

Legal Professional Privilege: Comparing Different Approaches Within the United States and the European Union

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THE CONCEPT of privileged attorney-client communications has been a long standing tenet in legal communities for decades. However, the scope and justification for privilege vary by jurisdiction. This article compares current trends concerning the status of privileged communications made between a lawyer and his or her client within both the United States (US) and the European Union (EU). While at least one jurisdiction in the US has extended attorney-client privilege to protect attorney-to-client communications, in a recently decided case, the European Court of Justice (“EUCJ”) affirmatively narrowed this privilege.

I. Green Light: Pennsylvania Protects Attorney to Client Communications

In an Opinion issued on February 23, 2011, the Pennsylvania Supreme Court clarified the issue of attorney-client privilege and recognized that the privilege protects attorney-to-client communications as well as client-to-attorney communications.¹ *Gillard vs. AIG Insurance* recognized that:

“ . . . in Pennsylvania, the attorney-client privilege operates in a two-

¹ *Gillard vs. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011).



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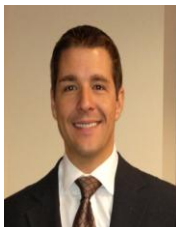
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fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.”

The *Gillard* decision overturned the prior standard, articulated most recently in *Nationwide v. Fleming*.² The *Nationwide* case involved internal documents from in-house counsel. The Pennsylvania Superior Court held, based on statute, that the documents were discoverable as they were communications from counsel to the client. The case was then appealed to the Pennsylvania Supreme Court. Because of odd circumstances, only four Justices participated in the *Nationwide* opinion, with two Justices affirming and two voting for reversal. As a result, the holding of the Superior Court remained the law of the Commonwealth until the *Gillard* decision.

Gillard involved a claim for statutory insurance bad faith arising out of the handling of an underlying claim for

uninsured/underinsured motorist benefits. The trial court ordered the Defendants to produce documents which were drafted by counsel for the Defendants in the underlying underinsured motorist claim and directed to the claims handler. The underlying action was a UM/UIM arbitration. On the eve of the hearing, the underlying matter settled. Subsequently, the statutory insurance bad faith action was filed. Since the documents were created relative to the underlying action that had concluded, the attorney work product privilege was not available. In the bad faith action, defense counsel asserted attorney-client privilege. The trial court issued a blanket ruling from the bench that communications from an attorney to his client are not protected by the attorney-client privilege. The trial judge stated:

“According to the Pennsylvania statute, the attorney-client protection only applies to communications made by the client. That’s my ruling.”³

The statute in question states:

“Confidential communications to an attorney. In a civil matter, counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”⁴

³ *Gillard*, 15 A.3d at 48.

⁴ 42 PA. COMP. STAT. § 5928.

² 605 Pa. 484 (Pa. 2010).

Both the trial court and the Superior Court strictly interpreted the statute, holding that since it only referenced client-to-attorney communications, only those communications would be privileged. In its argument, AIG took the position that the codification of the attorney-client privilege did not change or limit the essential nature of the common law, which dated back to colonial times in Pennsylvania. Further, the current statute essentially reenacted an original statute dating to 1887. Many years prior to the reenactment, the Supreme Court decided the case of *National Bank of West Grove v. Earle*.⁵ In that case, a group of unsecured creditors sought discovery from one “Counselor Johnson”, who was an attorney involved in the reorganization of stocks for a company known as Record Publishing Company, in order to satisfy outstanding creditors. Johnson objected to the discovery, arguing that “a bill of discovery is not the proper method, if there be any proper method, to compel counsel to disclose the advice given to his clients.” The Pennsylvania Supreme Court found that the advice was privileged, stating:

“If it were not, then a man about to become involved in complicated business affairs, whereby he would incur grave responsibilities, should run away from a lawyer rather than consult him. If the secrets of the professional relation can be extorted from counsel in open court, by the antagonist of his client, the client will exercise common prudence by avoiding counsel.”⁶

The *Earle* case did not specifically reference the 1887 statute. Relying upon *Earle* in argument, AIG argued that the reenactment of the statute had to be interpreted in a consistent manner with the Supreme Court’s holding in *Earle*.

A. *Nationwide v. Fleming*

In *Fleming*, the document at issue was a sensitive litigation strategy memorandum from a nationwide in-house lawyer to other nationwide lawyers and executives. The document provided the author’s opinion regarding the case, as well as strategy. The trial court ordered the document to be produced based upon waiver, not privilege. The Court concluded that Nationwide had waived the privilege by producing other related documents. On appeal, the Superior Court affirmed, but on a different basis. The Superior Court held that the document was not privileged at all. The Superior Court held that the privilege protected only client-to-counsel communications, not counsel-to-client communications. As such, they held that the document was never privileged because it was a counsel-to-client communication that did not reveal any prior client-to-counsel communications. Curiously, two Superior Court judges who authored the opinion were subsequently elected to the Pennsylvania Supreme Court. A third Justice on the Pennsylvania Supreme Court is a sister of one of the attorneys who represented a party in *Fleming*. Therefore, when *Fleming* came before the Supreme Court, three of the seven justices had to recuse themselves, leaving only four justices to render a decision. As often happens in

⁵ 196 Pa. 217, 4 A. 268 (1900).

⁶ *Id.* at 220.

such situations, there was a tie. In baseball, a tie goes to the base runner. In this case, however, the tie left the existing decision of the Superior Court as the law of the state.

It should be noted, though, that the two justices who voted in favor of affirming the Superior Court opinion based their position not on the reasoning of the Superior Court, but on the reasoning of the trial court. They held that they did not need to address the issue of whether or not there was a privilege since there had been a waiver. The two justices who voted to reverse held that there was no waiver and that a privilege should apply.

B. *Gillard v. AIG*

Shortly after the *Fleming* opinions were issued, the Supreme Court accepted allocatur on *Gillard*. Of particular concern in *Fleming* was the potential of a “chilling effect” that the ruling may have on communications by in-house counsel. Without privilege, it would be extremely difficult for in-house counsel to perform their daily job functions communicating with co-workers. Although allocatur was accepted in *Gillard*, the communication in *Gillard* was from outside counsel to the claims handler and, therefore, the facts would not directly address the in-house counsel dilemma. Nonetheless, the waiver issue was not present in the *Gillard* case, meaning that the Supreme Court would have to address the issue of attorney-client privilege directly.

Compounding the challenge in *Gillard* was the fact that all seven Justices would sit for the case. Included among the seven justices were the two who did

not participate in *Fleming* because they wrote the *Fleming* Superior Court opinion, and were subsequently elected to the Supreme Court. Their position was known from the Superior Court opinion, in which they opined that the privilege was unilateral. Additionally, the justice whose brother had sought the documents in *Fleming* was also sitting on the panel. The Court also included the two justices who wrote the *Fleming* Supreme Court opinion affirming *Fleming* on the trial court’s reasoning that there had been a waiver of the privilege.

To address the position of those two justices, AIG focused upon the waiver issue in *Fleming*. The argument to the Court was that one cannot find waiver unless there was a privilege to waive. Therefore, although those two justices did not address the privilege issue in their *Fleming* opinion, by finding a waiver of a privilege, the privilege must have existed.

With respect to the position taken by the justices who authored the Superior Court opinion in *Fleming*, AIG argued that the statute could be read consistent with the common law. Even though the statute only addresses communications from client-to-counsel, this does not mean that the attorney-to-client communications are not also protected. The common law, as enunciated in *Earle*, has always recognized that all communications between attorney and client were privileged. Counsel argued that the statute merely provided direction to counsel that they could not reveal communications from the client.

Joining in support of AIG were several amici filers, including the Philadelphia Bar Association, the Pennsylvania Bar Association, the

Allegheny County Bar Association (Pittsburgh), the Association of Corporate Counsel, Chamber of Commerce of the United States of America, the Energy Association of Pennsylvania, the American Insurance Association, the Pennsylvania Defense Institute, the Insurance Federation of America, and the Philadelphia Association of Defense Counsel. The amici filers focused on the impact of the privilege to corporate counsel, which could not directly be addressed by AIG. Further, the amici filers addressed the general concerns of the attorneys in Pennsylvania with respect to their ability to effectively represent clients if their communications were subject to disclosure.

C. The Court's Decision

On February 23, 2011, the Pennsylvania Supreme Court issued a majority Opinion, along with dissenting Opinions authored by two justices. Authoring the Opinion was Justice Saylor, who was joined by Chief Justice Castille, and Justices Baer, Todd and Orie Melvin. Justice Todd had co-authored the Superior Court opinion in *Fleming*. The dissenting Opinions were authored by Justice McCaffery, who was also a co-author of the *Fleming* Superior Court opinion, and Justice Eakin, who authored the opinion in support of affirmance by the Supreme Court in *Fleming*.

The Majority Opinion enunciated the Supreme Court's desire for consistency:

Pennsylvania courts have been inconsistent in expressing the scope of the attorney-client privilege . . . Presumably, the disharmony relates

to the ongoing tension between the two, strong competing interests-of-justice factors in play -- namely -- the encouragement of trust and candid communication between lawyers and their clients, and the accessibility of material evidence to further the truth-determining process.⁷

As AIG had argued, the Court recognized the difficulty and awkwardness in unraveling attorney advice from client input and the chilling effect that the lack of a privilege could have on fostering frankness of communication between lawyer and client. The Court noted that it is important that there is an understanding that communications between a lawyer and client would remain private.

Justice McCaffery in his dissent took the majority of the Court to task, saying that the Court was legislating from the bench. In the majority Opinion, the Court agreed that the statute and the common law could be read consistently. The majority relied on *Earle*, which recognized a two-way privilege, stating:

We appreciate that client communications and attorney advice are often inextricably intermixed, and we are not of the view that the legislature designed the statute to require 'surgical separations' and generate the 'inordinate practical difficulties which would flow from a strict approach to derivative protection.⁸

⁷ *Gillard*, 15 A.3d at 56-57.

⁸ *Id.* at 57.

Justice McCaffery, on the other hand, took a strict constructivist view of the statute. He noted that *Earle* was obscure and brief and, therefore, it had questionable precedential value. He also noted that public policy concerns should have been addressed by work product privilege. Nonetheless, in cases such as *Gillard* and other bad faith actions, the work product privilege would not be available. This specific issue, however, was not addressed in Justice McCaffery's dissenting. Justice Eakin addressed a different issue within his dissenting opinion. His position was that for communications to be privileged, they would have to contain information that emanated from the client. If counsel's communication did not contain any information derived from the client, then it should not be privileged.

D. Impact for In-House Counsel

Despite the fact that the *Gillard* communications were not made by in-house counsel, the opinion directly referenced the impact the holding would have for in-house counsel, as enunciated in the amici Briefs. Quoting the Brief filed by the Energy Association of Pennsylvania, the Court noted that "[a] reliably confidential relationship between counsel and client is needed more than ever for companies to operate as the good citizens the people of the Commonwealth expect them to be."⁹ Corporate in-house lawyers need to ensure their client's compliance with the law, and they could be hamstrung in those efforts if their

communications would be subject to discovery.

E. Conclusions

It is encouraging that the Pennsylvania Supreme Court seized the opportunity to clarify a confusing situation for counsel with respect to attorney-to-client communications. It is likely that the *Fleming* case presented a difficult fact scenario with the waiver issue, as well as other issues for the Court to comfortably provide a clear enunciation of its position. The fact that, after issuing the split decision on *Fleming*, the Court almost immediately accepted *Gillard* for appeal demonstrated that they were looking for the right case that would allow them to have the vehicle to clarify the law. The amici filers represented the interests of virtually all of the attorneys in the Commonwealth, as well as corporate and defense organizations, emphasizing the importance of the task at hand.

II. Red Alert: A Focus on European Union Case Law¹⁰

In contrast, a recently decided European case decided by the European Union Court of Justice ("EUCJ") has effectively limited the breadth of protections for confidential communications made between a client and his or her lawyer.

⁹ *Id.* at 54.

¹⁰ The term "European case law" does not refer to case law that is necessarily binding law within all of the Member States of the European Union, but rather refers to judgments made by the European Union Court of Justice.

Initially, it is important to note that there is a substantial difference between common law and civil law systems.¹¹ In civil law countries, the expression “professional secrecy” (or “*secret professionnel*” in French) is used and constitutes an approach *in personam* to confidentiality. Conversely, in common law countries, the term “legal privilege” is used and constitutes an approach *in rem* to confidentiality. In civil law countries, the idea is that some professionals, like doctors, lawyers and priests, must obtain confidential information from their patients, clients or congregation, that the law considers necessary for the exercise of their profession. In return for the need to receive such confidential information, the law imposes upon these professionals an unconditional and unqualified obligation not to disclose the confidential information he or she has received.

In France and Belgium, both civil law countries, the term “professional secrecy” is a principle of public policy.¹²

¹¹ For a comparison between the common law and civil law systems on this topic, see Thomas Baudesson and Peter Rosher, *Le secret professionnel face au legal privilege*, RDAI/IBLJ, 2006 No. 1, at 37; for an outline of Belgium law on this issue, see Bruxelles (ch. Mis. Acc.), 26 January 2011, *Journal des Tribunaux* 2011, N°6444, p. 542, note N. Colette-Basacqz.

¹² In Belgium, see for example Bruxelles (ch. Mis. Acc.), 26 January 2011, *Journal des Tribunaux* 2011, N°6444, p. 542. In France, see for example Article 2 of the Internal National Rules for Lawyers (“Règlement Intérieur National de la profession d’avocat (RIN)”), “*L’avocat est le confident nécessaire du client. Le secret professionnel de l’avocat est d’ordre public. Il est général, absolu et illimité dans le temps. Sous réserve des*

Professional secrecy is both general and absolute and has no limitation in time. Additionally, it is a lawyer’s right and duty, by reason of his or her position, to respect such privilege, under a threat of criminal and/or disciplinary sanctions.¹³

strictes exigences de sa propre défense devant toute juridiction et des cas de déclaration ou de révélation prévues ou autorisées par la loi, l’avocat ne commet, en toute matière, aucune divulgation contrevenant au secret professionnel”; which may be freely translated as follows: “The lawyer is necessarily its client’s confident. Lawyer’s professional secrecy is a matter of public policy. It is general, absolute and not limited in time. Subject to the strict requirements established in terms of its own defense before a court, as well as in terms of declarations or disclosures authorized or required by the law, lawyers should not commit any disclosure violating the principle of professional secrecy.”

¹³ In Belgium, see Article 458 of the Criminal Code (“Code pénal”), “*Les médecins, chirurgiens, officiers de santé, pharmaciens, sages-femmes et toutes autres personnes dépositaires, par état ou par profession, des secrets qu’on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice (ou devant une commission d’enquête parlementaire) et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d’un emprisonnement de huit jours à six mois et d’une amende de cent [euros] à cinq cents [euros]*”; which may be freely translated as follows: “Doctors, surgeons, health officers, pharmacists, midwives and all other person who must, by state or by profession, keep the secrets that they are given, and who disclosed those secrets, will be punished by eight days to six months imprisonment and a fine of €100 to €500, unless they are called to provide a judicial testimony (or before a parliamentary

Professional secrecy covers all confidential information given to a lawyer for the purpose of advice or defense. This approach to confidentiality is confirmed by the European Code of Conduct for lawyers.¹⁴

commission of inquiry) and unless the law obliges them to disclose those secrets.”

In France, see Article 226-13 of the Criminal Code (“Code pénal”), “*La révélation d’une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d’une fonction ou d’une mission temporaire, est punie d’un an d’emprisonnement et de 15000 euros d’amende*”; officially translated as follows: “The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year’s imprisonment and a fine of €15,000.”

¹⁴ Article 2.3 (“Confidentiality”) of the European Code of Conduct for European Lawyers:

“2.3.1 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 State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by

Conversely, in common law countries, the term “legal privilege” is used and constitutes an *in rem* approach to confidentiality. Under this methodology, the content of the communicated information is more important than the author or the recipient of the information. In order for legal privilege to apply, there must be: (1) a communication, (2) between counsel (both external and internal) and client, (3) made confidentially, (4) for the purpose of obtaining or rendering legal advice.¹⁵ This privilege, however, does not protect facts, business advice, or information obtained from third parties.¹⁶ The idea is that legal privilege will encourage frank discussions between a client and his attorney. It also ensures that an attorney is not hindered in providing legal advice and services to his or her client. This approach to confidentiality probably best explains why in-house lawyers also benefit from the legal privilege. Under this approach, it is the client’s privilege to release his lawyer from the obligation of secrecy. The legal privilege also survives the death of the individual client.

him or her in the course of providing professional services to observe the same obligation of confidentiality.”

¹⁵ See *Greenough v. Gaskell*, High Court Chancery, (1833) 39 E.R. 618, available at <http://www.uniset.ca/other/cs3/39ER618.pdf>; see also Lord Philips in re *McE* (Northern Ireland) In re *M* (Northern Ireland) In re *C* (AP) and another (AP) (Northern Ireland), [2009] UKHL 15 on appeal from: [2007] NIQB 101, available at <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090311/mce-1.htm>.

¹⁶ *Id.*

A. Focus on European Case Law

On September 14, 2010, the EUCJ decided the *Akzo Nobel* case,¹⁷ affirming the European Union's General Court, which held that the legal professional privilege ("LPP") did not include communications between companies and their in-house counsel. However, *Akzo Nobel* was not the first case to examine the scope of the LPP. On May 18, 1982, the EUCJ decided the *AM&S* case.¹⁸ *AM&S* is important for two reasons. First, the Court held for the first time that correspondence to and from an external member of the Bar is covered by the LPP. The *AM&S* Court further reasoned that coverage of external lawyers is a fundamental principle of European Union law, provided that the advice emanates from an independent lawyer enlisted in a Bar of a Member State. An in-house lawyer, however, cannot be considered independent from his sole client, who is also his employer, because of the employment relationship. Under *AM&S*, LPP was conditioned upon three cumulative requirements, including: (1) protected documents must be linked to

the exercise of the right of defense of a client; (2) that the information must have emanated from counsel who is independent from the client (i.e., counsel that is not linked to the client in a relation of employer/employee); and (3) the LPP is limited to the independent lawyers of the European Union. The opinion of Advocate General Sir Gordon Slynn was in favor of also conferring LPP to advocates employed by an undertaking.

AM&S also set out a procedure on how to effectively protect LPP. The *AM&S* court held that in order to maintain LPP protection, the undertaking must—without disclosing the contents of the correspondence—indicate to the civil servants of the Commission the facts that fulfill the conditions for the protection. If the Commission is of the opinion that such proof is not present or insufficient, it can order the production of the information. However, the undertaking can appeal such decision and request provisional measures suspending the effect of the Commission's order.¹⁹

On April 4, 1990, the General Court decided the *Hilti* case.²⁰ The *Hilti* ruling

¹⁷ *Akzo Nobel Chemicals, Ltd. and Akros Chemicals Ltd. v. Commission*, Court of First Instance (First Chamber, extended composition) of 17 September 2007, Joined cases T-125/03 and T-253/03, *European Court Reports 2007 Page II-03523*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:NOT>.

¹⁸ *Australian Mining & Smelting Europe Ltd. v. Commission*, Judgment of the Court of May 18, 1982, Case 155/79, *European Court Reports 1982 Page 01575*, available at http://www/eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=671979J0155&lg=en.

¹⁹ *Id.*

²⁰ *Hilti Aktiengesellschaft v Commission of the European Communities*, Order of the Court of First Instance (Second Chamber) of 4 April 1990, Case T-30/89, *European Court reports 1990 Page II-00163*, publication by way of extracts, available at http://eur-europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61989B0030&lg=en. See also *Hilti AG v Commission of the European Communities*, Judgment of the Court of 2 March 1994, Case C-53/92 P, *European Court reports 1994 Page I-00667*, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!

confirmed two general principles. First, any documents for which confidentiality is invoked must be made for the purposes and in the interests of the client's right of defense. Second, the information must emanate from an independent lawyer, or a lawyer who is not bound to the client by an employment relationship. Further, the *Hilti* court expressly held that "independent" means an "external" lawyer.²¹ In *Hilti*, the documents in question were notes, internal to the undertaking, which contained the content of advice received by the undertaking from external counsel and which were to be distributed within the undertaking. The Court held that these notes were confidential and, therefore, protected by LPP.

B. *Akzo Nobel v. Commission*

This approach to the LPP, which was first proffered by the *AM&S* court, and thereafter at least partially confirmed by the *Hilti* court, was clearly confirmed by both the General Court and EUCJ in *Akzo Nobel*. The General Court's ruling in *Akzo Nobel* concerned a double question. The Court had to first decide which documents were to be considered confidential. Next, the *Akzo Nobel* Court was faced with the question of whether LPP extended to advice given by in-house lawyers in EU competition law

investigations. In *Akzo Nobel*, there were two sets of documents and the court had to decide whether or not each set was to be considered confidential. The first set of documents ("Set A Documents") contained two versions of a typed memorandum from the general manager of Akcros (a subsidiary of Akzo) to one of his superiors. These documents explained the compliance program of the undertaking. It was also claimed that this information was discussed with an external lawyer of the undertaking. As evidence of conversations with external counsel, handwritten annotations appeared on one of the versions, which would have been written during a telephone conversation with the external lawyer of Akzo and Akcros (hereinafter collectively referred to as "Akzo"). The second set of documents ("Set B Documents") contained handwritten notes taken by the same general manager about conversations he had with employees of the undertaking. These notes were worked out in the memorandum section of the Set A Documents. The Set B Documents also contained outprints of two emails authored by the general manager and addressed to the in-house lawyer of Akzo. In *Akzo Nobel*, Akzo's in-house counsel also assumed the function of competition law coordinator for Akzo.

As to Set A Documents, the General Court found that there was no confidential correspondence with an independent lawyer. The Court further held that the memorandum was not drafted with the exclusive intent to be discussed with an independent lawyer, something that must be apparent out of the document itself. This condition of

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²¹ See *id.* at paragraph 16: "An examination of the aforesaid documents shows that they are, essentially, notes internal to the undertaking reporting the content of advice received from independent, and thus external, legal advisers."

exclusivity resulted from a restrictive interpretation of LLP. By discussing who was to be considered an independent lawyer, the General Court also addressed the Set B Documents. The Court ruled that the “Cohen-Advocaat,” the in-house lawyer of Akzo, was not an independent lawyer for LPP purposes.

Akzo subsequently appealed the decision of the General Court. However, the scope of Akzo’s appeal concerned only the question of whether LPP extends to legal advice given by in-house lawyers in EU competition law investigations. The specificity of this case was that the lawyer in question, the Cohen-Advocaat, had a status of “advocaat” or lawyer admitted to the Bar, but that he was also employed by Akzo on the basis of an employment contract. The hearing before the EU CJ’s Grand Chamber of thirteen judges took place on February 9, 2010 in Luxembourg. In addition to the parties involved in the action, a number of lawyers’ organizations and three Member State Governments were given leave to intervene. Advocate General Kokott advised against extending LPP to in-house lawyers employed by an undertaking, even when the in-house lawyer is also admitted to the Bar.

Akzo submitted that the status of an in-house lawyer, who is admitted to the Dutch Bar in the Netherlands (“Cohen-Advocaten”), could not be equated to the position of other in-house lawyers. Akzo further contended that the General Court had erred in law by failing to acknowledge the independence of Cohen-Advocaten, who are specifically regulated by statute. Akzo argued that there was no difference between a Cohen-Advocate and any other advocaat regulated by the

Dutch Bar. It also noted that the Dutch legislation, which established Cohen-Advocaten during the mid-1990s, set out strict ethical rules and sanctions that bind both advocaat and employer, so as to ensure independence.

C. Intervening Parties

The governments of Ireland, the UK, and the Netherlands all intervened in the *Akzo Nobel* case. The Dutch government defended a position similar to the position defended by Akzo, which was based upon the specific status of a Cohen-Advocaat. Both the UK and Ireland argued that LPP is a client privilege that is derived from fundamental rights. As such, they submitted that the case should not be viewed through the prism of the Commission’s power to enforce competition law; rather, the starting point for examining this case was that of a fundamental right. Ireland further argued that there had been a significant change in the EU’s jurisdiction by virtue of the Treaty of Lisbon,²² which conferred treaty status on the Charter of Fundamental Rights (the “Charter”), thus making it fully justiciable by the Court. Ireland observed that if the Charter and the European Convention of Human Rights (“ECHR”) coincided, rights should be read in accordance with the ECHR. Ireland also asserted that Article 6 of the ECHR applied, as all legal advice had the seeds of the proceeding, which was

²² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SO M:EN:HTML>.

described by the European Commission as professional secrecy. In so arguing, Ireland emphasized that lawyers in private practice could be replaced by a client without any reason, whereas in-house lawyers are protected by employment law.

The UK submitted that the Commission's need for adequate investigatory powers was important, but that it was not of comparable importance to a fundamental right. Consequently, the UK argued that the General Court had erred in giving the Commission precedence over the rights of the defense. The UK maintained that its approach was supported by *AM&S*, which referred to the right to consult a lawyer in confidence and to the protection of correspondence for the purpose of rights of the defense. Rights of the defense formed part of the fundamental principles of EU law, and existing case law confirmed the status of LPP as a fundamental principle²³. The UK was of the opinion that where an in-house lawyer was subject to the rules of ethics and discipline, which had the same meaning for that lawyer as a lawyer in private practice, his advice should be protected by LPP. Furthermore, the UK observed that in both *AM&S* and *Wouters*,²⁴ the court established LPP as a fundamental right.

The Dutch government, focusing on its own legal system, stated that the question to be answered by the Court was simply whether a Dutch Cohen-Advocaat's advice was covered by the LPP. In *AM&S*, the Court did not examine the situation of a lawyer that is subject to legislative rules designed specifically to take into account his status as an in-house lawyer, and to ensure his independence *vis-à-vis* his employer. The Dutch Bar echoed the submissions that the guarantees of independence given by the Dutch Statute were significant and had real substance. It also reminded the Court that the statute supplemented Dutch labor law, as it prohibited an employer from dismissing a Cohen-Advocaat when, *inter alia*, there was a difference of views between the two parties. In response to a question from Judge Lenaerts, Dutch experts confirmed that a Cohen-Advocaat had the right to represent his clients in court and that this was exercised in practice. It was disputed, however, whether there was any necessary link between rights of audience and LPP.

Other parties voluntarily intervened in *Akzo Nobel*, from both within and outside the EU, including the Council of the Bars and Law Societies of the European Union ("CCBE"),²⁵ the European Company Lawyers Association

²³ *Ordre des barreaux francophones et germanophones and Others v Conseil des ministres*, Judgment of the Court (Grand Chamber) 26 June 2007, Case C-305/05, available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0305:EN:HTML>.

²⁴ *J. C. J. Wouters, J. W. Savelbergh, and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van*

Advocaten, interveners: *Raad van de Balies van de Europese Gemeenschap*, Judgment of the Court of 19 February 2002, Case C-309/99, *European Court reports 2002 Page I-01577*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0309:EN:HTML>.

²⁵ See <http://www.ccbe.eu/index.php?id=12&L=0>.

("ECLA"),²⁶ the American Corporate Counsel Association – European Chapter ("ACC"),²⁷ and the International Bar Association ("IBA").²⁸ The CCBE submitted that the rules on confidentiality of LPP differ between Member States because there was no EU regulation of the legal profession. Because EU law recognizes the differences in the structure and regulation of the legal profession in Member States,²⁹ the CCBE asserted that there should be no difficulty in recognizing differences regarding LPP. The CCBE argued that not recognizing such differences would amount to a form of discrimination. The correct test, as preferred by the CCBE, was that LPP should be recognized where, under national rules, a lawyer is permitted to practice as an in-house lawyer and remain a full member of the relevant national bar, subject to its code of conduct and its oversight. The CCBE stated that practical objections by the Commission should not prevent the Court from recognizing such a principle.

The ECLA suggested a test with an even broader application than the test formulated by the CCBE, so as to include regulated legal professionals whose

advice was accorded LPP under the law of the Member State where such professionals were established. In support thereof, the ECLA cited the Treaty of Lisbon's entry into force and the resultant changes concerning the principle of conferral. The ECLA asserted that Treaty of Lisbon reinforced its arguments on national competence, because under the Treaty the EU had no power conferred on it to regulate lawyers. The ECLA submitted that EU law accepts that the definition of a lawyer is a matter for the laws of each Member State. As such, the ECLA argued that the Commission should not try to use its competition enforcement powers to interfere with the professional rights and duties of lawyers. Indeed Regulation 1/2003,³⁰ governing the Commission's powers to enforce competition law, states that the Commission is to respect the ECHR and that the Regulation is to be interpreted accordingly. The ECLA stated that there was no justification under EU law to treat in-house lawyers differently from those in private practice. It also noted the position taken by the Netherlands, the UK, and Ireland, as well as the *Darrois Report*³¹ in France, which concluded that the independence of in-house lawyers could be guaranteed. In addition, the ECLA submitted that the

²⁶ See <http://www.ecla.org/>.

²⁷ See <http://www.acc.com/>.

²⁸ See <http://www.ibanet.org/>.

²⁹ See for example Article 8 of the "EU Lawyers Establishment Directive", Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31998L0005&model=guichett&lg=en.

³⁰ Council Regulation (EC) No 1/2003 of December 15, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:NOT>.

³¹ *Rapport sur les professions du droit*, Mars 2009, available at http://www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf.

Court should not rule in a narrow manner, which would close off the possibility for the LPP to be afforded to advice given by other regulated professions.

The interests of non-EU lawyers were also represented during the hearing by the ACC–European Chapter and the IBA. Both submitted that LPP must attach to a communication from a lawyer who is a full member of a bar. The IBA argued that the real question was whether an in-house lawyer can be independent. The ACC went even further, and argued that it should not matter whether the Bar is within the EU or outside the EU. The ACC took the position that any lawyer fully licensed in accordance with the laws of the country in which he is established should be assumed to be competent and ethical until proven otherwise. The ACC rejected the idea that EU membership was a determinative factor of the trustworthiness of the legal profession. The ACC further argued that in almost thirty years since *AM&S*, “compliance” has become a watchword for companies, and in-house lawyers have played a crucial role in setting up and enforcing compliance programs. The ACC also questioned the practical difficulties or dangers of abuse of LPP to which the Commission referred. As explained by the ACC, there was nothing to prevent the Commission from sanctioning companies for claiming LPP in a vexatious manner over documents that do not give legal advice.

D. The Commission

The Commission was the sole party to the case that argued against LPP being accorded to in-house counsel. The

Commission recalled that the enforcement of competition law is an exclusive competence of the EU and, therefore, it submitted that the *Akzo Nobel* case was about defining the Commission’s powers; not about limiting LPP or regulating lawyers. In response to a question from the Spanish Judge-Rapporteur, Rosario Silva de Lapuerta, the Commission averred that any impact on lawyers would simply be a side-effect of the EU exercising its exclusive competence to regulate competition law. The Commission noted the recent judgment in the *EREF* case,³² which held that a non-lawyer does not have a right of audience before EU courts. The Commission submitted that this judgment had an effect on the legal profession without actually regulating it. The Commission stated that, in acknowledging that the LPP could attach to documents emanating from an independent lawyer, the Court in *AM&S* had granted a far greater protection than what was found in a number of Member States at that time. Even now, many Member States offer no such protection to documents found on the premises of an undertaking subject to a competition investigation, whatever their source. As an effect, if the Court found that LPP was a fundamental right, the Commission argued, it would effectively be ruling that many Member States were breaching such a fundamental right.

³² *EREF v Commission*, Order of the Court of First Instance of 19 November 2009, Case T-40/08, 2010/C 24/92, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:024:0052:0052:EN:PDF>.

The Commission also argued that it was not for the Court to engage in policy considerations and that the Court should decide to go beyond minimum fundamental rights. It supported this contention by noting that the European Parliament had previously rejected a proposal to extend privilege to in-house lawyers when voting on the proposed Regulation 1/2003. The Commission warned against creating a situation where it could copy a document in one country but not in another, which had the potential to create “document safe-havens”. It was emphasized that the Commission had very few powers and no coercive powers under Regulation 1/2003, and that it could not enter a company’s premises if the company opposed it. Rather, it was reliant on national authorities and national law for these kind of powers. The Commission argued that overruling *AM&S* would lead to confusion where there had not been any for thirty years.

In response to a question from Advocate General Kokott, on the differing incentive structures for in-house lawyers and those that are in private practice, the Commission observed that the living of an in-house lawyer was dependent upon the financial health and success of his employer, which represented a potential conflict of interest. The Advocate General also noted that the EU Money Laundering Directive seemed to exclude in-house lawyers from the definition of “lawyer.”³³ Akzo countered, however, that the Directive had been

replaced by Directive 2005/60,³⁴ which defines “lawyer” as having the meaning attributed to it by national law.

F. The Court’s Decision

In its decision, the EUCJ referred to the *AM&S* decision where it held that confidentiality of written communications between lawyers and clients should be protected at Community level, however, subject to two conditions. First, the *AM&S* court held that an exchange with the lawyer must be connected to the client’s rights of defense (i.e.: the *in rem* approach). Second, the exchange must have emanated from an independent lawyer, that is to say a lawyer who is not bound to the client by an employment relationship (i.e.: the *in personam* approach).

The independence requirement is based upon a conception of the lawyer’s role as collaborating in the administration of justice and as being required to provide legal assistance to his or her client in full independence and with the overriding interests of that cause.

The counterpart to this protection lies within the rules of professional ethics and discipline, which are promulgated and enforced in the general interest. The requirement of independence mandates the absence of any employment relationship between the lawyer and his

³³ *Akzo Nobel*, European Court Reports 2007 Page II-03523.

³⁴ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance), 25 November 2005, *Official Journal L 309*, pp. 15-36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:01:EN:HTML>.

client. As a result, LLP does not cover exchanges within a company or group, which are made to their in-house counsel. Independence is not only determined positively, by reference to professional ethical obligations, but it is also determined negatively, by the absence of an employment relationship. Notwithstanding the enrollment in a Bar or law society and the resultant professional ethical obligations thereto, an in-house lawyer does not enjoy the same degree of independence from his employer as does an external lawyer who works for an external firm in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his undertaking. If such conflict would happen to strengthen the in-house lawyer's position within the company, the fact remains that in-house lawyers are not able to ensure a degree of independence that is comparable to that of external lawyers.

The Court concluded that external lawyers and in-house lawyers should be placed in different categories and, therefore, they cannot be treated the same way. An in-house lawyer occupies the position of an employee, which by its very nature does not allow him to ignore the commercial strategies pursued by his employer and it thereby affects his ability to exercise professional independence. Furthermore, it was reasoned that an in-house lawyer's potential combination of tasks with his employer can undermine his independence. Because an in-house lawyer can exercise other tasks within a company, such as secretary or, as in *Akzo Nobel*, the task of competition law

coordinator, this may have an effect on the commercial policy of the undertaking. It may also affect the in-house lawyer's ability to exercise his professional independence.

G. Conclusions

Under *AM&S* and EU law, confidentiality and the LPP should be protected, so long as two conditions are fulfilled. First, any exchange must take place in the course of the exercise of the right of defense and, second, the exchange must be between the client and an independent counsel. The legal regime in the Netherlands cannot be regarded as signaling a developing trend in the Member States or as a relevant factor in determining the scope of the LPP. The situation, since *AM&S*, does not warrant a finding that in-house lawyers will benefit from LPP. To that end, there has not been an evolution in the law of the EU that would justify such a change. Regulation 1/2003 has defined the powers of the Commission broadly, empowering the Commission to enter any premises where business records may be kept, including private homes. As far as legal security is concerned, the *Akzo Nobel* court held that the investigations by the national authorities are to be distinguished from those by the Commission, so that there is no need to have the same rules of confidentiality and, therefore, no need for a reference to the national rules of confidentiality. Furthermore, as for the procedural autonomy, the Court held that one approach on the European level requires no interference from national law.

It seems clear from the *Akzo Nobel* decision that the EUCJ wanted to exclude from confidentiality any correspondence exchanged between an undertaking and counsels who are working for the undertaking on the basis of an employment contract, notwithstanding their enlistment in the Bar. Internal counsel, as well as external counsel working on the basis of an employment contract with the client are therefore excluded (*in personam* approach influence). Moreover, it also seems clear that the correspondence exchanged between the internal lawyer of the undertaking and its external lawyers remains protected by LPP (*in rem* approach influence). For those external lawyers who are not working on the basis of an employment contract, the EUCJ might well decide in the future that their correspondence with their client does not benefit from confidentiality, when the external lawyer depends fully upon its client economically or is identified with the client (e.g., “advocats” having their offices within the premises of their client or detached by their law firm to the client or still “advocats” having only one client).

H. Practical Effects

If certain documents are protected by confidentiality/LPP because they have been exchanged between the undertaking and its external counsel, there may still be limits to the type of documents that are protected by the LPP. If original documents are attached to a confidential letter that is addressed to an external lawyer there may be no problem, although one could question why the

original documents had to leave the office of the undertaking. Additionally, notes that simply copy the contents of communications with external counsel are also protected; however, notes that comment on such correspondence may not be confidential and, therefore, may not be afforded LPP protections.

As a practical matter, one cannot exclude that, in the future, verbal communications might be preferable to written communications. Moreover, communications should be channeled through external counsel as much as possible. Written advice from external counsel is best circulated within the client’s organization in an un-amended form and should not be summarized, commented on, or supplemented by corporate counsel. Furthermore, the client may need to be prepared to explain to the Commission the privileged character of each document, which implies that one must know and be able to explain the identities of the author and recipient, as well as the objectives for which the document was created. It is, therefore, advisable to keep privilege/LPP documents in separate paper files and email folders.

III. Conclusion

The principle of equal treatment requires that comparable situations should be treated similarly, while different situations should not be treated similarly—unless such treatment is objectively justified. One the one hand, Pennsylvania, like a majority of other US states, has adopted a common law approach to legal privilege. The Pennsylvania Supreme Court placed more

emphasis upon the nature and type of the communication, rather than the source of the communication. As a result, the Pennsylvania Court reasoned that the communications between an attorney and his or her client are often inextricably intermixed and, therefore, such communications should be considered confidential in their entirety. On the other hand, within the EUCJ's reasoned opinion in *Akzo Nobel*, the EUCJ placed more emphasis upon the source of the communication. As such, it appeared that the EUCJ did not consider external lawyers and in-house lawyers to be equal, because an in-house lawyer does not enjoy a level of professional independence equal to that of external lawyers. Therefore, the EUCJ refused to extend to in-house lawyers, the same benefit of LPP enjoyed by independent external lawyers.