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In *Australian Mining & Smelting Europe Ltd. (AM & S) v. Commission of the European Communities*,[1] the European Court of Justice (ECJ) for the first time interpreted European Community (EC)[2] law to protect the confidentiality of written communications between lawyer and client. The ECJ held that such communications made by an independent lawyer for the purpose of a client's defense are protected from disclosure to EC officials conducting competition investigations.[3] However, the ECJ's decision limits the principle of confiden-

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1. 1982 E. Comm. Ct. J. Rep. 1575, 34 Common Mkt. L.R. 264.

2. This note uses the term European Community in accordance with the resolution of the European Parliament. *Resolution on a single designation for the Community*, 21 O.J. EUR. COMM. (No. C 63) 36 (1978). The European Community was formed in 1957. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 11 (1958). The six original Member States were Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands. Denmark, the Irish Republic, and the United Kingdom joined the Community on January 1, 1973. Greece became the tenth Member State on January 1, 1981. In 1985, Spain and Portugal became Member States.

3. *See AM & S*, 1982 E. Comm. Ct. J. Rep. at 1611, 34 Common Mkt. L.R. at 323. The dispute in *AM & S* began when the member of the Commission of the European Communities responsible for competition policy ordered the investigation of AM & S, a company incorporated in the United Kingdom. The Commission requested specified documents some of which AM & S refused to permit inspection in their entirety. The legal advisers to AM & S argued that some of the documents were "covered by legal privilege, that is to say, the principle of legal professional privilege or confidentiality as understood in common law jurisdictions." *Id.* at 1579, 34 Common Mkt. L.R. at 267. The documents fell into four broad catagories:

(i) solicitors' instructions to counsel,
(ii) communications between an outside solicitor and an applicant or one of its parent companies containing legal advice or requests for legal advice,
(iii) documents containing legal advice or requests for legal advice from an 'in-house' lawyer employed by the applicant or one of its parent companies and
(iv) communications between executives of the applicant or one of its parent companies recording legal advice or request for legal advice.

Id. at 1625, 34 Common Mkt. L.R. at 277.

tiality[4] in a way that may have significant consequences for clients who transact business in Europe and retain lawyers from the United States.[5]

The Court stated that the principle of confidentiality applies "without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives."[6] This language apparently extends the protection of the principle of confidentiality only to communications with lawyers licensed in Community jurisdictions.[7] Thus interpreted, the principle places the clients of U.S. attorneys in a vulnerable position during EC competition investigations. European companies doing business in the United States, U.S. companies operating in Europe, multinationals based on either continent, and joint ventures between U.S. and European companies all obtain advice regarding U.S. law from U.S. attorneys. Documents conveying or requesting such advice would likely be of interest to Community officials conducting a competition investigation.[8] If such communications are not privileged, clients of U.S. attorneys may be vulnerable to a Commission demand for production even if the documents, or the clients themselves, are located in the United States.[9]

Understandably concerned about the potential ramifications of the *AM & S*

4. The ECJ referred to the protection of communications as a "principle of confidentiality." The Court arrived at the principle by taking "into account the principles and concepts common to the laws of [the Member] States." *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1610, 34 Common Mkt. L.R. at 322.

5. *See* Vollmer, *U.S. Lawyers Excluded from Protection in EEC Cases*, Legal Times, July 26, 1982, at 16; *see also* Boyd, *A.M.&S. and the In-house Lawyer*, 7 EUR. L. REV. 493 (1982) (discussing the effect of the *AM & S* decision on non-EC lawyers generally and on EC and non-EC, in-house counsel).

6. *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1612, 34 Common Mkt. L.R. at 324.

7. *See* Section of Int'l Law and Practice, Am. Bar Ass'n, Report to the House of Delegates, Section of International Law and Practice 1–2 (Jan. 18, 1983) ("*AM & S Europe Ltd v. Commission* recognized the existence of a limited attorney-client privilege within European Community law but, by its literal terms, seems to exclude communications with U.S., and other non-EEC, lawyers from protection." (footnote omitted)) [hereinafter cited as ABA Report]; *see also* Vollmer, supra note 5, at 16 ("[The] issue whether the privilege applied to documents from non-EEC lawyers, was directly before the Court, because AM & S had withheld communications from Australian lawyers. . . ."); A European commentator notes that the limitation to the privilege is "made more explicit by the French text of the Court's Judgment which states that the lawyer must be 'inscrit au barreau de l'un des Etats membres,' i.e. a member of a bar or law society or equivalent in a Member State and entitled to practise." Faull, *AM & S: The Commission's Practice Note*, 8 EUR. L. REV. 411, 411 (1983) (footnote omitted).

8. *See* Vollmer, *supra* note 5, at 16.

9. See *id.* at 16, 17. The Commission claims it has jurisdiction in competition investigations "not only over European companies, many of which have U.S. offices or subsidiaries, but also over foreign undertakings 'whose conduct has an appreciable impact within the common market.'" *Id.* (quoting COMM'N OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 36 (1982)). Thus, it is at least conceivable that a Commission investigation might involve a U.S. company operating only in the U.S. and, under a strict interpretation of the *AM & S* decision, require the disclosure of attorney-client communiciations.

decision for clients of U.S. lawyers, the American Bar Association has asked the Commission of the European Communities to "grant to an undertaking the same protection . . . against disclosure of written communications with a U.S. lawyer that Community law accords to a client's written communications with a lawyer of a Member State of the European Community."[10] Recently, the Commission has decided to take account of the fact that some non-EC lawyers giving advice in the EC come from countries that protect attorney-client communications. The Commission stated that it may be "necessary to negotiate agreements based on reciprocity with certain countries, with a view to extending legal privilege to their independent lawyers."[11]

The possibility that the Commission might, in the near future, negotiate a reciprocity agreement with the United States makes timely an examination of the treatment of communications between non-U.S. attorneys and U.S. clients under U.S. law.[12] In a report to the House of Delegates of the American Bar Association (ABA), the Section of International Law and Practice (ILP) argues that U.S. law of attorney-client privilege may be invoked to protect communications with all lawyers, foreign and national. It claims that "U.S. courts and antitrust enforcement agencies draw no distinction between U.S. lawyers and foreign lawyers when faced with a claim of attorney-client privilege; therefore, as a matter of comity, the Commission should accord clients with confidential communications to or from U.S. lawyers the same right."[13]

Part I of this note considers whether U.S. federal and state law applies the attorney-client privilege equally to communications with U.S. and non-U.S. attorneys. It concludes that, contrary to the ILP's position, the law on this issue is not firm. In light of the policy issues raised by the AM & S decision, part II considers factors that may justify discriminating between U.S. and non-U.S.

10. ABA Report, *supra* note 7, at 1.

11. Comm'n of the European Communities, *Confidentiality of Legal Documents: Application of the Competition Rules*, BULL. EUR. COMM., No. 6 at 43 (1983) [hereinafter cited as *Confidentiality of Legal Documents*]. In 1983, the Commission announced its intention to submit appropriate proposals to the Council of the European Communities to allow for negotiation of such agreements. *Id.*

12. The U.S. federal attorney-client privilege is an evidentiary privilege recognized by federal statute which has evolved by means of federal common law. For one formulation of the scope of the privilege, see UNIF. R. EVID. 502, 13 U.L.A. 249–51 (1974). The evidentiary privilege has a narrower scope than the ethical obligation of lawyers to protect client confidences. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980).

13. ABA Report, *supra* note 7, at 9. The ABA Section of International Law and Practice (ILP) based its reciprocity request to the Commission of the EC on three lines of argument, only the first of which will be considered in this note. It argued, first, that affording less protection to communications with U.S. lawyers than to communications with EC lawyers "would deny clients of U.S. lawyers a right that U.S. courts and antitrust enforcement agencies grant to clients of European lawyers." *Id.* at 2. Second, that "discriminating against communications with U.S. lawyers would be inconsistent with the basic principles declared by the Court in the AM & S decision." *Id.* Third, that it "would be contrary to the policies of encouraging trade and friendly relations between the U.S. and the Member States of the Community." *Id.* (footnote omitted).

lawyers, or among non-U.S. lawyers. It concludes that the public interest may be served best by extending the attorney-client privilege to communications with some, but not all, non-U.S. lawyers. Part III presents a proposal for defining the scope of the privilege. The proposal takes into account traditional policies justifying the privilege, while acknowledging and suggesting ways of dealing with new issues arising as practice by foreign attorneys in the United States increases.

I. U.S. Law of Attorney-Client Privilege: Application to Communications with Non-U.S. Lawyers

Neither federal nor state law clearly requires that non-U.S. lawyers be treated like U.S. lawyers for purposes of the attorney-client privilege. While the ILP states that "[t]he U.S. attorney-client privilege attaches to communications with lawyers of any jurisdiction,"[14] there is a dearth of federal case law supporting this assertion. The ILP's argument is based largely on unconvincing analogy. Furthermore, the ILP ignores state law, which is the law of attorney-client privilege applied by U.S. courts in diversity cases.

A. Federal Law

Renfield Corp. v. E. Remy Martin & Co.[15] is the only case in which a federal court directly addresses the issue of whether the attorney-client privilege applies to communications with a non-U.S. attorney.[16] The court allowed a French company to invoke the privilege, thus preventing the disclosure of written communications between corporate officials and French in-house counsel. The court held that documents located in both the United States and France were protected

14. *Id.* at 13.

15. 98 F.R.D. 442 (D. Del. 1982).

16. *Id.* at 444. Two other cases touch the issue tangentially. *See* United States v. Bowe, 694 F.2d 1256 (11th Cir. 1982); United States v. Sindona, 636 F.2d 792, 804 (2d Cir. 1980). It might be argued that in both these cases the court assumed that the attorney-client privilege would apply to communications between a client and a foreign lawyer. However, the fact that the attorneys involved were not licensed in the United States was not addressed in either opinion. In *Bowe*, an attorney from the Bahamas refused to comply with an order to answer a federal grand jury subpoena *duces tecum*. The appellate court did not rule on the applicability of the U.S. attorney-client privilege since a lower court's order to require production only of non-privileged material disposed of the issue. The court noted that the possiblity of a sanction against the Bahamian attorney for breach of Bahamian attorney-client privilege was an insufficient reason to quash the subpoena. 694 F.2d at 1258.

In *Sindona*, the court affirmed, on privilege grounds, a district court decision to preclude cross-examination of a witness based upon a letter inadvertently received by government counsel. The letter had been prepared by the witness at the request of his Venezuelan attorney, to aid the attorney's representation of the witness in another proceeding. The court ruled that the attorney-client privilege applied to the letter. 636 F.2d at 804. This case, which is not cited by the ILP, appears to support the ILP's position. The decision does not indicate, however, that the non-U.S. status of the attorney was an issue before the court.

from disclosure under the U.S. law of attorney-client privilege.[17] In determining the applicability of the attorney-client privilege to communications with non-U.S. lawyers, the court specifically addressed the common law requirement that a lawyer must be a member of a bar for the privilege to apply.[18]

Starting from the determination that the French legal profession has no organization equivalent to the American bar, the *Renfield* court held that bar membership was a functional rather than a literal requirement. If an attorney is "competent to render legal advice and is permitted by law to do so,"[19] lack of bar membership will not exclude application of the attorney-client privilege. The *Renfield* opinion cited no U.S. case law in support of this functional test.

In its report, the ILP cites a number of cases in support of the proposition that the attorney-client privilege protects communications with non-U.S. attorneys.[20] Most of these cases, however, either involve claims for the protection of communications with non-U.S. patent agents,[21] or claims for the protection of communications with U.S. attorneys who have given advice in states in which they are not licensed to practice law.[22]

In the text of its report, the ILP summarizes the cited patent agent cases saying that the courts "refused to order the production of communications with foreign

17. With regard to documents located in France, the court interpreted the Hague Evidence Covention to permit non-disclosure if the documents were covered by a privilege recognized either in France or the United States. *Renfield*, 98 F.R.D. at 443–44. Assuming that French law would not grant a privilege to refuse disclosure of the documents, the court decided that the U.S. provided such a privilege. *Id.* at 444. The court invoked choice of law principles to determine that the U.S. law of attorney-client privilege should also be applied to the documents located in the United States. *Id.* at 444–45.

18. The requirement that a lawyer be a member of a bar comes from the oft-cited test presented in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), though this case was not cited in the *Renfield* opinion. The court explained in *United Shoe*:

> 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 a 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 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.

Id. at 358–59 (emphasis added).

19. *Renfield*, 98 F.R.D. at 444.

20. ABA Report, *supra* note 7, at 13–15.

21. *Id.* at 14–15 (citing Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 953–54 (N.D. Ill. 1982); *In re* Ampicillin Antitrust Litig. 81 F.R.D. 377, 391–94 (D.D.C. 1978); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1169–79 (D.S.C. 1974); Mead Digital Sys., Inc. v. A.B. Dick & Co., 89 F.R.D. 318, 320–21 (S.D. Ohio 1980)). The report also cites Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 40 (D. Md. 1974), as directly contradicting its proposition.

22. .ABA Report, *supra* note 7, at 13–14 (citing Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249 (E.D. Wis. 1963); Georgia-Pacific Plywood Co. v. United States Plywood Co., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954)).

patent agents when the law of the foreign country provided a privilege for those communications."[23] The ILP asserts that this treatment supports the equal application of the attorney-client privilege to communications with U.S. and foreign lawyers of any jurisdiction.[24] The analogy does not hold up.

First, it is not clear that the policies supporting protection of attorney-client communications are identical to those supporting protection of patent agent-client communications. The attorney-client privilege "remains an exception to the general duty to disclose. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."[25] The protection of communications with patent agents is an extension of the privilege which not all courts choose to undertake. One court has found that while some degree of confidence may be appropriate between a client and his foreign patent agent, accountant, banker, or investment advisor, extending the attorney-client privilege to foreign patent agents would be excessive:

> [T]he necessity for "unrestricted and unbounded confidence" between a client and his attorney which justifies the uniquely restrictive attorney-client privilege simply does not exist in the other relationships. Expanding the privilege to treat foreign patent agents as if they are [sic] lawyers improperly expands the privilege beyond its proper bounds.[26]

Even if the need for confidence were the same, the patent agent cases cited in the ILP report would not support the assertion that the U.S. law of attorney-client privilege applies to communications with all foreign attorneys. According to the report, U.S. courts do not order the production of communications with foreign patent agents when those communications are privileged under the law of the foreign country.[27] Even if the cited cases could be so simply characterized,[28] their

23. ABA Report, *supra* note 7, at 14.

24. *Id.* at 13–14.

25. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961) (footnote omitted).

26. Status Time Corp. v. Sharp Elecs. Corp., 95 F.R.D. 27, 33 (S.D.N.Y. 1982).

27. ABA Report, *supra* note 7, at 15 n.54.

28. The cases cited by the ILP do not turn entirely upon the substantive law of foreign jurisdictions. In Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982), the court presented three theories under which letters from a U.S. client's U.S. attorney to a foreign patent agent would be privileged. First, if the lawyer merely acted as a conduit between the client and the patent agent, and if the foreign country protected client-patent agent communications, the communication would generally be privileged. If the lawyer and patent agent acted together as a conduit between the client and the foreign patent office, the communication would not be privileged. Second, if the letter reflected substantive lawyering, and the patent agent acted merely as a functionary, the communications would be protected as between a lawyer and a non-lawyer under attorney supervision. Third, if both lawyer and patent agent participated in substantive lawyering, communications would be protected as between two professionals, or co-counsel. *Id.* at 954.

The court in *In re* Ampicillin Antitrust Litig. 81 F.R.D. 377 (D.D.C. 1978), held that communica-

application to situations involving foreign attorneys would result not in unequivocal protection of communications with all foreign attorneys, but in discrimination on the basis of the protection afforded attorney-client communications in foreign jurisdictions.

The ILP draws additional support for its position that U.S. courts will apply the attorney-client privilege equally to communications with U.S. and non-U.S. lawyers from cases involving U.S. lawyers who give advice in states other than those in which they are licensed to practice.[29] In *Paper Converting Machine Co. v. FMC Corp.*,[30] the plaintiff sought production of documents containing written communications between officers or employees of the defendant and the defendant's lawyer. The lawyer practiced as a patent counsel in California although he was licensed only in Ohio. The court held that the attorney-client privilege applied. The defendant's lawyer was "entitled to the status of an attorney" for purposes of the privilege, despite the fact that he was not admitted to the bar of the state in which he was employed.[31]

tions relating to patent activities in the U.S. could be protected if the patent agent, U.S. or foreign, was registered with the United States Patent Office. *Id.* at 391. The communications must also "involve a response that requires knowledge, analysis, or application of patent law to particular information." *Id.* at 394. Communications relating to foreign patent activities could be protected if the foreign country granted a similar privilege. *Id.* at 391. The court noted a split in U.S. case law concerning the protection of client-patent agent communications. *Id.* at 392.

In Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1924), the court ruled that no communications with patent agents, American or foreign, are protected by an attorney-client privilege in the United States. *Id.* at 1169. Communications between foreign clients and foreign patent agents, relating to foreign patent applications, might be protected out of comity depending upon the law of the foreign country. Any communications relating to assistance in prosecuting patent applications in the United States are not privileged. *Id.* at 1170. Foreign patent agent communications which relate to the development of trial preparation materials are not protected by attorney-client privilege because "foreign patent agents are not attorneys." *Id.* at 1171.

The court in Mead Digital Sys., Inc. v. A.B. Dick & Co., 89 F.R.D. 318 (S.D. Ohio 1980), determined that communications between U.S. clients and U.S. patent agents are not protected. It noted, however, that communications between U.S. clients and foreign patent agents might be protected if the foreign law affords a privilege which could be observed as a matter of comity. *Id.* at 320.

The ILP cites Burlington Indus. v. Exxon Corp., 65 F.R.D. 26 (D. Md. 1974), as directly contrary to the cases supporting its position. The ILP summarized this case as holding that "communications with no patent agent, U.S. or foreign, is necessarily within the attorney-client privilege." ABA Report, *supra* note 7, at 5. In fact, the court held that the attorney-client privilege is available, under proper conditions, to patent cases. *Burlington Indus.*, 65 F.R.D. at 40.

29. *See* ABA Report, *supra* note 7, at 13–14.

30. 215 F. Supp. 249 (E.D. Wis. 1963).

31. *Id.* at 251. The court analyzed each communication for which the privilege was claimed under the test of *United Shoe*, 89 F. Supp. at 357. In addition, to discussing the subject and nature of privileged communications, the *United Shoe* test states that the communications must be made to a "member of a bar of a court." *Id.* at 251 (emphasis added) (for the full text of the test, see *supra* note 18.) The *Paper Converting* court, however, did not discuss this part of the test explicitly. *See* 215 F. Supp. at 251.

In *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*,[32] a court considered the issue of whether a lawyer, working as house counsel in a state other than his licensing state, could be considered an attorney for purposes of the attorney-client privilege. It held that communications with an attorney practicing in New York, but only licensed in Pennsylvania and the District of Columbia, were privileged.[33] The court noted that, given the requirement of re-examination for bar membership in most states, a contrary rule would deprive multi-state corporations "of the security of the attorney-client privilege unless counsel devotes himself almost entirely to studying for bar examinations."[34]

The language of both of these cases appears broad enough to extend the privilege to communications between U.S. clients and foreign attorneys. The ILP, in fact, states that it has "no reason to believe a court or an antitrust enforcement agency will apply a different rule to communications with a lawyer qualified in a foreign country but not admitted to the bar of the state in the U.S."[35] The holdings of the cases, however, are too narrow to easily support an analogy to cases involving foreign lawyers. In both cases, the court merely granted a U.S. attorney licensed by the bar association of one state the protection of the privilege in another state. It is not clear that the policies that support the protection of communications with U.S. attorneys practicing out of their licensing states equally support the protection of communications with foreign attorneys in the United States.

Some of the communications at issue in the *United Shoe* case were made to members of the defendant's patent department who were not members of the bar of the state in which they worked, but were admitted to other state bars. The court considered this an indication that these individuals were not acting as attorneys for the defendant and thus did not protect defendant's communications with them. It did not rule out the possibility of applying the privilege to lawyers from other states: "The situation would be different with regard to a visiting attorney from another state, for whom the privilege might well be invoked." *United Shoe*, 89 F. Supp. at 360.

32. 18 F.R.D. 463 (S.D.N.Y. 1956).

33. *Id.* at 466.

34. *Id.* The court also noted that the decision in *Zenith Radio Corp. v. Radio Corp. of America* did not require an attorney to be a member of the bar in which he is practicing in order for the attorney-client privilege to apply. The *Zenith* decision stated:

> Bar membership should properly be of the court for the area wherein the services are rendered, but this is not a sine qua non, e.g., visiting counsel, long distance services by correspondence, pro hac vice services, "house counsel" who practice law only for the corporate client and its affiliates and are not for the public generally, for which local authorities do not insist on admission to the local bar.

121 F. Supp. 792, 794 (D.Del. 1954). The ILP also cites *Zenith*. ABA Report, *supra* note 7, at 14.

35. ABA Report, *supra* note 7, at 14 (footnote omitted).

If they are not recognized as attorneys for the purpose of the attorney-client privilege, non-U.S. in-house counsel of multinational corporations may face practical problems as difficult as those identified by the the *Georgia-Pacific Plywood* court. However, foreign attorneys may or may not come from jurisdictions with privileges similar to the U.S. attorney-client privilege, and they may or may not be subject to professional discipline. Thus, while members of a state bar association practicing in another state can be relied on to hold privileged communications in confidence, there is no guarantee of how foreign lawyers will treat private communications with their U.S. clients.

The ILP draws additional support for its position from Proposed Federal Rule of Evidence 503, which provides that for purposes of the privilege, "[a] 'lawyer' is a person authorized, or reasonably believed by the client to be authorized, to practice in any state or nation."[36] Literal application of this rule would extend the privilege to communications with all foreign lawyers. The rule is not law, however. By refusing to adopt this proposed rule and others, Congress "manifested an affirmative intention not to freeze the law of privilege."[37] Existing Federal Rule of Evidence 501 provides that "the privilege of a witness, [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[38] Rule 501 is "intended to provide courts with the flexibility to develop rules of privilege on a case by case basis."[39] Thus, under existing law, federal courts may choose whether to treat all non-U.S. lawyers like U.S. lawyers, or to limit application of the privilege to reflect various policy considerations.

In sum, federal law does not firmly establish that the attorney-client privilege must be applied equally to communications with lawyers of all jurisdictions, U.S. and foreign. Under the Federal Rules of Evidence, Congress leaves the decision to the courts. Analogies to cases involving non-U.S. patent agents or out-of-state U.S. lawyers are tenuous at best. If U.S. courts determine for policy reasons that the law of attorney-client privilege should discriminate between U.S. and non-U.S. attorneys, or among non-U.S. attorneys, the Federal Rules of Evidence and current federal case precedent will not hinder them from giving effect to those policies.

36. PROPOSED FED. R. EVID. 503(a)(2); *see also* ABA Report, *supra* note 7, at 13.

37. Trammell v. United States, 445 U.S. 40 (1980). In this case, the Court considered whether an accused could exclude the voluntary testimony of his wife by invoking the privilege against adverse spousal testimony. *Id.* at 41–42. The court modified the existing rule to give the witness-spouse alone the privilege to refuse to testify. *Id.* at 53. The Court explained that it had authority to modify the existing rule because Congress, by rejecting nine specific privilege rules and enacting Rule 501, manifested an intention not to freeze the law of privilege. *Id.* at 47.

38. FED. R. EVID. 501.

39. 120 CONG. REC. 40,891 (1974) (statement of Rep. Hungate).

B. State Law

Each state formulates its own law of attorney-client privilege.[40] These laws vary in the protection they afford to communications with non-U.S. lawyers. Some state statutes, paralleling Proposed Federal Rule of Evidence 503, apply the privilege to communications with attorneys authorized to practice in any state or nation.[41] Other states have different policies. In Ohio, the availability of the privilege is determined by a rule paralleling existing Federal Rule 501. The privilege is governed "by principles of common law as interpreted by the courts of [Ohio] in light of reason and experience."[42]

In Kansas and New Jersey, the privilege is limited to communications with lawyers "authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer."[43] Under the literal language of the Kansas and New Jersey rules, a court would discriminate among non-U.S. lawyers, selectively protecting communications with lawyers from countries whose substantive law allowed for the protection of attorney-client communications. Whether such a court would be satisfied with any type of attorney-client privilege in the substantive law of the foreign jurisdiction, or would require a privilege similar in scope to one recognized in U.S. state or federal law,[44] is an open question.

II. Policy Considerations: A Justification for Discrimination?

The *AM & S* decision provides a fresh perspective from which to examine the place of foreign lawyers in a domestic system of attorney-client privilege. An examination of the policies underlying the Community's principle of confidentiality and the limitations placed on that principle is useful in a discussion of potential developments in the U.S. law of attorney-client privilege as applied to foreign lawyers.

40. *See* 81 Am. Jur. 2d *Witnesses* § 172 (1976). The ILP's report does not discuss state law regarding the availability of the attorney-client privilege to the clients of non-U.S. lawyers. However, state law on the issue must be examined when analyzing of the ILP's argument that U.S. courts will apply the attorney-client privilege to communications with non-U.S. lawyers, not only because state law will apply to cases brought in state courts, but also because it provides the rule of decision on the issue of privilege in suits brought under the federal courts' diversity jurisdiction. *See* Fed. R. Evid. 501; Eureka Inv. Corp v. Chicago Title Ins. Co., 743 F.2d 932, 936 n.3 (D.C. Cir. 1984).

41. *See, e.g.*, Fla. Stat. § 90.502 (1979); Neb. Rev. Stat. § 27-503 (1979); Nev. Rev. Stat. § 49.065 (1979); Proposed Fed. R. Evid. 503. Similar language is used in Unif. R. Evid. 502, 13 U.L.A. 249–51 (1974).

42. Ohio R. Evid. 501, Ohio Rev. Code Ann. Ev. R. 501 (Page 1981).

43. Kan. Stat. Ann. § 60-426(c)(3) (1983); N.J. Stat. Ann. § 2A: 84A-20 (West 1976).

44. For one formulation of the scope of the U.S. privilege, see Unif. R. Evid. 502, 13 U.L.A. 249–51 (1974).

In enunciating the principle of confidentiality, the ECJ looked to policy considerations common to the laws of the member states of the EC.[45] The Court found that "confidentiality serves the [requirement]...that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."[46] The opinion limits the principle by at least three conditions, however.[47] First, to be protected, communications between the lawyer and client must be "made for the purpose and in the interests of the client's rights of defence."[48] Second, such communications must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."[49] Third, the court implied that only communications involving lawyers licensed to practice in Member States are covered.[50]

When the ECJ emphasized that a client "must be able, without constraint, to consult a lawyer,"[51] it suggested a policy concern which has long been central to the U.S. law of attorney-client privilege. The purpose of the U.S. privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[52] Indeed, "[t]o induce *clients* to make such communications, the privilege...is said by courts and commentators to be a necessity."[53] Promoting the interests of the client depends upon sound advocacy, and advocacy "depends upon the lawyer's [sic] being fully informed by the client."[54]

At no time is the privilege of more importance to clients than when they face prosecution, civil suit, or investigation by a party adverse to their interests. The core of the U.S. attorney-client privilege is the protection of communications made "in contemplation of defense of a pending or imminently threatened prosecution."[55] In such a threatening situation, clients can only be expected to

45. *See AM & S*, 1982 E. Comm. Ct. J. Rep. at 1610, 34 Common Mkt. L.R. at 322.

46. *Id.* at 1610, 34 Common Mkt. L.R. at 323.

47. Some writers have suggested other possible limitations to the EC principle of confidentiality. *See, e.g.*, Millett, *Legal Confidentiality and the European Commission*, 126 SOLIC. J. 532, 533 (1982) (a client's written summary of advice given orally by a lawyer might not be a protected communication); Usher, *Legal Professional Privilege and Confidentiality in EEC Competition Proceedings; the Judgment of the European Court*, 1982 J. BUS. L. 398, 400 (communications from a lawyer qualified in one Member State, and practicing in another Member State, not under the terms of the services Directive but by pursuing activities to which access is not restricted, might not be protected by the principle).

48. *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1611, 34 Common Mkt. L.R. at 323.

49. *Id.*

50. *See id.:* at 1612, 34 Common Mkt. L.R. at 324.

51. *Id.* at 1610, 34 Common Mkt. L.R. at 323.

52. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

53. *United Shoe*, 89 F. Supp. at 358 (emphasis in original).

54. *Upjohn*, 449 U.S. at 389.

55. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1062 (1978) (footnotes omitted).

provide information to their attorneys when they are "free from the consequences or apprehension of disclosure."[56] The *AM & S* decision may have recognized this need when it limited the principle of confidentiality to communications made in "the interests of the client's rights of defence."[57]

The ECJ's exclusion of communications with non-EC attorneys from the scope of the principle of confidentiality[58] may indicate a desire to avoid encouraging EC clients to confide in foreign lawyers who may disclose confidential information. The Commission's willingness to begin negotiations that would apply the principle's protection to "independent" non-EC lawyers from countries in which the legal order provides for legal privilege,[59] may evidence a desire to extend the principle of confidentiality only to lawyers who are bound by law to respect client confidences. Such a limited extension would help to free EC clients of the apprehension and consequences of the disclosure of confidential communications before a foreign court.

U.S. law should reflect a similar policy. A law of attorney-client privilege that assumed all non-U.S. attorneys to be equally likely to protect client confidences would encourage U.S. clients to confide indiscriminately in any non-U.S. attorney. A client might confide in a non-U.S. lawyer only to find that private information could become public record before a foreign tribunal that does not recognize the confidentiality of lawyer-client communications. Particular clients might be hesitant to confide in a lawyer again, and clients in general might become less willing to confide in attorneys.[60] Thus, the purpose of the privilege would be undermined.

If the privilege of confidentiality "springs essentially from the basic need of man in a civilized society to be able to turn to his lawyer for advice and help,"[61] it is necessary that a client feel certain that his lawyer will not divulge a confidential communication. In the United States, this certainty is enhanced not only by an evidentiary privilege, but also by the professional obligation of lawyers to maintain client confidences. State bar associations discipline lawyers for infractions of state codes defining this obligation.[62]

The possibility of professional discipline, which comes with admittance to a state bar association, may be a major reason for the common law requirement that

56. *Upjohn*, 449 U.S. at 389 (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

57. *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1611, 34 Common Mkt. L.R. at 323.

58. *See supra* notes 6–7 and accompanying text.

59. *See Confidentiality of Legal Documents*, *supra* note 11, at 43.

60. This argument is based upon the assumption that the grant or denial of protection to communications with foreign lawyers will affect client behavior. The assumption is, admittedly, speculative. *See infra* note 74.

61. *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1654, 34 Common Mkt. L.R. at 308 (Slynn, Advoc. Gen., second opinion).

62. For a recent compilation of state ethical codes, see NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY, AM. BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980).

a lawyer be a member of a bar in order to qualify as an attorney for purposes of the attorney-client privilege.[63] The Model Code of Professional Responsibility, on which most state ethics codes are modeled,[64] provides that a lawyer "shall not knowingly . . . [r]eveal a confidence or secret of his client."[65] A lawyer must not reveal (1) "information protected by the attorney-client privilege under applicable law;" or (2) "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be . . . likely to be detrimental to the client."[66]

Non-U.S. lawyers may not be subject to analogous disciplinary systems. Applying the attorney-client privilege equally to communications with attorneys of all foreign jurisdictions may result in harm to U.S. clients whose confidences are violated by attorneys not required, under their home jurisdictions' ethics codes, to keep confidences. Again, the willingness of clients to confide in attorneys, the end that the attorney-client privilege is intended to encourage, would be undermined.

In delineating the Community's principle of confidentiality, the ECJ held that advice that may be protected must emanate from "independent" lawyers—"lawyers who are not bound to the client by a relationship of employment."[67] The limitation is based "on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence . . . such legal assistance as the client needs."[68] This language suggests two policy concerns. First, lawyers to whom the privilege is extended ought to be required to serve the interests of the justice system as well as those of their clients. Second, that those lawyers should be required to exercise independent judgment.

Similar policies are reflected in the Model Code of Professional Responsibility. According to the Model Code, U.S. lawyers must exercise independent judgment. Each lawyer is required to "preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do."[69] Lawyers must not "[e]ngage in

63. *See supra* notes 18 & 31.

64. The ABA adopted the Model Code of Professional Responsibility in 1969. Within three years, it had been adopted in 40 states. AM. BAR FOUND., ANNOTED CODE OF PROFESSIONAL RESPONSIBILITY, at ix n.2. For comparisons of state codes of professional responsibility with the Model Code of Professional Responsibility, see NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 62.

65. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1) (1980).

66. *Id.* at DR 4-101(A).

67. *AM & S*, 1982 E. Comm. Ct. J. Rep. at 1611, 34 Common Mkt. L.R. at 323.

68. *Id.* at 1611–12, 34 Common Mkt. L.R. at 324. The Court continued: "The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose." *Id.* at 1612, 34 Common Mkt. L.R. at 324.

69. Fuller & Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

conduct involving dishonesty, fraud, deceit, or misrepresentation."[70] A lawyer must withdraw from the employment of a client when he "knows or it is obvious that his client is bringing the legal action . . . merely for the purpose of harassing or maliciously injuring any person."[71]

In general, U.S. lawyers must refrain from engaging "in conduct that is prejudicial to the administration of justice."[72] According to the Code, "[a] lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."[73] Applying the U.S. attorney-client privilege to communications with non-U.S. attorneys not subject to analogous ethical restrictions may encourage client to consult with lawyers who will not remain sufficiently independent to exercise detached judgment. It may encourage reliance on the counsel of lawyers not legally bound to serve the interests of the U.S. justice system.

III. Weighing the Policies: A Proposal

Application of the attorney-client privilege to communications with lawyers of all jurisdictions would assure clients that their confidences, whether shared with U.S. or foreign attorneys, would be protected in U.S. courts. Furthermore, it might encourage the EC to extend the principle of confidentiality to communications with U.S. lawyers. However, the costs of such a policy would likely outweigh the benefits.

Nondiscriminatory application of the privilege to communications with all foreign attorneys would encourage the false assumption that all lawyers may be similarly entrusted with confidential information. Since some non-U.S. lawyers come from jurisdictions with different attitudes toward attorney-client confidentiality than those embodied in the U.S. system, some clients would inevitably suffer from the disclosure of private information by non-U.S. attorneys to adverse parties or foreign courts. This result might undermine confidence in attorneys generally, the opposite result from what we hope to obtain from an extension of the attorney-client privilege. In addition, the U.S. justice system might suffer from the effects of reliance on foreign attorneys who are not sworn to uphold the interests of that system.

70. Model Code of Professional Responsibility DR 1-102(A)(4) (1980).

71. *Id.* at DR 2-110(B)(1).

72. *Id.* at DR 1-102(A)(5).

73. *Id.* at EC 7-5 (footnote omitted). These disciplinary and ethical rules have been "adopted as binding obligations in some form in all the states and the District of Columbia" and are enforced by penalties prescribed by individual jurisdictions. ABA Report, *supra* note 7, at 15. The obligations "apply whether U.S. lawyers are practicing within their licensing jurisdictions or some other jurisdiction. . . ." *Id.* at 16.

This note recommends that the protection of the U.S. attorney-client privilege be limited to only to communications with those non-U.S. lawyers who:

(1) are subject to a system of professional discipline that
    (a) requires the protection of confidential communications with a client; and
    (b) requires attorneys to serve the interests of the justice system in addition to those of their clients; and
(2) are licensed to practice in any state or nation the law of which recognizes a form of attorney-client privilege.[74]

This limitation of the privilege might be incorporated into federal law in a number of ways. It might be enacted through a new Federal Rule of Evidence that defines lawyer in the above manner for purposes of the attorney-client privilege. Or the limitation might be realized in a gradual manner through court recognition of some or all of the requirements of a *Renfield*-type functional analysis.[75] The proposal might also be included in the implementing legislation of a national bar for foreign lawyers, should one ever be established. Finally, the limitation could be tested on a small scale through application of the proposal to lawyers registered to practice before the U.S. Patent Office,[76] or to lawyers and clients involved in federal anti-trust investigations.[77]

74. Under this proposal, clients are only required to have a reasonable belief that an attorney meets these criteria for the privilege to apply. At first glance, this seems to put a heavy burden of knowlege on the client. Yet most clients who consult with non-U.S. attorneys are likely to be "sophisticated" individuals engaged in international business transactions who will usually be better informed about the current state of privilege law than the average U.S. client.

This note has argued that limiting the privilege to communications with foreign lawyers likely to keep confidences will encourage client confidence in lawyers and the legal system by minimizing the number of incidents of lawyers revealing secrets. Yet, clients relying on foreign lawyers who do not meet the proposed criteria may see their private communications turned over to a U.S. court. They may experience a loss of confidence in lawyers in general based on this experience. Without objective information as to how clients react to the disclosure of their private communications with attorneys or to changes in privilege law, it is difficult to say with certainty whether this note's proposal will have a positive net effect.

75. *See* text accompanying notes 15–19 *supra*.

76. This might be accomplished through judicial interpretation of 37 C.F.R. § 1.341(c), (e) and 37 C.F.R. § 1.344. Under 37 C.F.R. § 1.341(c), U.S. and foreign attorneys and patent agents may register with the U.S. patent office to practice before the patent and trademark office. Registered foreign attorneys must come from countries whose patent offices provide "substantially reciprocal privileges to those admitted to practice before the United States Patent and Trademark Office." 37 C.F.R. § 1.341(e) (1984). Before any attorney's name will be registered, he or she "must conform to the standards of ethical and professional conduct set forth in the Code of Professional Responsibility of the American Bar Association as amended February 24, 1970." 37 C.F.R. § 1.344 (1984).

These sections could be amended to explicitely extend the scope of the U.S. attorney-client privilege to include registered foreign attorneys. They already partially embody the proposal requirements concerning professional responsibility and reciprocal privilege.

77. This might be accomplished through an amendment to 15 U.S.C.A. § 1312(c)(1) or 15 U.S.C.A. § 49 (1976).

IV. Conclusion

In the aftermath of the *AM & S* case, the prospect of negotiating an agreement with the EC regarding the treatment of communications with foreign lawyers makes timely an examination of the current treatment of communications with non-U.S. lawyers under U.S. attorney-client privilege law. Contrary to the conclusion of the ILP, this is not a settled area of law. The federal attorney-client privilege does not clearly attach to communications with lawyers of every jurisdiction. Furthermore, laws of the various states differ in the protection each affords to such communications. Thus, there is much room in U.S. law for development and change.

Before the United States enters negotiations with the EC, it should consider the policy ramifications of extending the privilege to all non-U.S. lawyers. In its articulation of an EC principal of confidentiality, the ECJ suggests factors which should be considered in the development of U.S. attorney-client privilege law. In order to safeguard client willingness to confide in attorneys generally, it may be necessary to limit the definition of "lawyer," for purposes of the privilege, to lawyers who are subject to professional discipline mandating the preservation of client confidences, and who come from jurisdictions recognizing a form of lawyer-client privilege. In order to promote the policies of justice administration, it may be useful to restrict application of the privilege to lawyers bound to exercise independent judgment, and required to serve the interests of the justice system.

The *AM & S* case has raised immediate concerns about potential discrimination against the clients of U.S. lawyers during EC competition investigations. Yet the ECJ, in its articulation of a new principal of confidentiality, may have offered new avenues for the development of U.S. attorney-client privilege law.