

The Financial Action Task Force Guidance for Legal Professionals: Missed Opportunities to Level the Playing Field

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The Financial Action Task Force [FATF] is an intergovernmental organization that has developed gatekeeper initiatives to prevent terrorism and money laundering, and to alert governments about these problems.¹ FATF has produced recommendations to this effect, often referred to as the 40+9 Recommendations, which along with their interpretative notes, “constitute the international standards for combating money laundering and terrorist financing.”² Legal professionals are included within the scope of covered parties in the FATF Recommendations, and after considerable discussion it was determined that lawyers should be subject to a separate, stand alone guidance in furthering these mandates.³ Thus, in October,

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1. FATF was created in 1989, with the United States being one of sixteen founding members. It is an independent international body that currently is a thirty-four member organization. *See* Financial Action Task Force, About the FAFT, <http://www.fatf-gafi.org>.

2. Financial Action Task Force, FATF Annual Report 2007-08, para. 10, at 4 (2008), <http://www.fatf-gafi.org/dataoecd/58/0/41141361.pdf>. FATF’s Forty Recommendations is a comprehensive action plan for combating money laundering that is designed for universal application. *See* Kevin L. Shepherd, *Guardians at the Gate: The Gatekeeper Initiative and the Risk-Based Approach for Transactional Lawyers*, 43 REAL PROPERTY, TRUST & ESTATE L. J. 607, 616 (2009). It consists of four major sections: the role of national legal systems in combating money laundering; the role of financial systems in combating money laundering; the measures necessary to combat money laundering and terrorist financing; and international cooperation. *See* THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS (2004), <http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf>. Nine Special Recommendations complement the Forty Recommendations, designed to combat the funding of terrorist acts and terrorists organizations. *See* 9 Special Recommendations (SR) on Terrorist Financing (TF), <http://www.fatf-gafi.org>. These 40+9 Recommendations are controversial, one reason being that, as originally drafted, lawyers were required to disclose confidential client information as part of the suspicious transaction reporting obligations. In response to this, the American Bar Association Task Force on Gatekeeper Regulation and the Profession drafted a resolution in 2003, which was adopted by the ABA House of Delegates, opposing “any law or regulation that, while taking action to combat money laundering or terrorist financing, would compel lawyers to disclose confidential information to government officials or otherwise compromise the lawyer-client relationship or the independence of the bar.” ABA Resolution and Report #104 (Feb. 2003), <http://www.abanet.org/leadership/recommendations03/104.pdf>.

3. *See* Shepherd, *supra* note 2, at 616-47, for a thorough history and development of the Financial Action Task Force on Money Laundering Gatekeeper Initiative and its Guidance for Legal Professionals. Lawyer Guidance is distinct from the FATF guidance for other covered groups, such

2008, The Financial Action Task Force RBA Guidance for Legal Professionals [Lawyer Guidance] was adopted, which encourages countries and national authorities to engage in active dialogues with their legal professionals aimed at “establishing effective systems to combat money laundering and terrorist financing.”⁴

Favoring a risk-based approach, Lawyer Guidance, which is described as “complex,”⁵ identifies issues specific to legal professionals and outlines risk factors to be considered in developing a risk-based system. Lawyer Guidance applies to legal professionals, identified as “lawyers and notaries,”⁶ when they “prepare for and carry out certain specified activities.”⁷ Lawyer Guidance recognizes confidentiality and privilege, acknowledging that “[t]he provisions contained in this Guidance, when applied by each country, are subject to professional secrecy and legal professional privilege.”⁸ It further notes that “the matters that would fall under legal professional privilege or professional secrecy and that may affect any obligations with regard to money laundering and terrorist financing are determined by each country.”⁹

Lawyer Guidance specifies that lawyers are “members of a regulated profession and are bound by their specific professional rules and regulations.”¹⁰ However, following the definition in the FATF Recommendations, in-house counsel are specifically excluded from the definition of “legal professionals.”¹¹ While some in-house counsel might consider their exclusion from this arena an advantage, arguably it reflects “cultural and structural biases against in-house lawyers.”¹² It also compounds recurring problems faced by in-house counsel, and lawyers in general, relating to confidentiality and privilege. From country to country, the scope and ap-

as with its treatment of suspicious transaction reporting [STR] for legal professionals. *Id.* at 637. Guidance for other covered sectors includes a mandatory STR obligation, which Lawyer Guidance does not. *Id.* at 637, n. 164.

4. Financial Action Task Force, RBA Guidance for Legal Professionals (2008), <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf> [hereinafter Lawyer Guidance], para. 9, at 5.

5. Shepherd, *supra* note 2, at 647.

6. Lawyer Guidance, *supra* note 4, para. 11, at 5. The role of the notary differs from country to country. For instance, a notary in Belgium is charged with authenticating official documents, the safekeeping of legal papers and conveyancing. *See* CROSS BORDER PRACTICE COMPENDIUM, Belgium 9 (Dorothy M. Donald-Little ed., 1991) [hereinafter CBPC]. In the Netherlands, a notaris prepares, authenticates and preserves documents relating to the transfer of land and the administration of estates. *Id.* at Netherlands 8. In Italy, a notaio mainly drafts documents such as testaments, deeds of gift, deeds of trust and conveyances of heritable property. *Id.* at Italy 11 (November, 1994).

7. Lawyer Guidance, *supra* note 4, para. 12, at 6-7. *See infra* note 29 and accompanying text.

8. Lawyer Guidance, *supra* note 4, para. 11, at 6.

9. *Id.*

10. *Id.* at 5.

11. *Id.* para 8 n. 2, at 5. *See infra* note 25 and accompanying text.

12. Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel*, 46 EMORY L.J. 1057, 1100 (1997).

plication of legal professional privilege varies widely.¹³ Some countries grant legal professional privilege to in-house counsel, while others do not.¹⁴ Some countries recognize a privilege against compelled disclosure, while others focus on confidentiality obligations rather than privilege.¹⁵ By failing to include in-house counsel in Lawyer Guidance, and calling for legal professional privilege and professional secrecy to be determined by each country, two opportunities have been missed. The first is a missed opportunity to recognize in-house counsel as legal professionals who are entitled to the protections and responsibilities associated with the practice of law. The second is a missed opportunity to call for standardization of matters relating to the doctrines of confidentiality and privilege, furthering predictability and certainty in these matters for in-house counsel, as well as for all legal practitioners who engage in international practice.

Missed Opportunity #1—Failing to Include In-house Counsel in Lawyer Guidance

In the United States, the practice of law is a unified profession and as a general premise, in-house counsel are accorded the same rights, privileges and responsibilities as any other lawyer.¹⁶ However, in many countries the legal profession is bifurcated and in-house counsel are not afforded the same status they enjoy in the United States. Because of differences in legal education and professional training, as well as concerns about professional independence, biases against in-house counsel exist.¹⁷

13. See Diana Good, et al., *Privilege: A World Tour*, PLC Cross Border Quarterly, vol. IX (Dec./Jan. 2004), available at <http://www.practicallaw.com/2-103-2508>.

14. See Diana Good, et al., *Privilege: The In-House View*, PLC Cross Border Quarterly, vol. XI (April/June 2005), available at <http://www.practicallaw.com/1-200-3100>.

15. See Good, et al., *supra* note 13.

16. The position of in-house counsel in the United States has evolved over time. From the late 19th century until about 1940, those serving as a corporation's general counsel were among the highest compensated individuals within the corporate structure, assuming critical roles and being held in very high regard. See Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 *FORDHAM L. REV.* 955, 958 (2005). But after 1940, general counsel's status began to diminish, falling to that of middle managers who worked on routine matters. See Daly, *supra* note 12, at 1060. Typically, the general counsel was "a lawyer from the corporation's principal outside law firm who had not quite made the grade as a partner." Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *STAN. L. REV.* 277, 277 (1985). The 1970's, however, saw the status of general counsel grow, joining "senior management near or at the top of the corporate hierarchy." DeMott, *supra* note 16, at 960. A number of reasons are postulated for this enhanced managerial stature, with one being the advisory services provided by general counsel, which combined business insight and legal skill in high level strategic decisions. *Id.* at 960-61.

17. See Louise L. Hill *Disparate Positions on Confidentiality and Privilege Across National Boundaries Create Danger and Uncertainty for In-House Counsel and Their Clients*, in *LEGAL ETHICS FOR IN-HOUSE CORPORATE COUNSEL* A-127, A-128 (BNA Corp. Practice Series No. 87, 2007).

The legal curriculum in most countries other than the United States is pursued at the undergraduate level.¹⁸ For admission to the bar in many countries, a designated apprenticeship and passage of one or more bar exams follows this undergraduate course work.¹⁹ In various jurisdictions, students can forego the professional training and bar admission after obtaining their degrees, and work in law related positions in businesses as in-house counsel.²⁰ For instance, in-house counsel may be able to “negotiate and interpret contracts and advise on regulatory and liability issues,” but have “no recognized status within the legal profession.”²¹ This contributes to the diminished regard in-house counsel may have in some countries. However, in other jurisdictions, in-house counsel may have no education and training distinctions from other lawyers, and be full members of the bar and subject to rules of ethics and professional discipline.²²

In addition to educational and training differences, a bias against international in-house counsel also springs from doubt as to the professional independence of these practitioners. In some countries, the “independence” that is required for legal practice calls for a lawyer to be self-employed.²³ “[R]easoning that financial reliance on a single employer must necessarily entail the surrender of ethical autonomy,” in certain jurisdictions lawyers serving as in-house counsel must resign their bar membership or be placed on inactive status during the time of their employment.²⁴ The FATF Recommendations appear to have embraced this proclivity that questions the independence of a legal practitioner employed by a business in their definition of “Designated Non-Financial Businesses and Professionals” as:

Lawyers, notaries, other independent legal professionals and accountants— this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working

18. See Daly, *supra* note 12, at 1100.

19. *Id.* at 1102.

20. See Hill, *supra* note 17, at A-128.

21. Daly, *supra* note 12, at 1102.

22. See Mauritis Dolmans, *Attorney-Client Privilege for In-House Counsel: A European Proposal*, 4 COLUM. J. EUR. L. 125, 132 (1998).

23. For instance in Belgium, an “avocat,” is a member of the bar, but may not be “a salaried, public or private employee” since this “might interfere with the independence of the avocat and liberal character of the profession.” CBPC, *supra* note 6, at Belgium 10-12. In-house counsel in Belgium are “juriste d’ enterprise,” who essentially have the same academic qualifications as avocats, but may not have undertaken an apprenticeship. *Id.* at 9. In Germany, in-house counsel are “syndikusanwalt,” who have education and training similar to the “rechtsanwalt,” who is a member of the bar. *Id.* at Germany 9 & 14 (August, 1998). However, a syndikusanwalt cannot represent his client in court for he is not regarded as a member of the bar since he is not “fully independent.” *Id.* at 10-12.

24. Daly, *supra* note 12, at 1102.

for government agencies, who may already be subject to measures that would combat money laundering.²⁵

Obligated to follow the FATF definitions, Lawyer Guidance referred to “legal professionals” as:

[S]ole legal practitioners and partners or employed legal professionals within professional firms. It is not meant to refer to ‘internal’ (*i.e.* in-house) professionals that are employees of other types of businesses, nor to legal professionals working for government agencies, who may already be subject to separate measures that would combat money laundering and terrorist financing.²⁶

Although wedded to certain principles and definitions of FATF, it seems Lawyer Guidance might have commented on in-house counsel’s exclusion as a “legal professional,” or addressed in-house counsel as a separate entity. Arguably, their treatment under the FATF Recommendations and Lawyer Guidance serves to underscore a “second class status”²⁷ that has stigmatized in-house counsel on the international scene.

In the United States, many in-house counsel engage in work that is proactive rather than reactive, combining business insight and legal skill in high-level strategic decisions that add significant value to their organizations.²⁸ It stands to reason that this is also often the case for in-house counsel operating in other jurisdictions, especially as business increasingly is being conducted on a worldwide basis.²⁹ Independence should not be viewed as lacking by virtue of the fact that in-house counsel are employed by their clients. Almost all lawyers are financially reliant on their clients, not just in-house counsel. Many lawyers have one or two clients who constitute the lion’s share of their practice, so the same argument surrounding independence that is directed toward in-house counsel could be directed toward these legal practitioners as well. If the education and training of in-house counsel is the equivalent of that of members of the jurisdiction’s practicing bar, in-house counsel should be accorded the same status.

The FATF Recommendations and Lawyer Guidance name five specified activities for their applicability to legal professionals. Specifically, the following categories of work are targeted:

- Buying and selling of real estate.
- Managing of client money, securities or other assets.
- Management of bank, savings or securities accounts.

25. 40 Recommendations, *supra* note 2, Glossary Definition of “Designated Non-Financial Businesses and Professions” at (e).

26. Lawyer Guidance, *supra* note 4, para. 8 n.2, at 5.

27. Daly, *supra* note 12, at 1063.

28. See DeMott, *supra* note 16, at 960-61.

29. See generally Hill, *supra* note 17, at A-127.

Organization of contributions for the creation, operation or management of companies.

Creation, operation or management of legal persons or arrangements, and buying and selling of business entities.³⁰

Among these are areas of work in which many in-house counsel engage. Also, there is no reason to think that in-house counsel do not possess the judgment, knowledge and expertise called for in Lawyer Guidance to develop and implement an appropriate risk-based approach and make sound risk-based judgments.³¹ By failing to comment upon or to acknowledge in-house counsel in this arena, an opportunity is missed to recognize the contribution of in-house counsel as lawyers. This acknowledgement would help to dispel the diminished status of in-house counsel in some countries, serving to elevate them within the profession in the international arena. Although Lawyer Guidance was required to accept the FATF definitions, it seems something about in-house counsel's specific exclusion from the definition of "legal professionals" could have been addressed.

Missed Opportunity #2—Failing to Call for Standardization in Matters Relating to Legal Professional Privilege and Include In-house Counsel within its Purview

The scope and application of legal professional privilege varies widely from country to country, creating problems for lawyers, especially those whose work crosses jurisdictional boundaries. These differences are of concern to all lawyers, but particularly to in-house counsel. While the concept of confidentiality and privilege is present to some extent in most jurisdictions, it does not usually attach to all categories of lawyers within the bifurcated legal professions.³² Typically, the rules

30. Lawyer Guidance, *supra* note 4, para.12, at 6-7. "Unless legal advice and representation consists of preparing for or carrying out transactions relating to these specified activities, it is not subject to the FATF Recommendations." *Id.* at 7.

31. *See id.* para. 29, at 9. The principle of the risk-based approach is to allocate resources efficiently in the prevention or mitigation of money laundering and terrorist financing so that resources can "be directed in accordance with priorities so that the greatest risks receive the highest attention." *Id.* para. 18, at 8. Risk is addressed in three principle areas: customer/client due diligence; legal professionals and/or firms' internal control systems; and the approach of oversight/monitoring. *Id.* para. 36, at 11.

32. *See* Good, et al., *supra* note 13. Denmark and Finland have unified legal professions. A qualified lawyer in Denmark is an "advokat," and a qualified lawyer in Finland is an "asianajaja." There is no distinction in these countries between lawyers undertaking different areas of work. *See* CBPC, *supra* note 6, at Denmark 2, and Finland 7. This, however, is not typical for countries outside the United States. For instance in Belgium, the legal profession is divided into the categories of avocat, juriste d'entreprise, stagiaire, huissier de justice and notaries. *Id.* at Belgium 8-12. In Germany, the categories of legal professionals are rechtsanwalt, rechtsbeistand, assessor, syndikusanwalt, richter, rechtspfleger, referendar and notar. *Id.* at Germany 9-13 (August, 1998). In Italy, the categories are avvocato, l'avvocato dello stato, procuratore and notaio. *Id.* at Italy 9-11 (November, 1994).

relating to confidentiality and privilege, imposed by statute in some jurisdictions, or found in codes of procedure or codes of practice administered by the bar, are confined to lawyers who are members of the bar.³³ In most countries, these are the lawyers classified as general practitioners who have rights of audience and are self-employed, not the salaried lawyers who may be perceived as lacking the necessary independence.³⁴ By calling for “the matters that would fall under legal professional privilege or professional secrecy ... [to be] ... determined by each country,”³⁵ Lawyer Guidance reinforces these differences that create uncertainty, if not danger, for lawyers. Not only does it underscore that in-house counsel may not be afforded legal professional privilege, it also misses an opportunity to advocate for standardization of privilege and confidentiality, which would be to the advantage of all lawyers whose work crosses jurisdictional boundaries.

The United States

In the United States, the attorney-client privilege is the only communications privilege recognized in every state.³⁶ Each state’s privilege rules generally follow the common law doctrine, and Rule 501 of the Federal Rules of Evidence governs federal courts.³⁷ Instead of establishing fixed rules for attorney-client privilege, the United States Supreme Court determined that Rule 501 allows privilege issues to be decided on a case-by-case basis.³⁸ Attorney-client privilege is based on “a pragmatic judgment that confidentiality is necessary in order to encourage client communication.”³⁹ Its purpose is “to promote open and uninhibited consulta-

33. See Good, et al., *supra* note 13.

34. See Good, et al., *supra* note 14.

35. Lawyer Guidance, *supra* note 4, para. 11, at 6.

36. See Daiske Yoshida, *The Applicability of the Attorney Privilege to Communications with Foreign Legal Professionals*, 66 *FORDHAM L. REV.* 209, 212 (1997).

37. E.g., *id.* at 213; Joseph Pratt, *The Parameters of the Attorney-Client Privilege for In-house Counsel at the International Level: Protecting the Company’s Confidential Information*, 20 *Nw. J. INT’L L. & BUS.* 145, 151 (1999). Rule 501 of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

38. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981). The Court acknowledged that this could “undermine desirable certainty in the boundaries of the attorney-client privilege.” *Id.* at 396-97.

39. Charles W. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 *FORDHAM INT’L L.J.* 529, 544 (1992).

tions with lawyers,” which is acknowledged “as providing a significant benefit to society.”⁴⁰

Generally speaking, attorney-client privilege attaches to confidential communications made between privileged persons, for the purpose of obtaining or providing legal assistance.⁴¹ While there are some individual state differences that relate to the privilege, lawyers engaged in practice in this country can be comfortable that certain exchanges will be protected. The Restatement (Third) of the Law Governing Lawyers puts forth a typical mandate, defining attorney-client privilege as:

- (1) a communication;
- (2) made between privileged persons;
- (3) in confidence;
- (4) for the purpose of obtaining or providing legal assistance for the client.⁴²

In addition to recognizing attorney-client privilege for the traditional lawyer practicing with a law firm, all United States jurisdictions recognize attorney-client privilege for in-house counsel,⁴³ although the extent of the privilege may vary from state to state.⁴⁴ The four factors set forth in the Restatement “contain the necessary elements to examine how the attorney-client privilege is applied to in-house counsel in the United States and abroad.”⁴⁵

Attorney-client privilege for in-house counsel in the United States has been described as “fairly predictable.”⁴⁶ As a general premise, attorney-client privilege exists in the United States when the client is a corporation and the lawyer is the corporation’s in-house counsel, provided:

- (1) the communication is made for the purpose of securing legal advice;
- (2) the employee making the communication does so at the direction of his or her corporate superior;
- (3) the superior requests the communication to secure legal advice;
- (4) the subject matter of the communication is within the scope of the employee’s corporate duties; and
- (5) the communication is not disseminated beyond those who need to know its contents.⁴⁷

40. J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT’L LAW. 35, 38 (2004). The public needs to know the law for society to function smoothly. This is furthered by consultation with attorneys, whose counsel should not result in greater liability. *Id.*

41. *Id.* In most jurisdictions, that which a lawyer communicates to a client is subject to the privilege, just as a client communication would be. *Id.* at 542.

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS sec. 68 (2000).

43. *See* United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336 (1915).

44. *See* Pratt, *supra* note 37, at 152.

45. *Id.* at 153. *See supra* note 41 and accompanying text.

46. Pratt, *supra* note 37, at 149.

47. *Upjohn Co. v. United States*, *supra* note 38, at 394-95. Limited to the provision of legal advice, any business advice provided by in-house counsel is not protected by attorney-client privilege.

The work-product doctrine also protects work prepared by traditional lawyers and in-house counsel. Not just limited to protecting communications, the work-product doctrine protects the “mental impressions, conclusions, opinions, or legal theories of an attorney” that relate to litigation.⁴⁸

Distinct from attorney-client privilege is a lawyer’s obligation of confidentiality. Confidentiality is a principle of legal ethics that governs whether a lawyer may reveal information related to a client representation. Applicable to the traditional legal practitioner as well as in-house counsel, this duty of confidentiality applies to all information related to the representation, whatever its source.⁴⁹ The attorney-client privilege, conversely, “protects only against compelled disclosure, and only against disclosure of information communicated between client and lawyer.”⁵⁰ Regarding these two concepts, “[e]verything that is privileged is also protected by the confidentiality principle but the converse is not true.”⁵¹

Outside of the United States

The concept of confidentiality and privilege is present to some extent in most jurisdictions.⁵² However, unlike the relative certainty that surrounds attorney-client privilege for lawyers in the United States, internationally, this is not the case. One reason for this is that in many countries, adversarial and discovery systems similar to those found in the United States do not exist.⁵³ Civil law systems typically lack the transparency and disclosure obligations found within common law systems.⁵⁴

In common law systems, privilege usually attaches to confidential communications between client and lawyer that are brought into existence for the primary purpose of giving or receiving legal advice.⁵⁵ It is a right that belongs to the client and can be waived by the client.⁵⁶ Conversely, the obligation in most civil law systems “amounts to no more than a duty on a party to disclose the documents which support

See Pratt, *supra* note 37, at 152. Therefore, in-house counsel are usually careful to make sure their client knows what type of advice is being disseminated. See Michele D. Beardslee, *If Multidisciplinary Partnerships are Introduced into the United States, What Could or Should be the Role of General Counsel?*, 9 FORDHAM L. CORP. & FIN L. 1, 37-38 (2003).

48. Mackintosh & Angus, *supra* note 40, at 43 (quoting FED. R. CIV. P. 26(b)(3)).

49. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004). See also RESTATEMENT, *supra* note 41, sec. 59.

50. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, sec. 9.2, p. 9-6 (3d ed. Supp. 2003).

51. Arthur Garwin, *Confidentiality and Its Relationship to the Attorney Client Privilege*, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION, 109, 110 (Vincent S. Walkowiak ed., 2008).

52. See Hill, *supra* note 17, at A-129.

53. *Id.*

54. See Good, et al., *supra* note 13.

55. See RESTATEMENT, *supra* note 42, sec. 68.

56. See Mackintosh & Angus, *supra* note 40, at 43.

its case and on which it wishes to rely.”⁵⁷ Civil law system codes of civil procedure, or codes of civil practice, often include provisions precluding lawyers from disclosing confidential communications between the lawyer and the client.⁵⁸ “It is not that the communication itself is privileged, but that the lawyer is under a duty not to disclose the information in it.”⁵⁹ In some jurisdictions, like France, a lawyer may not be relieved of this duty by a client, but clients are not bound by the duty themselves.⁶⁰ In others, like Spain, criminal sanctions can be imposed if the lawyer fails to comply with these obligations.⁶¹ In countries like Switzerland and Germany, it is only documents in the possession of the lawyer that are protected.⁶² Other documents, such as a letter of advice from a lawyer, may not be protected if they are in the possession of the client.⁶³ While lawyer confidentiality obligations are complementary with privilege against compelled disclosure, the two are “conceptually different nonetheless and therefore mutually independent.”⁶⁴ “Many professionals have a duty of secrecy, few have privilege.”⁶⁵ One may be required to disclose a communication in one jurisdiction, while having the benefit of privilege with respect to the same material in another jurisdiction.⁶⁶ These jurisdictional differences and distinctions create danger for lawyers and clients, particularly those whose work crosses jurisdictional boundaries.

Whether privilege exists at all for in-house counsel, or the extent of the privilege if it does exist, also varies significantly from country to country. Early on, issues about confidentiality and privilege, and how they relate to in-house counsel, arose infrequently outside the United States.⁶⁷ This is thought to be because, in some countries, in-house counsel played a less significant role within the corporation than in-house counsel in the United States.⁶⁸ At the present time, some countries grant legal professional privilege to in-house counsel, while others do not. For

57. Good, et al., *supra* note 13. Although there may be no duty to disclose documents that are harmful to a party, in some jurisdictions parties may be ordered by the court to make specific disclosure of designated documents. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* In Spain, a lawyer’s disclosure of confidential information may subject him to a prison term, fine and/or disqualification from practice. *Id.* (citing article 199.2, Spanish Criminal Code). See also Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 *FORDHAM INT’L L.J.* 967, 993-94 (2005).

62. See Good, et al., *supra* note 13. While privilege does not extend to material in the client’s possession in Switzerland and Germany, there are exceptions. In Switzerland, there is an exception to this general rule in criminal proceedings. In Germany, there is an exception for the defense of criminal or regulatory offenses. *Id.*

63. *Id.*

64. Gippini-Fournier, *supra* note 61, at 974.

65. *Id.* at 993.

66. See Good, et al., *supra* note 13.

67. See Dolmans, *supra* note 22, at 125.

68. *Id.*

instance in Brazil, Hong Kong,⁶⁹ Poland, Romania and Spain,⁷⁰ in-house counsel are treated the same way as lawyers who are self-employed with respect to matters of confidentiality and privilege.⁷¹ In Portugal, legal professional privilege is recognized for those employed by a private company,⁷² but not for public employees or those employed by the state.⁷³ In Germany, case law indicates that the doctrine of legal privilege can apply to in-house counsel if it can be shown that the corporation lawyer is sufficiently independent from his employer and the kind of work he undertakes is typical of a lawyer who is a member of the Bar.⁷⁴ In Belgium, the concept of in-house lawyer privilege has been recognized by statutory enactment.⁷⁵

Conversely, in the Czech Republic, France, Hungary, Japan and Russia, legal professional privilege is not recognized for in-house counsel.⁷⁶ Nor is it recognized in Luxembourg, Sweden⁷⁷ or Switzerland,⁷⁸ where in-house counsel cannot

69. In Hong Kong, legal professional privilege is recognized provided one's professional skill as a lawyer is being exercised. *See* Good, et al., *supra* note 14. However, this is typically the case with all in-house counsel who are afforded legal professional privilege. *See supra* note 46.

70. In Spain, there is no distinction between self-employed and employed lawyers, provided an employed lawyer is registered with one of the 83 local Bars. *See* Good, et al., *supra* note 14.

71. *Id.*

72. *Id.* A proposed provision in Portugal calls for a lawyer's contract of private employment to be reviewed by the Bar to ensure its conformity with the Professional Conduct Rules. *Id.*

73. *Id.* Membership in the Bar must be suspended for public employees and those employed by the state in Portugal. *Id.*

74. *Id.* In Germany, the "rechtsanwalt" is admitted to the Bar, gives general legal advice and has rights of audience, which is the ability to represent clients in court. *See* CBPC, *supra* note 3, at Germany 9 (Supp. 7, 1998). The "syndikusanwalt," a corporation lawyer in Germany, does legal work in the commercial, financial, and industrial sector, typically working for commercial firms, banks, or other financial or industrial companies. Although a syndikusanwalt has education and training similar to the rechtsanwalt, he cannot represent his client in court for he is not regarded as a member of the Bar since he is not "fully independent." *Id.* Lawyers typically receive a degree from a four-year university in Germany, complete two years of practical training, and pass two exams. Lawyers then fan out and head in different directions where additional training and exams may be required. *Id.* at Germany 14. "An imperfect analogy would be the way the medical profession operates in the United States." Hill, *supra* note 17, at A-128 n. 29.

75. In 2000, Belgium enacted law which provides that legal opinions given by in-house counsel for the benefit of their employers, and in the course of their employment as legal counsel, are protected. *See* Good, et al., *supra* note 14 (citing Law on the Establishment of an Institute for In-house Counsel (Law of 1 March 2000)). Not surprisingly, Belgium law excluded advice relating to commercial or operational matters as being subject to legal professional privilege. *See also supra* note 40. However, it has been noted that the extent of the privilege is unclear since the text of the Law of 1 March 2000 omitted any reference to Article 458 of the Criminal Code, which precludes persons entrusted with a duty of confidence by status or profession from revealing confidential information, except in certain circumstances. *Id.*

76. *See* Good et al., *supra* note 14.

77. In Sweden, employed lawyers must relinquish membership in the Bar Association and only members of the Swedish Bar Association have the right to legal privilege. *Id.*

78. In Switzerland, employed lawyers lose status as independent lawyers, but there may be some protection with regard to communications made in furtherance of litigation. *Id.*

be members of the Bar since they lack the required degree of independence from their employers.⁷⁹ In Italy, as in many other civil law jurisdictions, privilege applies to lawyers duly registered with the Bar Association, but in-house lawyers employed by their clients cannot be registered with the bar.⁸⁰

While there are advocates for extending the privilege to in-house counsel, there is also strong opposition. The European Parliament rejected an opportunity to extend legal privilege to in-house lawyers when, in its adoption of Regulation 1/2003, it voted down the Economic and Monetary Committee of the European Parliament proposal which provided that “[c]ommunications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline.”⁸¹ The European Court of First Instance also rejected an opportunity to extend legal professional privilege to in-house lawyers in 2007,⁸² by echoing the position of the European Court of Justice taken in 1982.⁸³

In 1982, the European Court of Justice addressed the scope of attorney-client privilege during an antitrust investigation and found that privilege existed as a basic right from “principles and concepts common” to all European Union Member States.⁸⁴ However, the Court determined that for communications with in-house counsel, privilege was not available because in-house counsel’s employment made these practitioners incapable of rendering advice that was independent.⁸⁵ The Eu-

79. *Id.*

80. *Id.* In Italy, a special section of the Bar List has been created on which in-house lawyers from some major Italian corporations may register. These registered lawyers have been granted limited standing in court, although it is not clear whether legal privilege will apply to them, or whether this mechanism would be considered an independently regulated bar. These registered lawyers may handle matters such as debt collection, but may not act in criminal matters to which their company may be a party. *Id.*

81. Gippini-Fournier, *supra* note 61, at 989 (quoting European Parliament Session Doc. Of 21 June 2001 Final, PE 296,005, at 65-66 (Committee on Economic and Monetary Affairs)(on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68. (EEC) No 2988/74 (EEC) No 4056/86 and (EEC) No 3975/87)). This proposed amendment was rejected in plenary session by a vote of 404 to 69, with 9 abstentions. *Id.* at 989.

82. *See Akzo Nobel Chemicals, Ltd. and Akros Chemicals Ltd. v. Comm’n of the European Communities*, Euro. Ct. First Inst., Case T-253/03 (2007).

83. *See AM&S Europe, LTD. v. Comm’n of the European Communities*, Case No. 155/79, 1982 E. Comm. Ct. J. Rep. 1575.

84. *Id.* at 1610.

85. *Id.* at 1611-12. The Court also stated that attorney-client privilege was only available to lawyers governed by professional rules within the European Union. *Id.* at 1612. This judicial pronouncement not only denied attorney-client privilege to in-house counsel, who in many jurisdictions are precluded from Bar membership, but it denied attorney-client privilege to all lawyers from outside the European Union in Commission investigations as well. The House of Delegates of the American Bar Association submitted a formal protest to the European Court of Justice’s ruling. *See Roger J. Goebel, Legal Practice Rights of Domestic and Foreign Lawyers in the United States* in RIGHTS,

ropean Court of First Instance reaffirmed this position in 2007, echoing the call for independence previously asserted by the European Court of Justice. The European Court of First Instance supported its contention that in-house lawyers should be treated differently from self-employed lawyers, stating that “in-house lawyers and outside lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers with companies that employ them.”⁸⁶

The matter of privilege for in-house counsel is receiving considerable attention today. While there is opposition to extending privilege to in-house counsel, there are those who advocate for its extension on a global basis.⁸⁷ Many feel that in-house counsel should have the freedom to advise clients without fear that their advice will be subject to third-party scrutiny.⁸⁸ Also, lawyers want predictability in this matter, with standardization being a primary goal.⁸⁹ Lawyer Guidance and the FATF Recommendations have missed an opportunity to further these objectives.

Conclusion

Establishing effective systems to combat money laundering and terrorist financing is of paramount importance to society. To this end, Lawyer Guidance, furthering the FATF Recommendations, has undertaken strategic measures to identify issues specific to the legal profession and outline risk factors to be considered in developing a risk-based system. While no direct powers are at play with the FATF Recommendations or Lawyer Guidance, both are compelling and influential. It is therefore unfortunate that, in both instances, in-house counsel are not recognized as lawyers who would be subject to their designated mandates. Specifically excluding in-house counsel from the definition of legal professionals serves to reflect the diminished status that in-house counsel possess in some jurisdictions.

It is also unfortunate that no attempt was made in Lawyer Guidance to standardize the doctrines of confidentiality and privilege, and bring in-house counsel within their purview. While Lawyer Guidance should be commended for requiring that professional secrecy and legal professional privilege be recognized in any system developed to combat money laundering and terrorist financing, a further step could have been taken. Calling for “the matters that would fall under legal professional privilege or professional secrecy ... [to be] ... determined by each country,”

LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 51, 76 n.140 (Mary C. Daly & Roger J. Goebel eds., 2004). However, it has been asserted that with respect to non-European Union qualified lawyers, “the Commission has been prepared to accept privilege claims in respect of documents produced by independent, external lawyers, such as U.S. attorneys.” Good et al., *supra* note 14.

86. Akzo Nobel Chemicals, *supra* note 82.

87. See Hill, *supra* note 17, at A-129.

88. See Dolmans, *supra* note 22, at 128.

89. See Hill, *supra* note 17, at A-129.

reinforces the jurisdictional differences that create uncertainty, if not danger, for lawyers. Not only does it underscore that in-house counsel may not be afforded legal professional privilege, but it also misses an opportunity to call for doctrinal standardization that would further predictability and certainty in matters relating to confidentiality and privilege, which is a matter of great importance for those whose practice crosses jurisdictional boundaries.