V. Implications for In-House Lawyers and the Availability of Legal Privilege

A. ATTORNEY-CLIENT PRIVILEGE IN HISTORY

This is not the place to engage in a deep philosophical debate on attorney-client privilege, but one can nevertheless safely say that for several hundred years in Western civilization, the privilege has been defended as providing an important social benefit to society. We have moved away from the concept that the privilege exists to enhance the status of the lawyer and, instead, we now focus on the importance to society of open and uninhibited communications with legal advisors. One of the basic underpinnings of most legal systems, including the EEC, is the ancient axiom that everyone is presumed to know the law, and it, therefore, follows that everyone can ascertain the law by consulting a lawyer. It is also ancient wisdom that one must be able to make inquiries on legal matters without incurring any danger. The communication must be privileged or else the inquiry will not be made in the first place, which means that the law will remain a sealed book. In that case, the presumption that everyone knows the law becomes an absurdity and the very foundation of the legal system is called into question.

B. IMPACT ON THE MULTINATIONAL CORPORATION

What public purpose can, therefore, be served by granting legal privilege to communications with outside lawyers and denying it with in-house lawyers? What difference does it make to society whether the legal advisor is on the company payroll and receives his check at the end of the month, or whether his office bills the company by the hour or is on a retainer. The important thing is that the company's decision makers know, in this highly complex age, what it is that society, in various countries, expects of them. Only the in-house lawyer, assisted of course by outside legal experts, can get that advice to the right people within the company in a cost effective manner. Does it, therefore, make sense to penalize a company through loss of legal privilege if it selects this form of legal communication, because the circumstances of modern multinational corporate life so demand?

The AM&S and John Deere cases have considerably choked off free and uninhibited internal written discussions of a company's obligations and liabilities under EEC competition law, and it seems that this state of affairs is not only
detrimental to the company itself, but also to society as a whole. As

is suggested by the ABA resolution referenced earlier, the EEC authorities should study carefully the consequences of their rulings and then ask the question once again, whether from the point of view of general public policy, it would not be more desirable for the legal privilege to be extended also to in-house counsel communications, such as it is in the U.K., Ireland and the United States.

Referring Principles:

XII.6 - Attorney-client privilege