insurance, electricity, and gas sectors. In January of 2008, Commissioner Kroes launched a sector inquiry of pharmaceutical companies engaging in business in the EU, including Wyeth, Pfizer, GlaxoSmithKline, and Sanofi-Aventis.

---


57 Commissioner Kroes took over as head of the Commission in 2004.


59 See Hunting in Packs, supra note 8, at 824-825.


61 See id.

62 See, e.g., James Kanter, Europe Expanding Inquiry on Availability of Drugs, N.Y. TIMES, May 15, 2008 at C3; Stephen Castle & James Kanter, European Antitrust Regulators Raid Large Drug Makers, N.Y. TIMES,
The financial stakes for prosecutions of competition violations are high and are increasing each year as jurisdictions around the globe become more aggressive in their prosecution of competition violations and engage in further cooperation with sister agencies. For example, the prosecution of just one cartel, the multi-national vitamin industry cartel, resulted in a total of over $3 billion in payments -- $26.5 million in fines from Australia, $30.5 million in class action settlement in Australia, $900 million in criminal fines in the U.S., €790.5 million in fines in the EU, $91.5 million in fines in Canada, and over $1.1 billion in civil settlements in the U.S.\(^{63}\) It is imperative that the U.S. not forfeit its ability to recover its share of compensation from the damage caused by international cartel activity. According to Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement at the U.S. Department of Justice Antitrust Division, international cartel activity “cost[s] U.S. businesses and consumers billions of dollars annually.”\(^{64}\)

**B. Differing Treatment of Evidence Containing Communications with In-House Counsel**

---

January 17, 2008, at C2. A statement issued by the Commission regarding the investigations said that they were launched, not due to evidence of wrongdoing, but “in response to indications that competition in the European market ‘may not be working well’ because ‘fewer new pharmaceuticals are being brought to the market, and the entry of generic pharmaceuticals sometimes seems to be delayed.’” See James Kanter, *Europe Expanding Inquiry on Availability of Drugs*, N.Y. TIMES, May 15, 2008, at C3. The statement went on to state that the number of new drugs reaching the market had dropped, and that “[i]f innovative products are not being produced, and cheaper generic alternatives to existing products are in some cases being delayed, then we need to find out why and, if necessary, take action.” *Id.* After questioning “about 100 companies,” Commissioner Kroes turned her attention in May of 2008 to “about 80 medical organizations, including associations of doctors, patients and pharmacies, and government agencies that set the prices of prescription drugs in Europe,” which “could make it the broadest antitrust investigation ever in the EU.” See James Kanter, *EU Broadens Inquiry Into Drug Market*, INT’L HERALD TRIB., May 16, 2008, at 16.

\(^{63}\) See Hunting in Packs, *supra* note 8, at 804.

\(^{64}\) See Hammond Remarks 2008, *supra* note __.
1. Treatment Outside the U.S.

While the U.S. and the United Kingdom recognize the attorney-client privilege for communications with in-house attorneys, as long as those attorneys are members of professional bodies, subject to rules of their professions,65 “most civil law jurisdictions . . . have traditionally not recognized an evidentiary privilege for communications with in-house counsel due to their lack of ‘independence.’”66 For example, in its landmark decision establishing a corporate attorney-client privilege, the E.U.’s highest court, the European Court of Justice, limited the privilege to communications made with “independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.”67 The court explained the requirement that the lawyer be “independent”68 as “based on a conception of the lawyer’s role as collaborating in


68 Id. at ¶ 27. In addition to holding that communications with in-house counsel are outside the scope of the privilege in the EU, the AM & S Court specified that the lawyer must be “entitled to practice his profession in one of the member states,” which means that communications with an outside attorney who is not admitted to the EU bar would also be outside the scope of the privilege. Id. at 1610-11. This portion of the ruling did not arise in the Akzo Nobel decision and has not been otherwise challenged with regards to outside U.S. counsel. The European Commission has not yet sought to use this ruling to gain access to corporate communications with outside U.S. counsel. As Mary Daly explained ten years ago, “the Commission’s self-discipline [in not pursuing such communications] has defused the issue.” Mary C. Daly, The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century, 21 FORDHAM INT’L L.J. 1239, 1280 (1998). However, this Eurocentric rule could at some point be used by the Commission to target communications with outside U.S. counsel. The potential for the E.U. to enforce this rule creates another mine-field for attorneys representing corporations in multijurisdictional cases covering parallel criminal and civil litigation and is the subject of a forthcoming article by author.
the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs."\(^{69}\)

A jurisdiction that does not recognize the attorney-client privilege for communications with in-house counsel may seize such communications and use such communications to prove its case. For example, shortly after the European Court of Justice’s decision limiting the attorney-client privilege in the E.U. to communications with outside counsel, the European Commission seized a memorandum from John Deere’s general counsel to company managers in Europe in which the company’s general counsel considered that the company policies may violate European law.\(^{70}\) The Commission then used that memorandum in its prosecution of the company as proof of John Deere’s knowing violation of the E.U.’s competition laws.\(^{71}\)

2. **Treatment of Otherwise Privileged Documents in U.S. Courts**

   a. **The U.S.’s Functional Approach to the Application of the Attorney-Client Privilege to Foreign Actors**


\(^{71}\) See id.
The two U.S. courts that have ruled on the application of the attorney-client privilege in U.S. courts to foreign in-house counsel have differed in their approaches; yet, both approaches have turned on whether the foreign actor had indicia of “attorney” status similar to American attorneys, such as bar membership and specialized legal education. For example, in Renfield v. Remy Martin, the court held that even though the communications would not be privileged in France, communications with French in-house counsel were privileged in U.S. courts. The Renfield court rejected the argument that the in-house counsel should be a member of a local bar for the privilege to attach, stating that instead, “the requirement is a functional one of whether the individual is competent to render legal advice and is permitted to do so.” Applying this test, the court held that the privilege applied to communications with the French in-house counsel at bar, because “like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation.”

Some jurisdictions that do not recognize the privilege for in-house counsel, such as Japan, allow those without a specialized law degree to provide legal advice as in-house counsel. Therefore, communications with in-house counsel in these jurisdictions would likely

---

72 This article considers how courts would treat assertions of privilege in response to motion to compel documents located outside of the U.S. For such documents, the Hague Convention controls and “assures that a witness will have the benefit [] of privileges recognized by the forum State, [those] privileges recognized by the State where the letters are executed,” and “the privilege recognized by the witness’s domicile.” See Renfield Corp. v. E. Remy Martin & Co., S.A., 98 F.R.D. 442 (D.Del. 1982). While outside the scope of this article, note that for documents located within the U.S., courts apply traditional choice of law principles to determine whether U.S. or foreign law applies. See id.

73 98 FRD 442 (1982).

74 Id.

75 Id. See also Honeywell v. Minolta, 1990 WL 66182 (D.N.J.) (reversing the magistrate’s decision that the Japanese in-house counsel was a “de facto attorney” for the purposes of privilege determinations, stating that the actor was not a member of an organized legal bar and possessed only a bachelor’s degree, rather than a law degree).

76 See Honeywell v. Minolta, 1990 WL 66182 (D.N.J.)
not be held to be privileged in U.S. courts. However, in other jurisdictions that do not recognize the privilege for in-house counsel, such as in the E.U., in-house and outside counsel have the same legal training. Therefore, it is documents containing communications with in-house counsel in these jurisdictions that would be subject to differing treatment in the U.S. and abroad. These documents would be subject to seizure and usable in foreign jurisdictions, but would be protected in U.S. courts.

b. Would Courts Find Waiver of the Privilege if a Foreign Jurisdiction Seizes Otherwise Privileged Documents?

The U.S. government or U.S. civil plaintiffs would have a colorable argument that “the cat is out of the bag” once a foreign jurisdiction, such as the E.U., seizes a document containing communications with in-house counsel and that the defendant waived its privilege when it did not sufficiently object to the foreign jurisdiction’s seizure of such document. The argument would be that in a jurisdiction such as the E.U., where the privilege is only recognized for communications with outside counsel (what I will refer to as an “outside only” jurisdiction), the company did not have a legal argument upon which to base an objection to production, and therefore, its production was compelled, rather than voluntary.

For example, in the E.U., the European Commission (the “Commission”), the executive arm charged with investigating and prosecuting competition violations, generally conducts

\[\text{\textsuperscript{77}} \text{See id.}\]

\[\text{\textsuperscript{78}} \text{See Joined Cases T-125/03 & T-253/03, Akzo Nobel Chemicals and Akross Chemicals v. Comm'n, 2007 O.J. (C 269) 43, at ¶ 166 (Sept. 17, 2007) (holding that communications between company executives and their in-house counsel, who was a member of the bar in his member state, were not privileged, regardless of similar legal training, because in-house counsel are not independent of their employers).}\]

\[\text{\textsuperscript{79}} \text{See E.U. John Deere Decision, supra at note __.}\]

\[\text{\textsuperscript{80}} \text{See Renfield v. Remy Martin, 98 FRD 442 (1982).}\]
surprise morning investigations.\textsuperscript{81} During these surprise investigations, which are often conducted in coordination with sister agencies in cooperating nations,\textsuperscript{82} the Commission enters a company’s place of business, and sometimes the homes and automobiles owned by company employees, seals off any portion of the premises or records it deems necessary,\textsuperscript{83} interviews employees,\textsuperscript{84} and seizes and copies all hard and electronic files it deems relevant,\textsuperscript{85} including those containing communications with in-house counsel.\textsuperscript{86} While a company may object to the seizure of specific documents, it must provide the Commission with the legal basis for that objection.\textsuperscript{87} Because the E.U. does not recognize the attorney-client privilege for documents containing communications with in-house counsel, a company has no legal basis for objecting to the seizure of such documents, even though the documents would have been privileged in the U.S..

The Court of Justice has explained that if target companies refused to cooperate or adopted an obstructive attitude, it would be impossible for the Commission to obtain the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} Commonly described by defense counsel and critics as “dawn raids.” \textit{See Hunting in Packs, supra} at note 8, at 815.
\item \textsuperscript{82} \textit{See id} at 825.
\item \textsuperscript{83} \textit{See id.}, at art. 20(2)(d).
\item \textsuperscript{84} \textit{See id.}, at art. 20(2)(e).
\item \textsuperscript{85} \textit{See Council Regulation (EC) 1/2003}, art. 20(2)(a)-(c), 2003 O.J. (L 1) 1.
\item \textsuperscript{86} \textit{See Joined Cases T-125/03 & T-253/03, Akzo Nobel Chemicals and Akross Chemicals v. Comm’n}, 2007 O.J. (C 269) 43 (Sept. 17, 2007) (refusing to extend the lawyers’ professional privilege to documents seized during a dawn raid that contained communications with in-house lawyers). \textit{See also} Council Regulation (EC) 1/2003 art. 21.
\end{itemize}
\end{footnotesize}
necessary information to carry out its investigations. Therefore, the European Court of Justice has stressed that companies subjected to investigation by the Commission have an “obligation to actively cooperate.” Accordingly, a company may be fined up to one percent of their total annual turnover for refusing to turn over documents to which the Commission is entitled. Therefore, a company must provide the Commission with all relevant documents, including those containing communications with in-house counsel. Under these circumstances, a defendant company might argue, it was compelled to produce documents that otherwise would have been privileged in U.S. courts, because lacking a legal claim to privilege under E.U. law, had the company raised such an objection, the Commission would have found its objection frivolous and fined it a burdensome amount.

Such an argument was raised with mixed results in In re Vitamins Antitrust Litigation, where each of twenty defendant vitamin companies had been investigated by one or more foreign governmental agencies and, as a result of such investigations, had produced documents that would have been privileged in U.S. courts. Thirteen of the defendants refused to produce

---


90 See Council Regulation (EC) 1/2003, art. 23(1), O.J. (L 1) 1 (authorizing the Commission to fine businesses up to 1% of total annual turnover for non-cooperation, including failure to supply information, production of incomplete records, and providing incomplete or incorrect answers to question).

91 The Commission may fine the target company up to 1% of total annual turnover if a company fails to cooperate with the investigation. See Council Regulation (EC) 1/2003, art. 23(1)(c), O.J. (L 1) 1 (production of books or records in incomplete form and refusal to submit to an inspection ordered by decision) and id. at (d) (incorrect, misleading and incomplete answers to questions).


93 Id. The agencies to whom disclosures were made by one or more defendants were: Brazilian Ministry of Justice, Swiss Competition Commission, New Zealand Commerce Commission, Federal Competition Commission of Mexico, Japan Fair Trade Commission, European Commission, Australian Competition and Consumer Commission, United States Department of Justice. Id. at **13-44.
documents in U.S. litigation, though the documents had been produced abroad, claiming they were protected by the work-product doctrine in the U.S.\textsuperscript{94} The Vitamins court enunciated the rule that in order to be compelled, the “disclosure [must] be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance, and that any available privilege or protection must be asserted.”\textsuperscript{95}

Five of the defendants in \textit{In re Vitamins} made disclosures to the European Commission and asserted that they were “‘in all practicality . . . compelled’ because a failure to comply with the request w[ould have] ‘inevitably’ result[ed] in another demand and ‘[would have had] serious

\textsuperscript{94}Id. While the defendants did not assert the attorney client privilege, the court stated that its “conclusions respecting the protections afforded defendants by the work product doctrine, particularly those concerning waiver, should apply generally in the circumstances at bar to those afforded by the attorney-client privilege.” \textit{Id.} at \textsuperscript{n.50}.

\textsuperscript{95}\textit{In re Vitamins Antitrust Litigation}, 2002 U.S. Dist. LEXIS 25789, \textsuperscript{96} (D.D.C., Feb. 7, 2002). In order to find compulsion sufficient to defeat a finding of waiver, other US courts have required “court-compelled disclosure \textit{or} other equally extraordinary circumstances.” \textit{See In re Sealed Case,} 877 F.2d 976, 980 (D.C. Cir. 1989) (emphasis mine) (“Short of court-compelled disclosure or other equally extraordinary circumstances, we will not distinguish between various degrees of ‘voluntariness’ in waivers of the attorney-client privilege.”). “Equally extraordinary circumstances” rising to the level of compulsion have not often been found by courts; however, such extraordinary circumstances were found by the court in \textit{Transamerica Computer Co. v. IBM Corp.}, 573 F.2d 646 (9th Cir. 1978). In \textit{Transamerica}, the Court held that IBM was “compelled” to disclose privileged documents where a court had ordered IBM to produce 17 million pages of documents in three months pursuant to an accelerated discovery program. \textit{Id.} at 648. The court explained that IBM made a “herculean effort” to flag privileged documents, but that it had inadvertently produced approximately 5,800 pages of supposedly privileged documents, compared to the 491,000 that it withheld. \textit{Id.} at 648-50. The court held that “the document inspection program imposed such incredible burdens on IBM that it would be disingenuous for us to say that IBM was not, in a very practical way, ‘compelled’ to produce privileged documents which it certainly would have withheld . . . under a less demanding schedule.” \textit{Id.} at 652. The court also relied upon Proposed Rules 511 and 512 of the Federal Rules of Evidence, which were approved by the Supreme Court but not ultimately adopted. \textit{Id.} at 651. Proposed Rule 512 “would have prohibited the use of any privileged matter if its disclosure had been ‘compelled erroneously’ or had been ‘made without opportunity to claim the privilege’.” \textit{Id.} The court believed that under these specific circumstances, IBM’s production of the documents was “‘made without (adequate) opportunity to claim the privilege’.” \textit{Id.} Citing \textit{Transamerica Computer, supra}, a California court recently held that a defendant company’s disclosure of otherwise privileged documents to prosecutors in exchange for avoiding indictment did not serve as waiver of the attorney-client privilege, because the Department of Justice’s policy of demanding waiver was coercive. \textit{See The Regents of the University of California, et al. v. The Superior Court of San Diego County,} (Court of Appeal, Fourth Appellate District, Division One, State of California 7/30/08). This case would not have precedential force in the federal courts, where the selective waiver doctrine, with the exception of the Eighth Circuit, has been rejected by all circuits that have considered it. \textit{See footnote 39, infra,} and discussion in accompanying text.
consequences for that company’s cooperation with the European Commission’s investigation.”

However, the court rejected this argument, stating that “[i]t is not enough that, had [the companies] not responded, the [Commission] might then have made further demands which, if flaunted, would have subjected defendants to penalties or other adverse consequences.” In response to the defendants’ argument that failure to comply with the Commission’s demands would have resulted in the imposition of fines, the court pointed to the lack of proof, stating that the “[d]efendants submitted no evidentiary support for these contentions.”

Similarly, the In re Vitamins court rejected the argument by one defendant that its disclosure was compelled, stating that the possibility that the Brazilian Ministry of Justice “could assume that the charges it is investigating are true” could not be a penalty, because the administrator was not required to make such a finding and because the defendant failed to present evidence of what the “consequences of such an assumption would be.”

However, the In re Vitamins court did find compulsion in one instance: where a defendant disclosed communications after receiving a letter from the Federal Competition Commission of Mexico threatening a fine for non-disclosure in the amount “equivalent to fifteen hundred times the minimum outstanding wage in Mexico City.” Accordingly, In re Vitamins could be interpreted to stand for the proposition that disclosure to a foreign

---

96 Id at **114-15.
97 Id. at *116.
98 Id. at **115-16.
99 Id. at *108.
100 Id.
101 Id. at *113.
was compelled if the party asserting privilege presents adequate proof that a severe and
definite penalty would be levied if the company did not comply with the document
demand. Therefore, while uncertain, it is possible that a company could preserve its
privilege in subsequent U.S. litigation if, upon the initiation of an investigation in an
“outside only” jurisdiction, a target company produces a letter stating that it is aware of
the stiff penalties that would be levied against it were it to object to the seizure of
documents containing communications with in-house counsel, it officially objects to the
seizure of such documents on the grounds that they would be privileged in a U.S. court.

IV. RECONSIDERING THE ATTORNEY-CLIENT PRIVILEGE FOR
COMMUNICATIONS WITH IN-HOUSE COUNSEL

Currently, the U.S. is more protective than many of its sister jurisdictions of vital
information that could be gathered from documents containing communications with in-house
counsel. This restriction on fact gathering and prosecution could lead to a deficit in the U.S.
government and U.S. civil plaintiffs’ ability to recover for antitrust violations, relative to foreign
governments and plaintiffs. According to the utilitarian rationale to support the corporate
attorney-client privilege, this cost must be outweighed by some benefit in order to justify this
impediment to the search for the truth which “contravene(s) the fundamental principle that the
public has a right to every man’s evidence.”

102 Trammel v. United States, 445 U.S. 40, 50 (1980) (discussing testimonial exclusionary rules and
privileges). See also CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 175 (Edward W. Cleary ed.,
West 2d ed. 1982) (1954) (stating that with regards to privileges generally, the “effect instead is clearly inhibitive;
rather than facilitating the illumination of truth, they shut out the light.”).
A. **Lack of Empirical Data**

While the utilitarian rationale for the attorney-client privilege for in-house attorneys depends upon the validity of the assumption that without the privilege, corporate employees would share less needed information with in-house counsel, the assumption is asserted by the courts with no empirical corroboration. As one scholar has noted “something more than mere intuitive appeal might be expected to justify a rule excluding relevant evidence from law enforcement. If legal privilege must be grounded in utilitarian balancing, it seems only right to demand at least some empirical corroboration as well as a more precise knowledge of the . . . marginal loss from introducing limitations or exceptions.”

Most of the empirical studies conducted to date have focused on corporate attorneys’ personal fears that without the privilege, clients would not engage in frank discussions with them, which would hamper their ability to advise the company. For example, the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers each recently conducted empirical studies, which showed that a high percentage of attorneys believed that absent the privilege, their clients would be chilled from communicating with them.

---

103 Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT’L L.J. 967, 985 (2005) (Arguing that the AM & S decision, extending the privilege to outside counsel, but not in-house counsel, is consistent with the justification for the privilege in the EU, which is rights-based, rather than utilitarian).

Corporate attorneys “have a personal stake in the preservation of the privilege”\textsuperscript{105} and may produced biased responses. Daniel Fischel concludes that because the corporate attorney-client privilege does not increase corporate compliance, that maintaining the privilege in the corporate context is more about maintaining the “demand for legal services,” than it is about corporate compliance.\textsuperscript{106} A recent article in a corporate law trade magazine in the UK published the results of a poll showing that the lack of privilege made the majority of in-house counsel respondents feel “like second class citizens compared with lawyers in private practice,” with more than half responding that they believed that the \textit{Akzo Nobel} decision had a “negative impact on their professional status.”\textsuperscript{107} Whether lawyers’ responses to survey questions are driven by fear of chilling communication with clients or by fear of diminished professional services demand or status, or a combination of all of the above, studies surveying attorneys’ perceptions simply do not provide useful information on the question of how clients would actually respond to changes in the corporate privilege rules.

The only prior study to date to gather data on corporate clients’ perceptions of the effect of the attorney-client privilege on client candor, that conducted by Vincent Alexander, only addressed the corporate privilege at the general level.\textsuperscript{108} While the study made an important

\textsuperscript{105} Alexander, \textit{supra} note 28, at 197 and n.17 (explaining that “[p]rofessional bias may have played a role in [the] development of the attorney-client privilege from its inception” and citing the belief by some that “\textit{Upjohn} has substantial economic implications for the legal profession. It makes it highly advantageous to use lawyers, or paraprofessionals acting under their direction, for investigations with some possible governmental regulatory impact on the corporation.” (\textit{quoting} 2 J. WEINSTEIN & m. BERGER, WEINSTEIN’S EVIDENCE \| 503 (b)[04], at 503-80 (1989)).

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} Michelle Madsen, \textit{Key Privilege Ruling Makes In-House Lawyers Feel Inferior}, LEGAL WEEK, October 25, 2007.

\textsuperscript{108} Alexander, \textit{supra} note 28, at 246 (corporate executives were asked “Do you think the corporate attorney-client privilege serves to increase management’s candor with counsel?”). Alexander asked the attorneys he surveyed whether they had experience representing multinational clients in a jurisdiction, such as the EU, that did
contribution to the field by confirming that U.S. corporate clients believe that some form of the corporate attorney-client privilege increases management’s candor with counsel, it did not ask questions to separate the need for the privilege to increase candor for communications with in-house counsel versus communications with outside counsel, nor did it ask questions to separate the communications by type, i.e., the need for the privilege to encourage candid communications regarding prospective corporate compliance versus communications involving past potential wrongdoing. Therefore, even the Alexander study does not provide information regarding the benefits of the U.S. system over an “outside only” privilege system. For instance, it has not been tested whether corporate executives believe that the privilege with in-house counsel would be necessary for candid communications regarding corporate compliance, if the privilege were to remain for communications that involve outside counsel, for instance, those communications concerning potential liability for wrongdoing.  

not recognize the privilege for communications with in-house counsel. See id. at 255 (Of thirteen attorneys who responded they had some experience with such a system, eight responded that no privilege for communications with in-house attorney chilled communication). However, Alexander did not ask the same question of the corporate clients.

One previous study appearing in the Yale Law Journal in 1962 found that fifty-five of 108 laypersons (50.9%) indicated that they would be less likely to make full disclosure to a lawyer in the absence of the privilege. See Note, Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1262, 1269-73 (1962). The Yale study is “not very helpful in gauging the effects of the corporate privilege, however, because the Yale Study does not indicate whether the participants based their views on individual or corporate attorney-client relationships.” Alexander, supra note 28, at 232. However, as Fred Zacharias observed, the study demonstrates that “[a]ttorney-client confidentiality may not be as important to clients as lawyers assume.” Fred Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 378 (1989) (observing that, “[A] significant percentage of the laypersons thought that lawyers, if questioned in court, would have an obligation to reveal confidences. Forty of the 108 subjects believed there should be a legal obligation of attorneys to reveal confidences when asked to disclose in court, and an additional 19 did not take a position opposing disclosure. The pool split evenly on the question of whether an outright elimination of the attorney-client privilege would deter client disclosures.”). 

See id. (75% of the executives (thirty-nine of fifty-two) “perceived a positive influence” of the privilege on candor, and the same 75% also responded that “management would be less candid with counsel if there were no privilege.”).

In fact, such an opportunity for conducting such empirical currently exists. Empirical research can test the actual effect of the differing privilege rules by studying U.S. corporations that conduct business in the U.S. as well as in the E.U. The author is currently undertaking such a study, the results of which will be published in a
In fact, while not studying attorney-client privilege in the corporate context, Fred Zacharias conducted an empirical study that showed that lawyers “misperceive how clients think” and concluded that a significant percentage of clients who claimed that they would not disclose information to their attorneys without the privilege believed that their attorney would be required to provide such information if ordered by a court to do so.\footnote{Rethinking Confidentiality, 74 IOWA L. REV. 351, 397 (1989) (surveying attorneys and laypersons in Tompkins County, New York, regarding their understanding of confidentiality rules and attitudes towards the same and observing that “a significant percentage of the laypersons thought that lawyers, if questioned in court, would have an obligation to reveal confidences. Forty of the 108 subjects believed there should be a legal obligation of attorneys to reveal confidences when asked to disclose in court, and an additional 19 did not take a position opposing disclosure. The pool split evenly on the question of whether an outright elimination of the attorney-client privilege would deter client disclosures.”).}

\section*{B. Has the E.U. Struck the Correct Balance?}

By limiting the attorney-client privilege to communications with outside counsel, the E.U. may have established a model for the U.S., striking the perfect balance of matching the privilege to the reality of the differing roles of in-house and outside counsel. When a U.S. company suspects wrongdoing within its organization, with very few, if any, exceptions, the company contacts outside counsel to conduct the internal investigation.\footnote{See Coffee, supra note __, at __.} Therefore, in-house counsel spend the majority of their time either working with and managing outside counsel, or in an advisory role within the corporation, assisting the corporate client in prospective compliance.\footnote{See id.}
Under the outside only model in the E.U., the work conducted in conjunction with outside counsel is privileged, so it is the communications that involve advising on prospective corporate compliance that are left outside the privilege. However, “[i]ndependent legal and economic incentives exist that may inspire corporations to strive for legal compliance irrespective of the prospect of privilege waiver,” which some scholars argue leads corporate employees and officers to engage in full and frank conversations with in-house counsel, even without the privilege. Some scholars have argued that the corporate compliance rationale for the corporate attorney-client privilege in general is not sound. Daniel Fischel explains that “[c]lients who seek to conform their conduct to law before they act have no need for confidentiality rules because they face no sanctions” whereas in instances where the question of “whether certain conduct is sanctionable is unclear,” confidential advice from an attorney may assist the actor in reducing the chances of detection or in reducing exposure to sanctions and that “[r]educing expected sanctions . . . will increase the number of violations by lowering the cost for noncompliance.”

Some may argue that the advisory role of in-house counsel would be pushed to outside counsel in order to gain the advantage of the privilege. Yet, others dismiss this argument, citing the reality that given the complexity of the multinational businesses, specific knowledge of the business that can only be attained by in-house counsel is necessary to navigate the international

---

114 Brown, supra note 36, at ___ (suggesting a limited corporate attorney-client privilege).

115 See, e.g., id. See also Daniel R. Fischel, Lawyers and Confidentiality, 65 U. CHI. L. REV. 1, ____ (Winter, 1998) (arguing that the attorney-client privilege in the corporate contact actually tends to “either have no effect or decrease the level of legal compliance,” but “never increase[s] the level of compliance.”).

116 Id.

117 Id.
regulatory schemes.\textsuperscript{118} In fact, given the existing uncertainty of the application of the privilege to attorney communication that contains a mix of business and legal advice,\textsuperscript{119} it is possible that eliminating the privilege with regards to corporate compliance advisory communications would have very little effect.\textsuperscript{120}

Some may argue that the outside only model is more costly. Companies with in-house counsel would be affected to the extent that they would have an incentive to involve outside counsel at the first sign of wrongdoing, rather than first vetting the issue extensively through in-house counsel. Yet, this change may increase the productivity of the investigation overall by ensuring that work is not duplicated. The model is at least not prohibitively expensive, because companies are engaging in business in other “outside only” jurisdictions, such as the E.U., and basic economics dictates that companies will not engage in business if it is not cost effective. However, data does not currently exist to show whether such a model is more expensive.

\section*{V. CONCLUSION}

In this new globalized world, our companies, government agencies, and courts will encounter differing local rules. Localities may only ensure their competitiveness in the global marketplace if they challenge their own rules and adopt the rules that best serve the rules’

\textsuperscript{118} See Fischel, supra at note 115. See also Thomas D. Morgan, \textit{Practicing Law in the Interests of Justice in the Twenty-First Century}, 70 Fordham L. Rev. 1793, 1797 (2002) (“Lawyers still advise business clients; the advisers tend to be inside general counsel, not outside law firms. General counsel are often corporate officers, part of the management team, and correctly perceived to know more about the client’s interests and concerns than outside counsel ever could.”).

\textsuperscript{119} See discussion, \textit{infra}, at note 33 and accompanying text.

\textsuperscript{120} Accord Upjohn, 449 U.S. at 393 (“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).
purposes. If the goal of the U.S. justice system is to seek truth and to allocate consequences among actors, and the corporate attorney-client privilege, as an exception to this goal, must be narrowly tailored, then the privilege should be whittled down to the most basic privilege necessary to ensure informed legal advice to achieve corporate compliance and to aid in defense. Given the lack of evidence that the privilege as it applies to communications with in-house counsel is necessary to achieve the purpose of the privilege, and the potential for disadvantage to U.S. interests in global litigation caused by the over-protection of communications with in-house counsel, U.S. courts should abolish the privilege as it applies to in-house counsel.