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Attorney-Client Privilege

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(Law Times Article)

Julius Melnitzer's recent article on privilege pointed out some of the risks faced by European in-house counsel in connection with privileged communications. As one of the Canadian members of the American Bar Association's Task Force on Attorney-Client Privilege, I commend you on identifying a point of real importance, not only for European corporations and their in-house counsel, but also for North American corporations and the legal profession in Canada and the United States. Let me offer a few points of clarification, perhaps some additional precision, and certainly some compounding of the risks.

The European Court of Justice, in *AM&S Europe v. The Commission* [1982] E.C.R. 1575, decided that privilege for confidential communications between lawyers and clients should be recognized as a matter of the "principles of law common to the Member States" of the EU. The court chose to create the protection of privilege, even though the underlying Treaty or "legislative" sources of EU law did not mention the subject. So far, so good.

But the Court restricted the scope of privilege by focusing on the particular professional qualities of the lawyer. In essence, the Court held that for privilege to apply, the lawyer must be: (i) independent ("not bound to the client by a relationship of employment"); (ii) subject to ethical and disciplinary rules (not all in-house lawyers in Europe are); and (iii) entitled to practice as an *external* lawyer in an EU. Mr. Melnitzer observes that it is unclear whether European jurisdictions would recognize the solicitor-client privilege for North American in-house counsel. In fact it is quite clear from *AM&S* that legal communications to and from in-house counsel, wherever located, are *not* protected. The communications of North American lawyers, whether in-house or not, are liable to inspection and copying by the staff of the European Commission in a competition investigation, if the documents are found on corporate premises within the EU.

For example, a search ("inspection", in EU talk) of the European premises of Volkswagen/Audi was conducted by Commission investigators in 1995. They took a copy of a legal opinion by one of the Volkswagen lawyers. That opinion warned about potential legal difficulties with a particular pricing policy of the company. The opinion was used to demonstrate the company's consciousness of illegality and was seen by the Commission as an aggravating factor. A fine of €90 million was imposed by the Court of First Instance in 1998, reduced from the original €102 million imposed by the European Commission.

As a second point of clarity, and a matter of particular concern to the ABA Task Force, it is quite clear under the *AM&S* decision that privileged communications between a client with offices in Europe and outside counsel in the United States and Canada will not be protected, if they are found on premises in Europe. The Commission is equally clear that those communications may be used as a basis for establishing both a breach of the relevant competition laws and the level of the penalty to be imposed. Even though the *AM&S* case had nothing to do with outside, non-EU counsel, the position of the court, and hence the European Commission, is that there is no privilege for client communications with non-EU registered counsel.

Quite extensive consultations with the Commission have been conducted over the years, involving the American Bar Association, British professional associations, the European Company Lawyers' Association and other associations. The Commission has been quite inflexible. It emphasizes the need for independence of the lawyer concerned, which in its view rules out any protection for the communications of in-house counsel. Secondly, it considers that under the law as it exists the Commission has no power to accord protection for the communications of non-EU-registered outside counsel. Very recently, Mario Monti, the EU Competition Commissioner, has responded to pressure from the European Company Lawyers' Association and members of the European Parliament on this issue. Mr. Monti indicated that communications to and from in-house lawyers (and presumably, non-EU registered lawyers) will no longer be used as an aggravating factor in imposing penalties, recognizing the "positive role that in-house counsel plays" in competition compliance. But that is as far as the Commission is willing to go, apparently. It will not extend privilege as such, to cover either in-house or non-EU lawyers according to Mr. Monti.

The difficulties posed for corporations seeking candid legal advice about complex, and frequently equivocal, competition issues has not been sufficient to convince the Commission. The fact that multi-jurisdictional deals require multiple lawyers, including those outside the EU, has had no influence on the Commission. The fact that jurisdictions in North America would recognize the privilege attached to communications of both in-house counsel and outside counsel in Europe has equally little impact, although it arguably has an aspect of restricting access to the European marketplace for legal services by North American lawyers. The Commission was granted authority to negotiate bilateral agreements with jurisdictions which had equivalent standards of discipline and ethical responsibility to those that applied to members of European Bars. No negotiations were ever conducted and the authority to engage in such negotiations has lapsed.

Moreover, this is not just a problem in Europe. Under Section 155 of the *Trade Practices Act* of Australia, the Australian Competition and Consumer Commission may require any person to provide information or evidence, including legally privileged material, that is relevant to a suspected contravention of that act. The fact that the communication in question is clearly of a privileged character is immaterial, according to *ACCC v. Daniels Corporation* [2001] F.C.A. 244. That case and a companion case have been appealed to the High Court of Australia and the appeal will be argued on June 18th of this year. The outcome is unclear, although the case has provoked considerable controversy in Australia and abroad.

In these circumstances there are a few precautions that can be taken by in-house counsel. One is to ensure that legal advice from non-EU-registered, outside counsel is not held unnecessarily on-site in Europe. Another is to retain local counsel in Europe and to channel both in-house and non-EU outside counsel's communications on competition matters through the European outside lawyers. The aim of this duplicative legal routing? To "cover" the work with a formal blanket of European privilege. There

are other devices available to minimize the risks created by the European policy. None of the options are consistent with the *raison d'être* of establishing in-house legal offices. They generate unnecessary expense, delay and inconvenience. There is uncertainty as to their effectiveness. They reflect a perception that ethical and professional propriety on the part of in-house lawyers is lacking, although the European Commission no longer articulates this perception.

The ABA Task Force is continuing to work on the problem. We hope to facilitate some recognition by the Commission of the difficulty the non-recognition of privilege causes clients seeking to understand their obligations and to the lawyers seeking to advise them. It is important that corporations with European and Australian business activities take particular care in the management of their legal communications. Your story has played a part in this process for Canadian companies and their lawyers.

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