

Exposed: Communications Between In-House Counsel and Company

By David H. Evans, Christopher Cusmano and Richard Oliver

In a Sept. 14, 2010 decision, the Court of Justice of the European Union reaffirmed that for the purposes of a European Commission competition investigation, legal professional privilege does not extend to communications between a company and its in-house counsel. The Court held that because in-house counsel are fundamentally different from external lawyers, and are not sufficiently independent in the performance of their duties, privilege cannot be used to shield internal communications from disclosure. The ruling confirmed a 2007 lower court judgment, and was consistent with the opinion of the Advocate General Juliane Kokott issued in April, which recommended rejecting such a claim for privilege.

In 2003, the Commission opened an investigation into potential cartel activity in the plastic additives market involving Akzo Nobel Chemical Ltd. and its subsidiary Akcros Chemical Ltd. Commission authorities raided Akzo's headquarters. Akzo disputed the Commission's right to inspect five of the documents based on privilege. These documents included e-mails between a general manager and in-house counsel. After review, the Commission rejected Akzo's privilege claim and refused to return the documents.

Akzo appealed the decision to the European Court of First Instance (now known as the General Court). The court rejected Akzo's claim of privilege, relying on a 1982 Court of Justice judgment, *Case 155/79 AM & S Europe Ltd. v. Commission* (1982), that distinguished between in-house counsel, who are dependent on their employers, and external lawyers, who retain independence from their clients, and established that in matters before the Commission and the courts of the European Union legal professional privilege only applies to communications with "independent" lawyers. Akzo then appealed to the Court of Justice, arguing that in-house counsel are sufficiently "independent" to justify the protection of legal professional privilege.

On appeal, the Court of Justice upheld the lower court's decision. In *Case C-550/07 P Akzo Nobel Chemical Ltd. v. Commission* (2010), the Court of Justice reaffirmed that legal professional privilege does not apply to communications between a company and its in-house counsel during a Commission investigation. The Court stated that there are two requirements for legal professional privilege: the communication must be related to the "client's rights of defence," and "must emanate from independent lawyers [that are not bound to the client by a relationship of employment]."

The Court of Justice explained that "independent" necessarily "means the absence of any employment relationship between the lawyer and his client." It referenced *AM & S Europe* and stated that the conception of an "independent lawyer" is someone that collaborates in the administration of justice and provides legal assistance to a client in full independence. According to the Court, in-house counsel cannot perform these duties as well as external lawyers because they are economically dependent on clients. The Court noted that in-house counsel occupy "the position of an employee which, by its nature, does not allow [them] to ignore the commercial strategies pursued by [their] employer, and thereby affects [their] ability to exercise professional independence." Unlike external lawyers, "in-house counsel [are] less able to deal effectively with any conflicts between [their] professional obligations and the aims of [their] client...and [are] not able to ensure a [comparable] degree of independence."

The Court rejected Akzo's arguments that its in-house counsel was sufficiently "independent" by virtue of his membership in the Netherlands national bar association, which imposes professional and ethical obligations, and his employment contract, which authorized him to comply with these obligations and respected his freedom to independently perform his duties. While professional and ethical obligations may "positively" demonstrate independence, the Court wrote, independence must also be shown "negatively" by the absence of an employment relationship.

The Akzo decision further entrenches the 1982 rule that communications between a company and its in-house counsel during the course of a Commission investigation are not protected from disclosure. The Court of Justice did not take the opportunity to revisit prior case law in light of the modern role in-house counsel often play in directing and managing compliance programs. As a result, companies should examine their internal policies to ensure there is adequate protection against the risks of disclosure, and the confidentiality of legal advice is maintained to the greatest extent possible.

Companies can take affirmative steps to preserve the confidentiality of legal advice. Most importantly, companies should avoid internal written communications with in-house counsel (including e-mail) on matters relevant or potentially relevant to a Commission investigation. In addition, companies should obtain legal advice from external lawyers wherever possible. While written communications and advice from external lawyers are entitled to legal professional privilege, companies should take the additional precaution of clearly marking such documents. Commission investigators increasingly rely on surprise inspections (frequently

known as "dawn raids,") and efforts to identify documents as privileged because they contain advice from external lawyers and storing these documents in separate files and folders beforehand, makes it more likely that they will not be disclosed. Also, the Akzo ruling did not address prior caselaw upholding legal professional privilege for communications involving in-house counsel made exclusively for the purpose of seeking legal advice from external lawyers, and for an internal summary of the legal advice provided by an external lawyer, so these documents presumably remain privileged. In light of the risks of disclosure, however, companies should take similar precautions, clearly marking these documents and storing them in separate files and folders.

Akzo also has a potential impact on attorney privilege in countries like the United States and the United Kingdom, where privilege rules are at odds with EU law. In the United Kingdom, the compulsory seizure by the Commission of documents that are privileged under English law is, without more, unlikely to be considered a waiver of privilege, as against parties other than the Commission, in any proceedings subject to English law. However, if the Commission were to subsequently make the documents and their contents public, the document could potentially lose the confidentiality necessary to maintain a claim to privilege in English law. Thus far, national courts have not yet entertained such arguments. Nevertheless, this prospect raises concerns about how multi-national companies should manage their affairs, especially in the context of large, multi-jurisdictional government investigations. As government authorities in many nations continue to increase the number, size, and scope of enforcement actions, and also increase their cooperation with other jurisdictions, this issue will likely be raised in the near future.

It should be emphasized that this decision does not affect member states' national rules. In a member state that recognizes privilege with respect to communications between a company and its in-house counsel, these communications will continue to be privileged if a competition investigation takes place at a purely national level. For example, the Office of Fair Trading in the United Kingdom would be unable to obtain

disclosure of communications between a company and its in-house counsel (in relation to legal advice or litigation) when undertaking an investigation under the Competition Act 1998 and Enterprise Act 2002 where there is no Commission involvement. Certain member states, such as France and Hungary, however, do not recognize privilege with respect to in-house counsel.

In the United States, a particularly aggressive opponent could argue that the compulsory seizure by the Commission of privileged documents constituted a waiver. That opponent would certainly argue that the disclosure of those documents to the public constituted a waiver. Whether such arguments would be persuasive, even in part, in a U.S. court is unclear. We suspect U.S. courts would be reluctant to find a waiver, and if parties attempted to end-run the privilege rules in any meaningful measure, Congress would get involved. Nonetheless, companies should remain vigilant.

Finally, in regard to seeking external counsel, the Akzo decision did not address the separate requirement for privilege under EU law that the "independent lawyer" be qualified to practice in the European Economic Area. Advocate General Kokott did not recommend any changes to this rule in her advisory opinion. Therefore, companies should presume this requirement remains in effect, and consider this factor when examining their internal policies and procedures to preserve the confidentiality of legal advice rendered by external counsel.

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Letters to the Editor

Most Service Members Don't Care About Sexual Orientation

"Don't Ask, Don't Tell Repeal: A Very Dangerous Sociological Experiment" by Dean R. Broyles, Sept. 23, reiterates an oft-repeated but erroneous conflation of two concepts. Acknowledging the inalienable rights of one group (homosexuals) doesn't automatically translate into deprivation of rights for another group ("religious objectors" in Broyles parlance.) Broyles suggests more time should be allowed to poll service members on their view of serving with gay and lesbian comrades, but research shows most service members simply don't care. Competency is a much bigger factor than sexual orientation. Human rights do not depend on polling. Bigotry comes in many forms. If a person, male or female, and of whatever sexual orientation wishes to serve in the United States military, we should honor his or her commitment and gratefully accept the person's willingness to serve us all.

Laurel Thurston
Encino

'Don't Ask, Don't Tell,' Forced Choice Between Silence and Lies

In his Sept. 21 article, *"Don't Ask, Don't Tell Repeal: A Very Dangerous Sociological Experiment,"* Dean R. Broyles of The Western Center for Law and Policy called the recent ruling in *Log Cabin Republicans v. United States* declaring "Don't Ask, Don't Tell" (DADT) unconstitutional a "dangerous sociological experiment...like a giant cultural steamroller" intending to establish the "homosexual legal

agenda...at the expense of religious freedom" and military readiness. Broyles accused the Department of Justice of "refusing to defend and enforce the law" while labeling Central District Court Judge Virginia Phillips an "activist judge." Certainly no one who attended the trial, knew the evidence that was presented, or read the trial briefs and transcripts would have asserted the positions taken in Broyles' piece, which have nothing to do with the facts of DADT but everything to do with preconceived notions that have no place in legal discourse.

Broyles' accusation that the government put on an "empty-suit" defense would certainly come as a surprise to the very able attorneys from the Justice Department who vigorously defended the litigation, objecting to virtually every discovery request and filing multiple dispositive motions including motions in limine to exclude every document and every witness. Judge Phillips' decision invalidating DADT was firmly grounded in the evidence and testimony that came before her in a two-week trial, from 18 witnesses (including seven exceptionally well qualified experts) and over a hundred exhibits, precisely none of which Broyles discusses.

The government introduced no exhibits or testimony of its own, other than the legislative history of the statute, because there simply was none that it could have presented: no study has ever shown that the presence in the military of gays and lesbians adversely affects morale, discipline, or unit cohesion. On the contrary, every academic study ever done – including those written or commissioned by the Defense Department – concludes that sexual orientation is simply not germane to military readiness. And instance after instance in the real world – the fact that discharges under DADT decrease in wartime compared to peacetime; the fact that the military must enlist

convicted felons to take the place of competent soldiers discharged under DADT; the fact that individuals are recommended for promotion to field-grade officer rank in the midst of their DADT discharge proceedings – shows that applying DADT to our military in fact harms morale and readiness. A judge who would have ignored the mountain of evidence proffered by Log Cabin and still found that DADT furthers an important governmental interest might better fit Broyles' worldview, but she would have been an injudicious judge indeed.

Permitting gay and lesbian individuals to serve openly in our military in no way infringes upon fellow servicemembers' free exercise of their own religion. All are free to practice the faith of their choosing. What this ruling does, by contrast, is vindicate gay and lesbian servicemembers' First Amendment rights to free speech and association, freeing them from DADT's forced choice between silence and lies. They may now speak with the same candor and honesty as their heterosexual comrades, thereby increasing the bonds of trust within their military units.

The U.S. Armed Forces today includes servicemembers from every ethnicity and faith found in our country, as well as thousands of gay and lesbian individuals who serve honorably and heroically. The ability to work with others is not just a political expediency, it is imperative to military success. Log Cabin's victory will improve our country's defense by permitting all those who are willing to sacrifice their lives for freedom to serve proudly.

Dan Woods, Earle Miller, Patrick Hagan
White & Case, Los Angeles

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