PRIVILEGED COMMUNICATIONS WITH IN-HOUSE COUNSEL UNDER UNITED STATES AND EUROPEAN COMMUNITY LAW: A PROPOSED RE-EVALUATION OF THE *AKZO NOBEL* DECISION

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I. INTRODUCTION

Law and wine have much in common. Both law and wine seek the unattainable: for law, it is justice; for wine, transcendence. However, neither law nor wine is available for free and at times, seemingly parenthetic matters can obscure their objectives. A wine's container, such as a bottle secured by cork or screw top, may exert more influence on a purchaser than the bouquet. With the law, the designation of a lawyer as *in-house counsel* or *outside counsel* may have greater sway over which lawyer a corporation consults than the lawyer's own legal skills. This anomaly was underscored by the European Union's Court of First Instance decision: *Akzo Nobel Chemicals Limited v. Commission of the European Communities.*[1]

In *Akzo Nobel*, the court held that lawyers employed as in-house counsel were not independent of their corporate employers and, thus, could not engage in privileged communications with their client, the corporation.[2] However, the court in *Akzo Nobel* determined that the same corporate communications are protected from disclosure if such communications are held with lawyers who are deemed outside counsel.[3] By finding that lawyers employed as in-house counsel are not independent, the Court of First Instance's decision in *Akzo Nobel* unnecessarily created uncertainty for corporations and, thus, undermined the rationale supporting attorney-client privilege law. Furthermore, because the attorney-client privilege only has value if the privilege is predictable at the time the communication takes place,

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1. 2008 Bus. L.R. 348 (C.F.I. 2007).

2. Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 383 (C.F.I. 2007).

3. *Akzo Nobel*, 2008 Bus. L.R. at 385.

the *Akzo Nobel* decision inadvertently impaired the attorney-client privilege laws of Member States of the European Community, such as Great Britain, and within the United States.

In addition to impairing the attorney-client privilege laws of many countries, the *Akzo Nobel* decision provided an unwarranted boost to the practices of outside counsel. For instance, although a corporation may prefer to consult its in-house counsel for legal advice, the corporation may instead retain outside counsel to protect its communications, done in connection with obtaining legal advice, from the risk of disclosure which may arise if a discovery claim arose later under European Community law, rather than British law for example.[4] Thus, like the wine purchaser who selects the type of container rather than the quality of the wine, the *Akzo Nobel* decision elevated the status of outside counsel over the attorney-client privilege's goal of furthering a corporation's receipt of legal advice in the interests of justice. It need not have done so.

This Article will argue that *Akzo Nobel* misapplied the corporate privilege formulation it derived from *AM & S Europe Limited v. Commission of the European Communities*.[5] This Article will also present an alternative analysis which will establish that the *AM & S Europe* formulation did not foreclose all in-house counsel from being parties to privileged communications. Thereafter, this Article will propose a two-part test. If the aforementioned two-part test is met, in-house counsel should be included among those eligible to engage in privileged communications under European Community law.

As a prelude, however, this Aticle will next provide a brief discussion of how the United States and European Community laws treat in-house counsel privileged communications. The *Akzo Nobel* decision will be the focal point of the discussion.

4. United States v. Philip Morris, Inc., [2003] EWHC 3028, ¶ 64 (Q.B.D. Comm. Ct.) (U.K.). In-house counsel, under British law, are included within the privilege. *See generally* JOHN GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 1.24 (3d ed. Supp. 2008).

5. Case 155/79, 1982 E.C.R. 1575. Case 155/79, AM & S Europe Ltd. v. Comm'n of the European Cmtys. (*AM & S Europe*), 1982 E.C.R. 1575, ¶ 21 (stating lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment").

II. PRIVILEGED CORPORATE COMMUNICATIONS WITH IN-HOUSE COUNSEL: COMPARING UNITED STATES LAW WITH THE LAW OF THE EUROPEAN COMMUNITY[6]

A. A BRIEF NOTE ON PRIVILEGED COMMUNICATIONS

A client's communications with his or her lawyer may be privileged, that is, kept confidential, even if sought by a third party in litigation.[7] However, the facts underlying the client's communications with his or her lawyer are not privileged.[8] Thus, a third party may discover the facts underlying a client's communications with his or her lawyer from any source except the privileged attorney-client communication. Privilege, then, protects the communication between a client and his or her lawyer, not the disclosed information in general.[9]

To illustrate, assume that when seeking legal advice, XYZ Incorporated showed two of its supplier contracts to its lawyer. The contracts' status as business records did not thereby change. Therefore, upon a third party's discovery request for the supplier contracts, the two supplier contracts previously shown to XYZ Incorporated's lawyer may not be withheld as privileged. Instead, the two supplier contracts must be disclosed. Additionally, XYZ Incorporated must also disclose all other supplier contracts it has in its files. However, the third party may not inquire as to which of the supplier contracts XYZ Incorporated disclosed to its lawyer because such an inquiry would intrude into XYZ Incorporated's legal advice-seeking communications and, thus, the attorney-privilege would protect such information from disclosure.

Nonetheless, privilege does eliminate a valuable source of discoverable information: the communications clients have had with their lawyer. In a particular case, eliminating the possibility that communications between clients and their lawyer may be discovered as evidence may yield an unjust result because the same evidence may not be able to be acquired from an alternative source.[10]

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6. For a more detailed discussion, see JOHN GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE (3d ed. Supp. 2008).

7. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Crosby v. Berger, 11 Paige Ch. 377, 378 (N.Y. Ch. 1844) ("The object of the rule, protecting privileged communications from being disclosed by attorney or counsel, is to secure to parties who have confided the facts of their cases to their professional advisors, as such, the benefit of secrecy in relation to such communications; so that the client may disclose the whole of his case to his professional advisor. . . .").

8. *Upjohn*, 449 U.S. at 395; *see generally* JOHN GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 3.51 (3d ed. Supp. 2008).

9. Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 314 (2002).

10. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) ("The social good derived from the proper performance of the functions of lawyers

Yet, the privilege, specifically the confidentiality protection afforded to attorney-client communications, is deemed vital to the overall system of justice.[11] From this perspective, protecting a client's communications with their lawyer is justified. The reasoning goes as follows. The legal system is complex and the individuals and the legal entities enmeshed in it require the assistance of lawyers.[12] Furthermore, individuals and legal entities need guidance to conform to the law's requirements. However, a lawyer's legal advice is only as good as the information on which it is based and a prime source of the lawyer's information comes from the client.[13]

The attorney-client privilege, by promising confidentiality, encourages client candor with their lawyer. Consequently, when client candor is encouraged, a lawyer will receive important and necessary information from the client. Thereafter, a lawyer can provide better legal advice to the client. Essentially, the attorney-client privilege facilitates the legal system's goal of furthering justice.

However, not every attorney-client communication is privileged. Those attorney-client communications that are not privileged remain discoverable. An often-cited formulation for identifying privileged attorney-client communications appeared in *United States v. United Shoe Machinery Corporation*.[14]

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acting for their clients is believed to outweigh the harm that may come from the suppression of evidence in specific cases."); 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961) ("[T]he privilege remains an exception to the general duty to disclose. . . . Its benefits are all indirect and speculative; its obstruction is plain and concrete. It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth.").

11. Barton v. United States Dist. Court, 410 F.3d 1104, 1112 (9th Cir. 2005) ("[F]undamental importance of the attorney-client privilege to our adversarial system of justice."); *see generally* GERGACZ, *supra* note 8, § 1.06-1.12.

12. *United Shoe*, 89 F. Supp. at 358 ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential.").

13. *See* Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 422 (1833) ("This principle we take to be this: that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be for ever sealed.").

14. 89 F. Supp. 357 (D. Mass. 1950). *United Shoe*, 89 F. Supp. at 358-359 ("The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal

The standard for identifying privileged attorney-client communications may be separated into three factors. The first factor examines the topic of the attorney-client communication. Essentially, the first factor is only satisfied when the attorney-client communication concerns legal advice.[15] Thus, not every exchange between a client and their lawyer is worth the confidentiality protection that the attorney-client privilege provides. For instance, attorney-client communications about business matters or the intricacies of Mozart's Jupiter Symphony are discoverable.

Second, a client and their lawyer must keep the attorney-client communication confidential when the attorney-client communication occurs and thereafter to be protected from discovery by the attorney-client privilege.[16] Thus, the attorney-client privilege does not provide an attorney-client communication protection from discovery when confidentiality was not sustained by the client. Therefore, an attorney-client communication exchanged by a client and their lawyer in a public place, where strangers can readily overhear, is not protected from discovery, nor is an attorney-client communication that is later divulged to an outsider.[17]

The final factor of privileged attorney-client communication focuses on the status of the participants. Specifically, the participants in a privileged attorney-client communication must be a *client*[18] and a *lawyer*.[19] Communicators may have innumerable relationships: stu-

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proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.").

15. Celmer v. Marriott Corp., No. 03-CV-5229, 2004 WL 1822763, at *2 (E.D. Pa. July 15, 2004) (stating an incident report sent to corporate claims department initially and thereafter sent to counsel was an ordinary business communication rather than a communication with counsel); *see generally* GERGACZ, *supra* note 8, §§ 3.43-3.47.

16. *Upjohn*, 449 U.S. at 385; *In re* Penn Cent. Commercial Paper Litig., 61 F.R.D. 453, 463 (S.D.N.Y. 1973) ("It is hornbook law that the voluntary disclosure or consent to the disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege."); *see generally* GERGACZ, *supra* note 8, §§ 3.56-3.66, 5.01-5.65.

17. United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege."); Permian Corp. v. United States, 665 F.2d 1214, 1222 (D.C. Cir. 1981) ("We believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality."); Exxon Corp. v. Dep't of Conservation and Natural Res., 859 So. 2d 1096, 1104 (Ala. 2002) ("Whether a party intended the communication to be confidential is dependent on who was privy to the legal advice.").

18. *E.g.*, Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 427-28 (N.D. Ill. 2006) (stating the client was the corporation even though the lawyers were retained by the corporate audit committee); Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau, 150 F.R.D. 193, 197 (D. Kan. 1993) (explaining that the lawyer-board of directors member acting in role of attorney); *see generally* GERGACZ, *supra* note 8, §§ 2.04-2.12, 2.35-2.42, 3.22-3.36.

19. *Great Plains*, 150 F.R.D. at 197 (stating that lawyer-board of directors member acting in role of attorney); *see generally* GERGACZ, *supra* note 8, §§ 3.22-3.36.

dent-professor; buyer-seller; or employer-employee. However, none of the aforementioned groups are linked to the system of justice and the provision of legal advice.[20] Thus, there is no need to encourage the aforementioned groups to communicate by granting a confidentiality incentive. The court in *Akzo Nobel Chemicals Limited v. Commission of the European Communities*[21] focused on this third factor, specifically the *lawyer* requirement and whether in-house counsel fit within it.

B. In-House Counsel And Privileged Communications in the United States[22]

Under the law of the United States, in-house counsel are not disqualified from having privileged communications with their client.[23] If the attorney-client communications otherwise qualify under the three aforementioned factors, the attorney-client privilege will attach to such communications. Thus, a lawyer's employment status as in-house or outside counsel has never affected the applicability of the attorney-client privilege in the United States.[24]

Consider the court's analysis in *United States v. United Shoe Machinery Corporation,*[25] the leading case in the United States, when it stated:

> On the record as it now stands, the apparent factual differences between these [in-]house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attor-

20. United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999) (stating an attorney within an accountant's role); *In re* Spring Ford Indus., Inc., No. 02-15015DWS, 2004 WL 1291223, at *3 (Bankr. E.D. Pa. May 20, 2004) (explaining the lawyer acting as a foreign language translator).

21. 2008 Bus. L.R. 348 (C.F.I. 2007). Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 380-86 (C.F.I. 2007).

22. *See generally* John Gergacz, Attorney-Corporate Client Privilege § 3.18-3.20 (3d ed. Supp. 2008).

23. *In re* Echostar Commc'n Corp., 448 F.3d 1294, 1299 (Fed. Cir. 2006) (stating the mere fact that in-house counsel conducted the internal investigation did not render the opinions less legal than if the investigation had been conducted by outside counsel); Allstate Ins. Co. v. Herron, 393 F. Supp. 2d 948, 956 (D. Alaska 2005) (explaining the privilege applies with equal force for both in-house and outside counsel); Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (opining that in-house counsel is an attorney under the attorney-corporate client privilege); Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc. 218 F.R.D. 125, 139 n.13 (E.D. Tex. 2003) ("[A]n attorney's status as in-house counsel neither dilutes nor waives the privilege.").

24. Lang v. Intrado, Inc., No. 07-cv-00589, 2007 WL 4570558, at *2 (D. Colo. Dec. 26, 2007) ("The mere fact that Ms. Jenkins is an in-house attorney does not negate the attorney-client privilege nor does it render her communications business advice.").

25. 89 F. Supp. 357 (D. Mass. 1950).

> ney-client privilege. And this is apparent when attention is paid to the realities of modern corporate law practice. The type of service performed by [in-]house counsel is substantially like that performed by many members of the large urban law firms. The distinction is chiefly that the [in-]house counsel gives advice to one regular client, the outside counsel to several regular clients.[26]

However, not every corporate-employed lawyer may engage in privileged attorney-client communications with the corporation. For instance, a corporate-employed lawyer may work in a business capacity for the corporation, say as a sales manager. Thus, no attorney-client communication privilege would arise because the lawyer's corporate role is as an executive, not as a legal advisor.[27] Furthermore, bar membership is also a prerequisite before a corporate lawyer can engage in privileged attorney-client communications with the corporation.[28] Thus, a corporate lawyer who has not been admitted to practice is treated as a lay person for purposes of the attorney-client privilege. Thus, an in-house counsel who acts as a legal advisor with his or her corporation and who is also a member of the bar is as capable of having privileged attorney-client communications in the United States, as are outside counsel.

Nonetheless, communications between a corporation and its in-house counsel are not treated identically to those of outside counsel.[29] After all, individuals who are in-house counsel are also employees of their clients; this factor adds complexity to separating in-house counsel's lawyer-role communications from those that are business-related communications.[30] The concern between in-house counsel's lawyer-role communications and business-related communications is that if a court finds that the requested communication is protected from discovery by the attorney-client privilege, the court's finding may inad-

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26. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

27. Cal. Union Ins. Co. v. Nat'l Union Fire Ins. Co., No. 86-CV-609, 1989 WL 48413, at *2 (N.D.N.Y. Apr. 27, 1989) (stating attorney acting as a claims manager).

28. Fin. Techs. Int'l, Inc. v. Smith, No. 99-CIV-9351, 2000 WL 1855131, at *5 (S.D.N.Y. Dec. 19, 2000).

29. Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., No. 93-Civ-5125, 1996 WL 29392, at *3-4 (S.D.N.Y. Jan. 25, 1996).

30. Lugosch v. Congel, No. 1:00-CV-0784, 2006 WL 931687, at *29 (N.D.N.Y. Mar. 7, 2006) (stating the nature of in-house counsel role may blur business and legal functions, thus, complicating privilege evaluations.); TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143, 144 (S.D.N.Y. 2003) (stating added difficulty arises when the attorney is in-house counsel who also holds a high level executive position); Springfield v. Rexnord Corp., 196 F.R.D. 7, 9 (D. Mass. 2000) ("However, an in-house lawyer may wear several other hats (e.g., business advisor, financial consultant) and because the distinctions are often hard to draw, the invocation of the attorney-client privilege may be questionable in many instances.").

vertently shield too much evidence from discovery. Consequently, a more demanding and stringent review of communications between in-house counsel and the corporation takes place as compared to similar communications undertaken by outside counsel. Essentially, the differentiation between a corporate client and its attorney is less apparent for in-house counsel as compared to outside counsel. Additionally, all other things equal, it is more difficult to establish that a communication should be afforded attorney-client privilege when the communication occurs between a corporation and its in-house counsel rather than its outside counsel.

The court in *Rossi v. Blue Cross and Blue Shield of Greater New York,*[31] aptly described this elevated review of communications between a corporation and its in-house counsel when it stated:

> [U]nlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys [of a corporation] may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose, the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.[32]

Thus, although in-house counsel may participate in privileged communications with their corporate employer under the law of the United States, courts expect a more exacting showing in order to lower the risk that discoverable materials will be protected as privileged. The courts' analyses are based on nuance. A recent case construing European Community law took a sterner approach.[33]

C. In-House Counsel and Privileged Corporate Communications Under European Community Law

Under European Community law, evaluating whether a corporation's communications with a lawyer are privileged is a two-step pro-

31. 540 N.E.2d 703 (N.Y. 1989).

32. Rossi v. Blue Cross & Blue Shield, 540 N.E.2d 703, 706 (N.Y. 1989).

33. *See generally* Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348 (C.F.I. 2007).

cess.[34] First, the lawyer must be categorized as *independent*, that is, the lawyer must not be bound to his or her client by reason of employment. If the lawyer qualifies as independent, the second step of the process is then undertaken. Here, the elements of privilege are applied. The elements of attorney-client privilege include determining whether the communications between a lawyer and his or her client concerned legal advice and whether the communications were made for purposes of the client's right of defense.

On the other hand, if the lawyer is bound to his or her corporate employer, the analysis of determining whether or not a corporation's communications with a lawyer are protected under the attorney-client privilege ends. Such lawyers are incapable of participating in privileged communications with their corporate employers. Therefore, the corporation's communications with in-house counsel, and related materials, are discoverable with no further inquiry.

The classification of the lawyer, as a basis of affording or denying a corporation's communications attorney-client privilege, was developed in the 1982 case of *AM & S Europe v. Commission of the European Communities*.[35] Furthermore, the lawyer classification rationale of *AM & S Europe* was recently applied in *Akzo Nobel Chemicals Limited v. Commission of the European Communities*.[36]

1. *AM & S Europe and the "Independent" versus "Bound" Lawyer Formulation*

AM & S Europe arose during an investigation into whether Australian Mining & Smelting Europe Limited violated European Community market competition rules.[37] Although the Commission of the European Communities had wide-ranging authority to examine an investigated corporation's business records, the court in *AM & S Europe* found that some written attorney-client communications between the corporation and its lawyer were found to be off-limits.[38] However, the court imposed two conditions before communications between the cor-

34. Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 374 (C.F.I. 2007). The court first analyzed communications with outside counsel, who was deemed an "independent lawyer." *Id.* These were found not privileged because they did not exclusively concern legal advice. *Id.* at 374-77. For the communications with in-house counsel, no analysis of the privilege took place. Instead, the court determined that in-house counsel was not an "independent lawyer" and thus, could not engage in privileged communications with the corporation. *Id.* at 382-84.

35. Case 155/79, 1982 E.C.R. 1575. Case 155/79, AM & S Europe Ltd. v. Comm'n of the European Cmtys. (*AM & S Europe*), 1982 E.C.R. 1575, ¶ 21 (stating lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment").

36. 2008 Bus. L.R. 348 (C.F.I. 2007).

37. *AM & S Europe*, 1982 E.C.R. 1575, ¶ 1.

38. *Id.* ¶ 18.

poration and its lawyer would remain confidential: first, the communications must involve the corporation's right of defense; and second, the communications had to emanate from an independent lawyer.[39]

As for the latter condition, the court in *AM & S Europe* limited the scope of privilege-qualified lawyers.[40] That is, irrespective of what attributes of independence a lawyer may possess, that lawyer is not *privilege-independent* if bound to his or her client by a relationship of employment.[41]

The court's *independent lawyer* formulation was based on policies the court derived from the lawyer's dual roles: (i) a joint participant with the courts in the administration of justice; and (ii) a legal advisor to his or her clients. Thus, an independent lawyer owes duties to both the courts and his or her clients, exemplified by professional ethical standards he or she is obliged to follow.[42] Furthermore, an independent lawyer's unique position distinguishes the lawyer from other corporate advisors (e.g., financial manager, management consultant). Therefore, an independent lawyer not only serves his or her client's interests, but also the interests of the legal system.

Notably, the court's formulation in *AM & S Europe* did not use the terms *in-house* or *outside* counsel. In fact, the terms *in-house* and *outside* counsel do not appear in the *AM & S Europe* decision. Nonetheless, the court's exclusionary language in *AM & S Europe* raised questions about whether corporations could ever have privileged communications with lawyers they employed, or whether the attorney-client privilege would arise only with outside counsel. In *Akzo Nobel,* the Court of First Instance considered this issue.[43]

2. *The Court in Akzo Nobel Applied the Court's Formulation in AM & S Europe and Excluded In-House Counsel*

Akzo Nobel arose during an investigation of Akzo Nobel Chemical, AKEROS Chemicals, and their subsidiaries (hereinafter "Azko Nobel"). The Commission of the European Communities (the "Commission") was gathering evidence about whether anti-competitive activities had occurred in violation of European Community law.[44] Azko Nobel resisted turning over five documents to the Commission and stated that the five documents were privileged attorney-client commu-

39. *Id.* ¶¶ 21-22.
40. *Id.* ¶ 21 (stating lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment").
41. *Id.*
42. *Id.* ¶ 24.
43. *Akzo Nobel*, 2008 Bus. L.R. 348, 378-80.
44. *Id.* at 348, 351.

nications. The Commission rejected Azko Nobel's assertion that the attorney-client privilege precluded disclosure of the five documents. In order to facilitate a resolution, the Commission's officials who undertook the investigation of Akzo Nobel divided the five documents into two groups: Set A and Set B.[45]

The documents constituting Set A were a memorandum and a copy of the memorandum with hand-written notes. Azko Nobel's general manager prepared both documents. Additionally, Azko Nobel's general manager directed the memorandum to one of his superiors. More specifically, Azko Nobel's general manger compiled the memorandum in order to provide Azko Nobel's outside counsel with information about Akzo Nobel's competition law compliance program. The three documents constituting Set B included a note Azko Nobel's general manger used when preparing the aforementioned memorandum and two e-mails between Akzo Nobel's general manager and a member of Akzo Nobel's in-house legal department.

Ultimately, the court in *Akzo Nobel* found that the attorney-client privilege did not protect any of the five documents from discovery. The court held that the memorandums in Set A, and the notes in Set B, were not exclusively legal advice-seeking documents.[46] Thus, even though the documents were communications between Akzo Nobel and an independent lawyer, the documents' topics were outside the scope of the attorney-client privilege.

The emails in Set B were internal corporate communications between Akzo Nobel's general manager and Akzo Nobel's competition law coordinator.[47] Akzo Nobel's competition law coordinator was a lawyer who worked full-time as in-house counsel in Akzo Nobel's legal department and held no management position within the company. In addition, Akzo Nobel's competition law coordinator was a member of the Netherlands' bar and was subject to its professional rules and discipline. Netherlands law recognized the special nature of these obligations. Consequently, Akzo Nobel's competiton law coordinator's employment contract provided that if there was a conflict between his employment obligations to Akzo Nobel and the professional duties he owed as a lawyer, under the law of the Netherlands, his professional duties would control.

The status of Akzo Nobel's competiton law coordinator, the company asserted, meant that he was not merely a corporate employee. Instead, Akzo Nobel asserted that its competiton law coordinator was an *independent lawyer* to the same extent as an outside Netherlands

45. *Id.* at 352.
46. *Id.* at 374-78.
47. *Id.* at 378-84.

lawyer would be. Both in-house and outside counsel, the company contended, are subject to the same bar rules and discipline while also enjoying the same status, rights, and obligations. Thus, Akzo Nobel asserted that both in-house and outside counsel should be treated alike for attorney-client privilege purposes.[48] Akzo Nobel's argument interpreted the *AM & S Europe* decision as creating a benchmark for independence. Once this benchmark is met, a lawyer, whether in-house or outside counsel, could conduct privileged communications with a corporate client.

The Court of First Instance rejected Akzo Nobel's reading of the court's formulation in *AM & S Europe*.[49] Lawyer independence, the court stated, was not defined in positive terms; that is, comprised of certain tests, such as bar membership and being subject to professional ethics rules. Instead, the court determined that the definition of lawyer independence, as set forth in *AM & S Europe*, was set in negative terms. Specifically, the court in *Akzo Nobel* determined that certain types of lawyers were not included in the court's formulation in *AM & S Europe* of what constitutes an independent lawyer. Thus, the court in *Akzo Nobel* determined that independent lawyers, irrespective of their attributes, cannot be bound to their clients by an employment relationship. Therefore, communications between a non-independent lawyer and their corporate client is no more privileged than communications between corporate executives. Even though in-house counsel may be members of a bar, as are outside counsel, the court in *Akzo Nobel* concluded that under the court's formulation in *AM & S Europe*, an independent lawyer is "structurally, hierarchically[,] and functionally . . . a third party in relation to the undertaking receiving [the legal] advice."[50] Thus, the court in *Akzo Nobel* determined that in-house counsel did not qualify as independent lawyers.

48. *Id.* at 378-80.

49. *Id.* at 383 ("[T]he court in its judgment in the *AM & S* case defined the concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics.").

50. *Id.*

III. CONSTRUING *AM & S EUROPE* AND *AZKO NOBEL* TO PROTECT CORPORATE COMMUNICATIONS WITH IN-HOUSE COUNSEL

A. CRITIQUE OF THE *Akzo Nobel* Decision

The *Akzo Nobel Chemicals Limited v. Commission of the European Communities*[51] decision was troubling for several reasons. First, the court's decision in *Akzo Nobel* adversely affected corporate communications within certain Member States of the European Community and within the United States. Second, the court's decision in *Akzo Nobel* treated attorney-client privilege law, which is facilitative, as if it were a substantive law. Third, the court's decision in *Akzo Nobel* misconstrued the *independent lawyer* formulation articulated in *AM & S Europe Limited v. Commission of the European Communities*.[52]

Application of the attorney-client privilege must be predictable at the time the attorney-client communication takes place, otherwise a lawyer cannot give his or her client any assurance of confidentiality.[53] Without an assurance of confidentiality, a client will feel no more at ease communicating with his or her lawyer than if the attorney-client privilege did not exist at all.

However, the application of the attorney-client privilege, and the corresponding incentive for clients to openly communicate with their lawyer due to the protection of confidentiality, is not solely affected by the predictable application of the attorney-client communication's terms (i.e., whether the communications were *legal* or *business* communications). Instead, the application of the attorney-client privilege is also influenced by differences among various jurisdictions' laws.[54]

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51. 2008 Bus. L.R. 348 (C.F.I. 2007).

52. Case 155/79, 1982 E.C.R. 1575. Case 155/79, AM & S Europe Ltd. v. Comm'n of the European Cmtys. (*AM & S Europe*), 1982 E.C.R. 1575, ¶ 21 (stating lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment").

53. *E.g.*, United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915) ("The desirability of protecting communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such as enactment would be a practical prohibition upon professional advice and assistance."); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (explaining an attorney's "assistance can only be safely and readily availed of when free from the consequences . . . of disclosure"); Barton v. United States Dist. Court, 410 F.3d 1104, 1112 (9th Cir. 2005) ("Potential clients must be able to tell their lawyers their private business without fear of disclosure. . . ."); Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 861, 863 (3d Cir. 1994) ("[W]e provide certainty that the client's confidential communications will not be disclosed unless the client takes an affirmative step to waive the privilege . . . .").

54. For example, Illinois law uses a variant of the "control group" test to assess privileged corporate communications, Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 257 (Ill. 1982), while federal law is controlled by a broader factors-based

If attorney-client communications protected by one jurisdiction's attorney-client privilege law would be discoverable if another jurisdiction's law applied instead, a lawyer's client will need to be able to predict under which jurisdiction's law discovery will later be sought. If the lawyer can accurately predict under which jurisdiction's law discovery will later be sought, then the attorney-client communications can be structured to safely place them within the privileged category. Otherwise, the least accommodating jurisdiction's attorney-client privilege law will trump the other jurisdictions' attorney-client privilege laws. A prudent client will not bank on the contrary and risk creating a treasure trove of discoverable material if that assumption was wrong. Such is the effect of the *Akzo Nobel* decision.

The court's decision in *Akzo Nobel* that disqualified in-house counsel from the attorney-client privilege puts the court's decision in *Akzo Nobel* at odds with certain Member States' laws (i.e., Great Britain)[55] and the laws of the United States.[56] Nonetheless, corporations whose activities may be governed by British, United States, or European Community market competition laws will hesitate when seeking legal advice from in-house counsel, even if future disputes may arise under the laws of Great Britain or the United States. At best, predicting which jurisdiction's attorney-client privilege law will apply beforehand would be an uncertain exercise. Thus, the more restrictive European Community privilege law will, for all intents and purposes, control how multi-national corporations structure their communica-

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test, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). A party applying the *Upjohn* standard when state law applies, instead, would find that no privilege would arise. Dietz v. United States, No. 91-C-5352, 1992 WL 26712, at *2 (N.D. Ill. Feb. 7, 1992). *See generally* JOHN GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 3.94 (3d ed. Supp. 2008).

Similarly, had the *Akzo Nobel* case been brought under British law, where the investigation took place, rather than under European Community law, in-house counsel communications would have qualified for privilege consideration. In-house counsel, under British law, are included within the privilege. United States v. Philip Morris, Inc., [2003] EWHC 3028, ¶ 64 (Q.B.D. Comm. Ct.) (U.K.); *see generally* GERGACZ, *supra* note 54, at § 1.24.

55. *Philip Morris*, [2003] EWHC 3028, ¶ 64; *see generally* GERGACZ, *supra* note 54, at § 1.24. For a discussion of other Member States laws, see Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 380-81 (C.F.I. 2007), and Lista M. Cannon, *Comparative Approaches to the Attorney-Client Privilege in the U.S., Canada, U.K.*, 8 SEDONA CONF. J. 125 (2007).

56. *In re* Echostar Commc'n Corp., 448 F.3d 1294, 1299 (Fed. Cir. 2006) (stating the mere fact in-house counsel conducted the internal investigation did not render the opinions less legal than if the investigation had been conducted by outside counsel); Allstate Ins. Co. v. Herron, 393 F. Supp. 2d 948, 956 (D. Alaska 2005) (stating the privilege applies with equal force for both in-house and outside counsel); Premiere Digital Access, Inc. v. Cent. Tel. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (explaining in-house counsel is an attorney under the attorney-corporate client privilege); Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc. 218 F.R.D. 125, 139 n.13 (E.D. Tex. 2003) ("[A]n attorney's status as in-house counsel neither dilutes nor waives the privilege.").

tions that deal with obtaining legal advice. Thus, outside counsel will be consulted by these corporations because using in-house counsel may make the communications discoverable.

Consider an American corporation that does business both at home and in Great Britain. The holding in *Akzo Nobel* brings into question the wisdom of using in-house counsel as legal advisors in either the United States or Great Britain. Even though the corporation's communications with in-house counsel may be privileged under United States or British law, the risk of disclosure if European Community law applied makes in-house counsel a less viable alternative than before.

However, the aforementioned problems that a multi-national corporation faces when using in-house counsel would not have arisen had the court's decision in *Akzo Nobel* been to the contrary: that is, in-house counsel may conduct privileged communications with their corporate clients. Were a European Community Member State's and the European Community's law were both found to protect communications between corporations and their in-house counsel, corporations within those Member States would not face the attorney-client privilege predictability dilemma.[57] Thus, corporate communications with in-house counsel in Great Britain, that would qualify for the attorney-client privilege under British law, would also be protected from discovery by the attorney-client privilege if a matter in which the communications were sought was brought under European Community law instead. Consequently, a corporation could communicate with its in-house counsel knowing that whatever jurisdiction's law applied, the communications would be protected. Thus, corporations would not have to restructure its attorney-client communications so as to qualify the communications for the attorney-client privilege. This alternative *Akzo Nobel* decision would have accommodated the practice already existing within those Member States, under their own laws.

Consider also the effect of the alternative *Akzo Nobel* decision on corporations within Member States that do not recognize the attorney-client privilege when the attorney-client communications occurred between a corporation and its in-house counsel (e.g., France).[58] Even if the *Akzo Nobel* decision protected communications between a corporation and its in-house counsel under European Community law, the predictability dilemma of whether the attorney-client privilege attached to communications between a French corporation and its in-

57. The term "communication," as used in this sense, should be defined as a communication between a corporation and its in-house counsel for the purpose of obtaining legal advice.

58. Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 380 (C.F.I. 2007); Cannon, *supra* note 55, at 126.

house counsel would remain. Consequently, French corporations would remain wary when consulting in-house counsel because if French law, rather than European Community law, was later applied, the communication would have to be revealed in discovery. Consequently, because of the predictability dilemma, these corporations would likely structure their attorney-client communications to reflect the effect of French law. Otherwise, these corporations would risk disclosure of their attorney-client communications. Thus, the alternative *Akzo Nobel* decision would have accommodated corporate communication practices contemplated by these Member States' own laws.

There is a lovely irony here. The stated aim of the court's decision in *Akzo Nobel* was to recognize elements[59] common to the attorney-client privilege laws of the Member States.[60] In fact, the *AM & S Europe* formulation, from a quarter-century before, was devised on the same basis.[61] As noted above, however, the court's decision in *Akzo Nobel* favored intra-corporate privilege communication policies of some Member States' laws (e.g., France) over other Member States' laws (e.g., Great Britain). Yet, a court's holding that was contrary to the court's holding in *Akzo Nobel* would have accommodated the policies of all Member States.

This upside-down effect reflected the court's overemphasis in *Akzo Nobel* on the words of the *AM & S Europe* formulation to the detriment of the aims of the *AM & S Europe* formulation.[62] Attorney-client privilege is an operational part of the system of justice. Indeed, attorney-client privilege transcends many particular substantive laws, (i.e., the European Community's market competition rules) and instead operates alongside such laws by facilitating the provision of legal advice. Although the words of the ruling in *Akzo Nobel* cannot be ignored (i.e., "bound to the client by a relationship of employment"),[63]

59. *Akzo Nobel*, 2008 Bus. L.R. at 364-65 (stating the elements common to the attorney-client privilege laws of the Member States are: (1) the observance of confidences between lawyers and clients; and (2) the importance of ensuring that communications between lawyers and clients remain confidential if the client's needs warrant such confidentiality when seeking legal advice).

60. *Id.* at 383-84 (stating that even though more States recognize in-house counsel for privilege than at the time *AM & S Europe* was decided, "it is not possible to identify tendencies which are uniform or have clear majority support in that regard in the laws of the member states").

61. *AM & S Europe*, 1982 E.C.R. 1575, ¶ 18 ("Community law, which derives from not only the economic, but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client.").

62. *Id.*, ¶ 21 (clarifying lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment").

63. *Id.*

courts interpreting the applicable privilege law should keep the effects of such interpretation on communications between a corporation and its in-house counsel firmly in view. Additionally, placing undue emphasis on language construction may, as in *Akzo Nobel*, overwhelm the attorney-client privilege's communication policy goals. A preferred approach seeks to harmonize both perspectives.

As an analogy, consider Chopin's *Etude in C*, particularly the relationship between the score and the piano on which it is played. Singling out one at the expense of the other will make the Etude's performance unendurable. Perhaps the transcription was filled with mistakes. Maybe the piano was out of tune. Essentially, both the score and the piano need an individual's attention for the Chopin piece to come together. The court in *Akzo Nobel*, like a musician who slights the instrument, produced a discordant result rather than a harmonious one. The following subsection will resolve the discord.

B. Fitting In-House Counsel Within the *AM & S Europe* Formulation And *Akzo Nobel*

Consider the exclusionary language of the court's holding in *AM & S Europe Limited v. Commission of the European Communities*,[64] the heart of courts holding in *Akzo Nobel Chemicals Limited v. Commission of the European Communities*,[65] which stated: "independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."[66] Thus, in-house counsel were deemed not able, with full independence, to simultaneously provide legal advice to their clients and collaborate with the courts in the administration of justice.

Despite the interpretation of this phrase in *Akzo Nobel*, some corporations employ lawyers who are not *bound* to them. These in-house lawyers should be able to conduct communications with their corporate clients that are afforded protection from discovery pursuant to the attorney-client privilege.

Under the *AM & S Europe* formulation, a lawyer is independent if he or she can fulfill his or her dual roles simultaneously: legal advisor to the client and administrator of justice within the courts.[67] To emphasize this, the court in *AM & S Europe* stated both positive and negative illustrations of when a lawyer does or does not fulfill his or

64. Case 155/79, 1982 E.C.R. 1575.

65. 2008 Bus. L.R. 348 (C.F.I. 2007).

66. Case 155/79, AM & S Europe Ltd. v. Comm'n of the European Cmtys. (*AM & S Europe*), 1982 E.C.R. 1575, ¶ 21.

67. *AM & S Europe*, 1982 E.C.R. 1575, ¶ 24.

her dual roles of independence.[68] For instance, the court in *AM & S Europe* cited a lawyer's bar-regulated status as being consistent with the dual role policy.[69] Alternatively, the court in *AM & S Europe* determined that lawyers bound to clients by an employment relationship would not be consistent with the dual role policy.[70] Thus, a lawyer's *independence* requires that the lawyer be neither, exclusively a hireling; nor a dispassionate cog in the system. Instead, a lawyer's *independence* should be deemed the means by which the lawyer's dual roles can be realized. The aforementioned status is what the *AM & S Europe* formulation tried to capture.

1. In-House Counsel are Not Equivalent to Outside Counsel

In-house counsel are employees of their corporate clients and are integrated within the corporation. In-house counsel's integration within the corporation distinguishes them from outside counsel who are third parties in relation to their corporate clients. Even though in-house counsel may have attributes similar to outside counsel (i.e., provide legal advice, bar membership, subject to professional rules), in-house counsel remain corporate employees. This status is not changed by the professional qualifications that in-house counsel are subject to.

The employee, third party distinction was the core of the Court of First Instance's decision in *Akzo Nobel*. The claimant in *Akzo Nobel* asserted the equivalent attributes argument, (provide legal advice, membership in a bar, and subject to professional rules) in support of in-house counsel attorney-client privilege.[71] However, the court in *Akzo Nobel* concluded that the *AM & S Europe* decision required that the lawyer be "structurally, hierarchically[,] and functionally . . . a third party . . . ."[72] However, neither the claimant's position nor the court's position in *Akzo Nobel* provided a satisfactory construction of the *AM & S Europe* formulation.

On the one hand, the claimant in *Akzo Nobel* failed to focus on the language excluding lawyers bound to their clients by an employment relationship. Therefore, the claimant in *Akzo Nobel* failed to distinguish its in-house counsel from those employees who were unable to conduct privileged communications. On the other hand, the court in *Akzo Nobel* presumed, without analysis, that all lawyers employed by their corporate clients were bound to them and thus not independent. What follows is an alternative reading. The following text recognizes

68. *Id.* ¶¶ 24, 27.
69. *Id.* ¶ 24.
70. *Id.* ¶ 27.
71. Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 378-80 (C.F.I. 2007).
72. *Akzo Nobel*, 2008 Bus. L.R. at 383.

the distinction between in-house and outside counsel, but in addition, differentiates between in-house counsel who are bound to their corporate employers and those who are not.

2. *In-House Counsel Who are Not Bound to Their Clients by a Relationship of Employment*

In-house counsel are not *bound* to their corporate employers if two conditions are present. First, the lawyer's organizational role must be as a legal advisor. Second, the lawyer's ability to provide the corporation with legal advice must be prescribed by regulations, rather than merely the terms of his or her employment contract.

a. In-House Counsel as Legal Advice Provider

A lawyer may hold any number of positions within a corporation from chief executive officer to department manager to legal advisor. Although a lawyer's legal training may be valuable in any of the aforementioned positions, only in the latter will his or her role be a *legal* one.

Thus, the first condition for privileged communications between a corporation and its in-house counsel, under the *AM & S Europe* formulation, focuses on the lawyer's organizational role within the corporation. The inquiry of the lawyer's organizational role is contractual, examining the duties the lawyer is obliged to do for his or her corporate employer. These duties must be of a *legal advisor* in nature, essentially duties reflecting a lawyer's work. By way of contrast, corporate management positions or those involving, say, product development, marketing, or strategic planning would be *business* roles, even if the person filling one of the roles was a lawyer.

The distinction between organizational roles was derived from the attorney-client privilege laws of the United States.[73] The focus of the distinction between organizational roles is a functional one, not one based on credentials. Thus, a lawyer acting within an accountant's organizational role cannot have privileged communications with the corporation because the attorney-client privilege requires legal advisor-role participation.[74] This distinction between organizational roles permits the corporate client to structure communications pertaining to legal advice with certain employees that have a high probability of being protected under the attorney-client privilege. Creating an in-house legal department is one of the means to ensure that a corporation can have confidential communications pertaining to legal advice

73. *See generally* JOHN GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §§ 3.22-3.36 (3d ed. Supp. 2008).

74. United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999).

because the employees constituting the in-house legal department have *legal advisor* roles within the organization.

The first condition alone, however, is not sufficient to bring in-house counsel within the *AM & S Europe* formulation. If the lawyer's organizational role within the corporation is only contractual, the lawyer's ability to provide legal advice to the corporation is solely a function of the employment relationship. Essentially, if a lawyer remains in good standing with the corporate employer, the lawyer can continue to give the corporation legal advice. However, if the lawyer is assigned to a different role (e.g., regional manager) in the organization, the lawyer cannot continue to give the corporation legal advice. Additionally, a third party may not intrude and remove the lawyer from his or her assigned organizational role because such a decision is the corporation's decision. Such first-condition-only lawyers are *bound* to their corporate employer clients and, thus, excluded from being *independent* under the *AM & S Europe* formulation. These lawyers meet only one of the policies of the *AM & S Europe* formulation: they provide the client with legal advice.[75] Their ability to provide legal advice arises only from their employment contract. Thus, the lawyer's *legal advice* and the lawyer's *employment relationship* are inextricably bound together. Such an in-house counsel would not be deemed *independent*.

b. In-House Counsel Must Have a License to Practice

The second condition for privileged in-house counsel communications under the *AM & S Europe* formulation focuses on who must consent before a lawyer can provide his or her corporate employer with legal advice. If only the corporate client consents, via the employment contract, the lawyer is no different than any other employee. Specifically, the lawyer's legal advisor role is based solely on an employment relationship.

However, if another institution must also grant leave before a lawyer can provide his or her corporate employer with legal advice, the corporation is no longer the only arbiter. The corporate employer's ties to the in-house counsel are loosened because in order for the employment-contract lawyer to assume the *privilege-lawyer* role, he or she must satisfy the requirements of the third party too, namely the requirements of the other institution. Such third party oversight makes this in-house counsel stand apart from an in-house counsel *bound* to his or her corporate employer. Effectively, the in-house counsel who is not bound to his or her employer is a *privilege-lawyer*

75. *AM & S Europe*, 1982 E.C.R. 1575, ¶ 24.

irrespective of his or her relationship to the corporation and can provide legal advice only because he or she is in good standing with the third party. Such an in-house counsel fulfills the dual roles that the *AM & S Europe* formulation tried to capture. Consequently, such an in-house counsel would not be bound to his or her corporate client by an employment relationship and could therefore conduct privileged communications.

Therefore, the key enabling condition for in-house counsel to conduct privileged communications with his or her corporate employer is that a third party institution (i.e., licensing agencies or bar associations) must require in-house counsel to comply with professional standards. Those professional standards should be designed to anchor in-house counsel within the legal system and to impose obligations upon in-house counsel to the system of justice apart from the duties owed to his or her corporate client.

Failure to obtain this license from a third party institution, or failure to live up to professional standards, would disqualify in-house counsel from occupying the *privilege-lawyer* role. Furthermore, if a Member State did not make such a provision for in-house counsel, the condition would similarly be unmet. Communications by an *unlicensed* in-house counsel would not, therefore, receive protection from discovery under the attorney-client privilege because the provision of the legal advice was solely related to his or her employment by the corporate client. This condition for satisfying the *AM & S Europe* formulation is similar to the attorney-client privilege law of the United States as it applies to corporate communications.[76] For instance, within the United States, communications between an unlicensed in-house counsel and his or her corporate client are deemed no different than a lay person's communications with a corporation. Thus, such communications are not privileged in the United States and are therefore discoverable.

Consider the *Financial Technologies International Incorporated v. Smith*[77] decision. Financial Technologies' in-house counsel was a law school graduate and had passed the bar exam.[78] However, Financial Technologies' in-house counsel had never applied for admission to the bar and did not have a license to practice law.[79] The court found that in-house counsel's communications with Financial Technologies were not protected from discovery by the attorney-client privilege.[80] In so

76. *See generally* GERGACZ, *supra* note 73, § 3.21.
77. No. 99-CIV-9351, 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000).
78. Fin. Techs. Int'l, Inc. v. Smith, No. 99-CIV-9351, 2000 WL 1855131, at *1 (S.D.N.Y. Dec. 19, 2000).
79. *Fin. Techs.*, 2000 WL 18855131, at *1.
80. *Id.* at *3.

holding, the court determined that because the in-house counsel lacked bar membership, he was not a lawyer for attorney-client privilege purposes.[81] Although there is no comparable *bound by* test under the law of the United States, the court's decision in *Financial Technologies'* illustrates the importance of bar membership to the status of attorney-client privilege-eligible lawyers.[82]

Had the *Akzo Nobel* decision interpreted the *AM & S Europe* formulation's exclusionary language as suggested above, it is likely that Akzo Nobel's in-house counsel would have been deemed a attorney-client privilege-qualified lawyer. First, Akzo Nobel's in-house counsel's corporate role was to provide legal advice to Akzo Nobel as in-house counsel. Akzo Nobel's in-house counsel was not a business manager. Second, Akzo Nobel's in-house counsel's membership in the Netherlands' bar imposed obligations beyond those he owed to his employer, Akzo Nobel. Akzo Nobel's in-house counsel's *lawyer* status was, then, not bound to his employment with Akzo Nobel. Essentially, Akzo Nobel's in-house counsel could remain a *lawyer*, regardless of whether his employment with Akzo Nobel continued.

IV. CONCLUSION

In spite of holding that in-house counsel were not eligible to participate in privileged communications with their corporate clients, the Court of First Instance, in the *Akzo Nobel Chemicals Limited v. Commission of the European Communities,*[83] did not consider a key component of the formulation it applied, the formulation first espoused in *AM & S Europe v. Commission of the European Communities.*[84] Specifically, the *AM & S Europe* formulation excluded from privilege only those lawyers who were *bound* to their corporate clients by an employment relationship.

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81. *Id.*

82. *See supra* notes 21-32 and accompanying text (stating that under United States law, in-house counsel may conduct communications with their corporate clients while also maintain the protections of the attorney-client privilege).

83. 2008 Bus. L.R. 348 (C.F.I. 2007).

84. Case 155/79, 1982 E.C.R. 1575. Case 155/79, AM & S Europe Ltd. v. Comm'n of the European Cmtys. (*AM & S Europe*), 1982 E.C.R. 1575, ¶ 21 (stating lawyer-client communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment"); Akzo Nobel Chems. Ltd. v. Comm'n of the European Cmtys., 2008 Bus. L.R. 348, 383 (C.F.I. 2007). In-house counsel was held unable to participate as the "lawyer" in privileged communications with a corporate client. *Id.* However, in-house counsel could still act as the corporate client-communicator with outside counsel. *Id.* at 384. Under United States law, in-house counsel may also communicate on behalf of the corporate client. McCook Metals L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 255 (N.D. Ill. 2000) ("To the extent that the communications are between outside counsel and in-house counsel, these are considered communications between attorney and client, with the in-house counsel acting as agent for the corporate client.").

This Article evaluated the *AM & S Europe* formulation component that excludes the attorney-client privilege from only those lawyers who are *bound* to their corporate clients by an employment relationship and argued that not all in-house counsel are *bound*. This Article then suggested a two-part test to evaluate the *bound* factor: (i) whether the lawyer's corporate role was as a legal advisor; and (ii) whether the lawyer was a member of the bar (licensed) and, thus, obligated to follow bar rules when providing legal advice.

Had the court in *Akzo Nobel* considered the two-part test described above, its decision would have better reflected the varied corporate attorney-client privilege laws of the Member States and would have been flexible enough to accommodate changes therein. Member States that recognize the attorney-client privilege with in-house counsel would have had a guide to follow to harmonize Member State and European Community law. In the nations in which in-house counsel communications were unprotected by the attorney-client privilege, no appreciable change would occur in corporate communications because the predictability dilemma described in Section III of this Article would stand in the way. If the attorney-client privilege was important for corporate clients in those Member States, outside counsel would be used.

Thus, the *Akzo Nobel* decision should not be seen as shutting the door on the attorney-client privilege for in-house counsel under European Community law. Instead, the *Akzo Nobel* decision should be seen as a way station, with more analysis to come.