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It's the End of Privilege as We Know It, and I [Don't] Feel Fine: the Deterioration of the Corporate Attorney-Client Privilege and Work Product Protection in the European Union, United Kingdom, and Germany

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IT'S THE END OF PRIVILEGE AS WE KNOW IT, AND I
[DON'T] FEEL FINE: THE DETERIORATION OF THE
CORPORATE ATTORNEY-CLIENT PRIVILEGE AND WORK
PRODUCT PROTECTION IN THE EUROPEAN UNION, UNITED
KINGDOM, AND GERMANY

Ashley N. Ramm*

I. Introduction	302
II. Background	304
A. Corporate Legal Privilege and the Work Product Doctrine in the United States	304
B. Corporate Legal Privilege and Work Product Protection in the European Union	306
C. Corporate Legal Privilege and Work Product Protection in Germany.....	307
1. Current State of Germany's Work Product Protection.....	309
2. German Prosecutors' Raid of Jones Day's Germany Offices.....	309
D. Corporate Legal Privilege and Work Product Protection in the United Kingdom.....	310
1. The State of Corporate Legal Professional Privilege and Work Product Protection before <i>Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.</i>	310
2. New Rule from <i>Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.</i>	312
IV. The Effect of the Eroding Legal Protection for Companies Who Operate "Across the Pond".....	314
A. United Kingdom Corporate Legal Privilege and Work Product Protection Restrictions Effect on Companies	314
B. Germany Corporate Legal Privilege and Work Product Protection Restrictions Effect on Companies	315
C. European Union Corporate Legal Privilege and Work Product Protection Restrictions Effect on Companies	316
V. Reasons to Adopt the United States Corporate Attorney-Client Privilege and Work Product Protection	317
VI. Advice for Companies Operating "Across the Pond"	320
A. How to Preserve the Corporate Attorney-Client Privilege	

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and Work Product Doctrine in the United States	321
B. Advice for Preserving the Corporate Legal Privilege and Work Product Protection Abroad.....	322
VI. Conclusion	323

I. INTRODUCTION

In a world where prosecutors raid law firm offices, confiscating work product, and attorney-client privilege disappears because a court deems anticipated litigation to be non-adversarial or cooperative, the state of legal protection for companies doing business “across the pond” has never been more uncertain.¹ The corporate attorney-client privilege, a staple in American jurisprudence, was broadened by the Supreme Court’s decision in *Upjohn Co. v. United States*, decided in 1981.² Black’s Law Dictionary defines the attorney-client privilege³ as “[t]he client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.”⁴ This privilege allows companies to communicate with in-house and outside counsel to receive legal advice without fear that counsel will be compelled to disclose the communication in court.⁵ Additionally, companies may protect all documents made by the company’s attorneys in anticipation of litigation under the work product doctrine.⁶ Both principles are essential to fair representation in any justice system and allow companies to speak openly and truthfully with their counsel in order to receive the best legal advice possible.

While companies in the United States benefit from these vital principles, companies who operate, whether solely or additionally, in the European Union Member States and the United Kingdom are not always

1. Robert Anello and Richard Albert, *Erosion of the Corporate Attorney-Client Protection in Europe*, NY LAW JOURNAL (June 5, 2017), <https://www.law.com/newyorklawjournal/almID/1202788555189/>.

2. 449 U.S. 383, 397 (1981) (rejecting the “control group test” as too narrow to govern the corporate attorney-client privilege).

3. Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privilege* § 2.2-2.3 (3d ed. 2018); While this Comment does not delve into the history and development of the attorney-client privilege, it is important to note that the attorney-client privilege was the first privilege to be recognized and can be traced back to as early as 1577. The original rationale of the attorney-client privilege was to allow attorneys to maintain confidentiality—to not divulge their client’s confidences. This rationale eventually was abandoned for a new reason behind the privilege, to promote clients to consult their attorneys and disclose information. This new rationale favored the client holding the privilege as opposed to the original rationale, where the attorney served as the only holder.

4. *Privileges*, Black’s Law Dictionary (10th ed. 2014).

5. *Upjohn*, 449 U.S. at 386.

6. *Id.* at 400-02.

so lucky.⁷ In May 2017, the High Court of England and Wales, the Queen's Bench Division in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.* held that communication between the company (ENRC) and the company's in-house counsel during an investigation into "corruption and financial wrongdoing" allegations was not privileged because the anticipated litigation from the United Kingdom government agency, the Serious Fraud Office (SFO), was not adversarial, but rather was likely to conclude in settlement.⁸ Additionally, district courts in Germany have held that raids and document seizures of law offices by government prosecutors are legal.⁹ During a recent raid, Munich's prosecutors seized documents from the internal investigations conducted by Jones Day, an American law firm, for Volkswagen regarding circumventing emission limits allegations.¹⁰

This Comment examines the corporate attorney-client privilege and work product protection, including the impact of the High Court of England and Wales, the Queen's Bench Division's holding in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, and the Munich Regional Court's decision on the Jones Day office raid in Germany. Part II discusses the background surrounding the jurisprudence of the corporate attorney-client privilege and work product protection in the United States, European Union, Germany, and United Kingdom. Part III considers the current state of the corporate attorney-client privilege and work product protection in the European Union, Germany, and United Kingdom, and examines the arguments in favor and against the current state of privilege in the European Union, Germany, and United Kingdom. This Comment will also address why the current state of corporate attorney-client privilege and work product protection in the European Union, Germany, and United Kingdom is

7. See generally *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, [2017] EWHC 1017 (QB) (holding materials created by outside counsel for company's internal investigation were not protected because there was no anticipation of adversarial litigation); see also Case 550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 E.C.R. I-08301 (finding in-house counsel's lack of professional independence from employees excluded documents from being privileged).

8. *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, [2017] EWHC 1017 (QB).

9. See generally *Investigations in Germany: District Court strengthens legal privilege*, TAYLORWESSING (Oct. 19, 2015), <https://united-kingdom.taylorwessing.com/en/investigations-in-germany-district-court-strengthens-legal-privilege> (noting the District Court of Hamburg denied privilege for attorney-created documents during an internal investigation for HSH Nordbank, finding there was no privilege for incriminated employees).

10. Jack Ewing & Bill Vlasic, *German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry*, NY TIMES (March 16, 2017), <https://www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html>.

overly restrictive and goes against the reasoning behind the privilege. Finally, this Comment argues that Europe should adopt the United States attorney-client privilege and work product doctrine and will provide advice for American companies doing business in Europe to help preserve the corporate attorney-client privilege and work product protection during internal investigations.

II. BACKGROUND

A. Corporate Legal Privilege and the Work Product Doctrine in the United States

Upjohn v. United States was a landmark United States Supreme Court decision that established when the corporate attorney-client privilege applies and defined the scope of corporate work product doctrine.¹¹ *Upjohn* held that the attorney-client privilege applies to communications between an employee and in-house counsel if: (1) the communication is information needed for the attorney to provide legal advice to the company; (2) the communication relates to matters within the employee's scope of employment; (3) the employee was aware the information being shared was for the attorney to provide legal advice to the company; and (4) the company intended for the communication to be kept confidential—that is, the employee knew the communication was confidential and the communication was only shared with employees who are required to know because of their role in the company.¹² Further, *Upjohn* confirmed that the work product doctrine, Rule 26(b)(3)(B) of the Federal Rules of Civil Procedure, applies equally to in-house counsel's work product in anticipation for litigation as it does outside counsel's.¹³

In *Upjohn*, Upjohn manufactured and sold pharmaceuticals in the United States and to other countries through its foreign subsidiaries.¹⁴ One of Upjohn's foreign subsidiaries discovered that its employees may have made corrupt payments to foreign government officials.¹⁵ Upjohn's general counsel was informed and after consulting outside counsel, the general counsel decided to investigate the payments.¹⁶ The company's attorneys sent letters on behalf of the Chairman, labeled "highly

11. 449 U.S. at 386.

12. *Id.* at 393-95.

13. *Id.* at 400-02.

14. *Id.* at 386.

15. *Id.*

16. *Id.*

confidential,” with questionnaires to all foreign managers.¹⁷ The letters also noted that the Chairman asked the general counsel to conduct an investigation into the suspected corruption.¹⁸ Beyond the questionnaires, the attorneys interviewed the managers and many other officers and employees.¹⁹ After the company sent a preliminary report to the Securities and Exchange Commission (SEC) on a Form 8-K disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation.²⁰ The IRS received a list of everyone Upjohn’s attorneys interviewed and everyone who responded to the questionnaire.²¹ The IRS then demanded production of all files related to the investigation, including notes taken by attorneys during the interviews and the completed questionnaires.²² Upjohn refused, claiming the documents were protected by the attorney-client privilege and constituted work product prepared by attorneys in anticipation of litigation.²³

The Supreme Court held the communications between Upjohn employees and in-house counsel were protected by the attorney-client privilege because they were: (1) made at the direction of corporate superiors; (2) by a corporate employee; (3) to in-house counsel; (4) concerning matters within the scope of the employee’s duties; (5) revealing information “not available from upper echelon management;” (6) necessary for in-house counsel to provide legal advice to the company; (7) the employee was aware the communication was for legal purposes; and (8) that the information was confidential.²⁴

The Court further held that the notes and memorandums deemed not to be communication protected by the attorney-client privilege fell under the attorney work product doctrine.²⁵ Mental impressions, conclusions, opinions, or legal theories of in-house counsel created in anticipation of litigation are protected and immune from discovery under that doctrine.²⁶ The notes and memoranda were prepared by the attorneys in anticipation of litigation with the IRS and reflected the attorneys’ mental process.²⁷ Absent a showing of substantial need and inability to obtain the facts from the interviews without undue hardship, Upjohn could not

17. *Id.* at 386-87.

18. *Id.* at 386.

19. *Id.* at 387.

20. *Id.*

21. *Id.*

22. *Id.* at 387-88.

23. *Id.* at 388.

24. *Id.* at 394-95.

25. *Id.* at 397.

26. *Id.* at 400; FED. R. CIV. P. 26(b)(3).

27. *Id.* at 397.

be forced to disclose the attorney's memoranda and notes to the IRS.²⁸ The Court reversed and remanded the case for further proceedings to determine if the IRS could obtain the information without undue hardship.²⁹

While the majority of individual states in the United States continue to follow *Upjohn* to determine which company communications fall under the attorney-client privilege, a minority of states use a different method.³⁰ A few states have deviated from the test used in *Upjohn*, applying the "control group" test, which only allows attorney-client privilege between communications with attorneys and top management responsible for directing the company's action in response to legal advice.³¹ Thus, currently in the United States, communications between in-house and outside counsel and (most) company employees falls under the attorney-client privilege. Additionally, the work product doctrine under the Federal Rules of Civil Procedure applies to companies in addition to individuals.³²

B. Corporate Legal Privilege and Work Product Protection in the European Union

Similar to the individual states that make up the United States, the European Union is made up of different countries called "Member States" that have their own internal laws.³³ Most countries within the European Union recognize some type of legal privilege, and the scope and application of the privilege varies from Member State to Member State.³⁴ For matters governed by the European Union and administered

28. *Id.* at 400.

29. *Id.* at 402.

30. *The New Attorney-Client Privilege . . . How Will These Issues Play Out in Litigation?*, Am. Bar Ass'n (2010), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjy_D29OjXAhUCwYMKHd0xDFMQFggpMAA&url=https%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Flabor_law%2Fmeetings%2F2010%2Fannualconference%2F121.authcheckdam.pdf&usg=AOvVaw2-CDJzWJ1NpQvNZykhvvo.

31. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 258 (1982) (the state of Illinois reaffirmed its adherence to the control group test to determine which communications between employees and attorneys falls under the attorney-client privilege based on the employee's input on company decisions); *see Sterling Fin. Mgmt., L.P. v. UBS Paine Webber, Inc.*, 782 N.E.2d 895, 900 (2002) (the First District Appellate Court of Illinois confirmed the application of the control group test to determine the application of corporate attorney-client privilege in cases controlled by Illinois law); *Upjohn*, 449 U.S. at 391.

32. *Upjohn*, 449 U.S. at 386.

33. *Law*, European E-Justice (Apr. 26, 2016), https://e-justice.europa.eu/content_law-2-en.do.

34. John Hancker, *Inconsistent Privilege Rules and Transatlantic Interagency Cooperation*, 27 *Antitrust* 62 (2013), https://www.americanbar.org/content/dam/aba/publications/antitrust_magazine/spring13_3-26.pdf.

by their institutions, like the European Commission which governs antitrust investigations, the European legal privilege applies.³⁵

Under European Union law, legal privilege does not attach to communications between in-house counsel and the company with whom they are employed.³⁶ Decided by the European Court of Justice, the highest court in the land that outranks various supreme courts,³⁷ in 1982, *AM & S v. Commission* was the first case to recognize that legal privilege protects communications between a client and their independent lawyer who is not bound by their client via a relationship of employment.³⁸ In *Akzo Nobel Chemicals v. Commission*, decided in 2010, the European Court of Justice held that the *AM & S v. Commission* decision specifically excluded legal privilege between a company and its in-house counsel on the basis that in-house counsel is not independent because of the structural, hierarchical, and functional relationship between in-house counsel and the company.³⁹ Rather, legal privilege applies to communications between a corporation and independent or outside lawyers when the communications are made regarding legal advice relating to the corporation.⁴⁰

C. Corporate Legal Privilege and Work Product Protection in Germany

Like most Members of the European Union, Germany has its own rules governing attorney-client privilege and attorney work product protection.⁴¹ Under German law, attorneys are required to keep client communication confidential under the professional secrecy obligation.⁴² Information provided to attorneys from their clients is not subject to

35. *Id.*

36. Case 550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 E.C.R. I-08301.

37. Wayne Ives, *Civitas Inst. For the Study of Civil Soc'y*, Court of Justice of the European Union (2015), http://www.civitas.org.uk/content/files/IN.5.ECJ_.pdf.

38. Case 155/79, *AM & S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575.

39. Case 550/07, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 E.C.R. I-08301.

40. *Id.*

41. *See generally* Bundesrechtsanwaltsordnung [BRAO] [The Federal Lawyers' Act], § 43a(2), translation at http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf (Ger.); *see also* Strafprozessordnung [StPO] [Code of Criminal Procedure], § 53(1), translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.); Strafprozessordnung [StPO] [Code of Criminal Procedure], § 97, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

42. *Confidentiality of Communications Between Clients and their Patent Advisors*, http://www.wipo.int/export/sites/www/scp/en/confidentiality_advisors_clients/docs/03_germany.pdf; Bundesrechtsanwaltsordnung [BRAO] [The Federal Lawyers' Act], § 43a(2), translation at http://www.brak.de/w/files/02_fuer_anwaelte/berufsrecht/brao_stand_1.6.2011_englisch.pdf (Ger.); Strafprozessordnung [StPO] [Code of Criminal Procedure], § 53(1), translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

disclosure through attorney testimony in criminal or civil proceedings.⁴³ Whether Germany's attorney-client privilege extends to in-house counsel and their clients (companies and/or companies' employees) appears relatively unclear.⁴⁴ However, in 2006 the Regional Court of Berlin held that legal professional privilege for in-house attorneys' may attach where the lawyer has a special relationship with the client, the client gives actual instructions to the lawyer for a specific case, and the lawyer is doing more than providing answers to various legal questions.⁴⁵ Therefore, at least in some jurisdictions, Germany does recognize a limited attorney-client privilege for in-house counsel.

In addition, written correspondence between attorneys and their clients, notes made by attorneys concerning their clients' confidential information, and other objects entrusted to attorneys by their clients are not subject to seizure.⁴⁶ District Courts in Germany have split when determining if documents prepared by attorneys during internal investigations are protected from seizure under the German Code of Criminal Procedure.⁴⁷ This split was highlighted by the recent raid of Jones Day's offices in Germany (discussed below).⁴⁸

43. Strafprozessordnung [StPO] [Code of Criminal Procedure], § 53(1), translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.); Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 383, translation at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89715/103683/F-595450696/ZPO.pdf> (Ger.).

44. See *Attorney-Client Privilege: A Critical Topic for In-House Counsel of Multinational Companies*, FAEGRE BAKER DANIELS (Sept. 15, 2008), <https://www.faegrebd.com/attorney-client-privilege-a-critical-topic-for-in-house-counsel> (stating no judicial or statutory law clearly resolves the issues, but most legal commentators say the privilege applies so long as in-house counsel is a barred attorney); see *Shire Dev. LLC v. Cadila Healthcare LTD*, No. 1:10-cv-00581-KAJ, 2012 U.S. Dist. LEXIS 97648, at *16-17 (D. Del. June 12, 2012), (noting that Germany does not extend legal professional privilege for in-house lawyers); see Joseph Pratt, Comment, *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. 1999, 145, 167 (1999-2000) (stating, Germany recognizes attorney-client privilege for in-house counsel who keep separate offices, with sole access, and act in their professional capacity as attorneys).

45. Christopher Swaak, *Legal Privilege: An Overview of EU and National Case Law*, E-COMPETITIONS, https://captcha.gecirtnotification.com/pitc/?url=http%3a%2f%2fwww%2eaeje%2eeu%2ffiles%2fimages%2fNews%2fLegal%2520Privilege%2520in%2520e%2dCompetitions%2520040414%2epdf%3f%5fsm%5fnc%3d1&referer=https%3a%2f%2fwww%2egoogole%2ecom%2f&reason=This+site+is+categorize+d+as+Miscellaneous+or+Unknown&reasoncode=CATEGORY_CAUTIONED&timebound=1&action=deny&kind=category&rule=52&cat=Miscellaneous+or+Unknown&user=212630287@ge.com&lang=en_US&zsq=jv2ZS00tSjTr6JWQP10MfrmPsNvZ2ZS0kHWvHJHzsq (last visited Dec. 1, 2017).

46. Strafprozessordnung [StPO] [Code of Criminal Procedure], § 97, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

47. *Supra* note 9.

48. *Case of the Week: Federal Constitutional Court Issues Interim Order in Jones Day/Volkswagen Case*, DISPUTE RESOLUTION IN GERMANY (July 26, 2017), <http://www.disputeresolutiongermany.com/2017/07/case-of-the-week-federal-constitutional-court-issues-interim-order-in-jones-dayvolkswagen-case/>.

1. Current State of Germany's Work Product Protection

Under the German Code of Criminal Procedure, information held by a client's attorney is generally exempt from seizure.⁴⁹ However, the District Court of Hamburg in 2010 found that information held between the attorneys and their incriminated employees was not protected from seizure.⁵⁰ The court held that only the company, and not the incriminated employees, was the attorney's client and there was no relationship of trust between the attorneys and the employees—making the protection against seizure inapplicable.⁵¹ This 2010 decision by the District Court of Hamburg was rejected five years later by a District Court of Braunschweig decision.⁵²

In 2015, the District Court of Braunschweig held that documents created for the purpose of serving the legal defense were exempt from seizure under Section 97 of the German Code of Criminal Procedure.⁵³ In its conclusion, the court found that “*the initiation of investigation proceedings against the affected individuals (...) does not constitute a necessary requirement, as a relationship of trust concerning the preparation of a defence worthy of protection may also exist if the client merely fears the future initiation of investigation proceedings.*”⁵⁴ To determine if the disputed documents were made in preparation of the company's defense, the court inspected the timeline.⁵⁵ The court found that documents created by the law firm after the first seizure were made for the company's defense and therefore were exempt from seizure.⁵⁶

2. German Prosecutors' Raid of Jones Day's Germany Offices

In the highly publicized incident, Munich Prosecutors seized documents prepared by Jones Day attorneys for their client, Volkswagen, in connection with Volkswagen's emission scandal.⁵⁷ The Regional Court of Munich found that the German authorities' raid of Volkswagen's hired firm's offices (Jones Day) in Germany and seizure

49. Strafprozessordnung [StPO] [Code of Criminal Procedure], § 97, translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

50. *Supra* note 9.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (emphasis in original).

55. *Id.*

56. *Id.*

57. Anello & Robert, *supra* note 1; Linda Chiem, *VW To Appeal Raid On Jones Day To German High Court*, LAW360 (May 16, 2017, 4:15 PM), <https://www.law360.com/articles/924225/vw-to-appeal-raid-on-jones-day-to-german-high-court>; Ewing & Vlasic, *supra* note 10.

of investigation documents relating to Volkswagen's emissions scandal was legal.⁵⁸ Volkswagen appealed the decision to Germany's Federal Constitutional Court.⁵⁹ The Federal Constitutional Court ordered the Munich prosecutors to turn over the documents collected during the raid to the court, temporarily blocking the government from using the information until the pending appeal decision.⁶⁰

D. Corporate Legal Privilege and Work Product Protection in the United Kingdom

The United Kingdom does not recognize the attorney-client privilege or work product doctrine as defined in the United States. Rather, the United Kingdom recognizes the "legal professional" privilege, which includes (1) the legal advice privilege and (2) the litigation privilege.⁶¹ The legal advice privilege does not extend to communication between all employees, but only to those responsible for communication with the company's hired attorneys.⁶² Under the legal advice privilege, documents must contain some legal analysis, legal input, or general trend of the lawyer's advice to be protected, whereas the litigation privilege only requires that documents are obtained or assembled for the purpose of litigation to be protected.⁶³ In the 2017 case, *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, the High Court found that litigation privilege does not extend to material created by a company's hired attorneys in anticipation of litigation if that litigation is not viewed as "adversarial."⁶⁴

1. The State of Corporate Legal Professional Privilege and Work Product Protection before *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*

Unlike most of the United States, legal advice privilege does not extend to all employees of a company; rather, it only extends to certain employees.⁶⁵ In *Three Rivers (No. 5)* the court held that the "client" was

58. *Id.*

59. *Supra* note 9.

60. John Kennedy, *German Court Temporarily Bars Use of Jones Day VW Docs*, LAW360 (July 31, 2017, 9:03 PM), <https://www.law360.com/articles/949349/german-court-temporarily-bars-use-of-jones-day-vw-docs>, <http://www.disputeresolutiongermany.com/2017/07/case-of-the-week-federal-constitutional-court-issues-interim-order-in-jones-dayvolkswagen-case/>.

61. *Three Rivers District Council & Ors v. Bank of England*, [2003] EWCA 474.

62. *Id.*

63. *The RBS Rights Issue Litigation*, [2016] EWHC 3161 (Ch).

64. [2017] EWHC 1017 (QB).

65. *Three Rivers District Council & Ors v. Bank of England*, [2003] EWCA 474.

not all of the company's employees but rather three individuals who were given the responsibility of coordinating and communicating with the company's lawyers.⁶⁶ In 2016, the English High Court in *The RBS Rights Issue Litigation* confirmed the holding in *Three Rivers (No. 5)*—that legal advice privilege does not extend to communications between employees and the company's lawyers because employees are not the client, but rather a third party which legal advice privilege does not extend to.⁶⁷

The litigation privilege, which is similar to the United States work product doctrine, attaches to confidential documents made by an independent lawyer⁶⁸ for the purpose of preparing for reasonably contemplated litigation.⁶⁹ The court in *The RBS Rights Issue Litigation* found that for documents to be protected by the legal professional privilege, the documents must contain legal analysis, legal input, or a general trend of the lawyer's advice.⁷⁰ The court also held that a “train of inquiry”⁷¹ is not enough to protect the documents and that it is the responsibility of the party claiming the privilege to prove the documents contain some type of legal input.⁷²

In regards to a company's internal investigations, an independent lawyer's litigation privilege will only attach to work product if it is created in anticipation of very likely adversarial litigation.⁷³ Fear of being investigated by a regulatory authority or other inspectors is not enough for the litigation privilege to attach to any document created by independent lawyers relating to an investigation.⁷⁴ The mere possibility of litigation is not enough to protect work product under the litigation privilege, nor does the privilege attach to work product when litigation is not adversarial, such as litigation likely to result in settlement.⁷⁵ If a company hires an independent lawyer to investigate an allegation, legal

66. *Id.*

67. [2016] EWHC 3161 (Ch).

68. Case 155/79, *AM & S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575 (referring to an independent lawyer as one who is not employed by their client; a lawyer “not bound to the client by a relationship of employment.”).

69. *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, [2017] EWHC 1017 (QB).

70. [2016] EWHC 3161 (Ch).

71. *Id.* (Here, “train of inquiry” refers to the attorney's chain of thought evidenced through the interview questions asked by the attorney contained in the verbatim interview transcript. “[T]he Court has expressly (*per Birss J in Property Alliance Group v. RBS (No 3)*) rejected the submission that such a transcript is privileged.”).

72. *Id.*

73. *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, [2017] EWHC 1017 (QB).

74. *Id.*

75. *Id.*

advice privilege will not apply unless the communications are specifically made for the purpose of the company acquiring legal advice.⁷⁶ Additionally, documentation such as investigative reports made by an independent lawyer will not receive protection unless they are made for the purpose of providing legal advice to the company.⁷⁷

2. New Rule from *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*

In *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.*, Eurasian Natural Resources Corporation Ltd. (ENRC) began investigating a whistleblower allegation of “corruption and financial wrongdoing” regarding an African company they acquired and their subsidiary in Kazakhstan.⁷⁸ ENRC hired DLA Piper, a global outside law firm, to investigate the allegations made and, shortly after, the Serious Fraud Office (SFO) became engaged in ENRC’s self-reporting per the SFO Self-Reporting Guidelines.⁷⁹ Eventually, SFO’s involvement turned into a criminal investigation into ENRC, and following the Criminal Justice Act 1987, SFO requested ENRC to produce four categories of documents created during the investigation.⁸⁰ The documents requested were comprised of: (1) notes taken by outside counsel from interviews with ENRC employees and officers, suppliers, and other third parties ENRC dealt with regarding the events being investigated; (2) materials created by forensic accountants who focused on identifying controls and systems weaknesses and improvements; (3) documents indicating or containing factual evidence that were presented to ENRC by their hired outside counsel; and (4) documents that were referenced in a letter sent to SFO by ENRC’s legal advisers, which included forensic accountant reports and email communications from a qualified lawyer employed by ENRC in a non-lawyer position to an ENRC executive.⁸¹

When analyzing the litigation privilege, the court found that the litigation privilege attaches when “(1) [l]itigation is in progress or reasonably in contemplation; (2) [t]he communications are made with the sole or dominant purpose of conducting the anticipated litigation; [and] (3) [t]he litigation . . . [is] adversarial, not investigative or

76. *Id.*

77. *Id.*

78. [2017] EWHC 1017 (QB).

79. *Id.*

80. *Id.*

81. *Id.*

inquisitorial.”⁸² The court adopted a test for litigation privilege which required ENRC to be “aware of circumstances which rendered litigation between itself and the SFO a real a likelihood rather than a mere possibility.”⁸³

The court found that during the acquisition of the African company, there was no evidence that ENRC feared exposure to the risk of criminal prosecution.⁸⁴ Additionally, the court determined that during the investigation of the African company for behavior that would warrant prosecution, evidence did not show that ENRC feared prosecution.⁸⁵ Further, there was no evidence that ENRC feared litigation after the whistleblower allegations because they were still unverified, but rather, they feared a formal SFO investigation if the SFO learned about the allegations.⁸⁶ Additionally, the court concluded that SFO was not an adversary to ENRC and that ENRC would have settled if any type of issue arose, and if settlement failed, ENRC did not fear that the issue would be litigated.⁸⁷ Therefore, the court found that the litigation privilege did not apply because there was no evidence that ENRC was preparing for a defense in anticipation of adversarial litigation.⁸⁸ Instead, they were preparing for an investigation and at the most, a settlement with SFO in which the litigation privilege does not attach to documents intended to be shown to the other side for the purpose of settling.⁸⁹

In examining the legal advice privilege, the court found that for it to attach, communications between clients and their lawyers must be regarding legal advice which “relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law.”⁹⁰ Additionally, lawyers must be acting in their professional capacity.⁹¹ The legal advice privilege also attaches to confidential documents made by a lawyer for the purpose of giving legal advice.⁹²

The court determined that outside counsel’s communications with the interviewed individuals were not made for the purpose of conveying any instruction, on behalf of the corporation, to outside counsel.⁹³ The court also found that outside counsel’s preparatory work which enabled

82. *Id.*

83. [2017] EWHC 1017 (QB).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. [2017] EWHC 1017 (QB).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. [2017] EWHC 1017 (QB).

ENRC to seek and receive legal advice is not privileged.⁹⁴ Since a claim for legal privilege on a lawyer's working papers is only successful if they display the trend of legal advice, notes taken by outside counsel of what witnesses said during interviews does not fall under the privilege.⁹⁵ Additionally, the court held that communications between ENRC's Head of Mergers and Acquisitions, a licensed lawyer, and other executives, even when asking for advice, does not fall under the legal advice privilege because the communications were made by a "man of business," not a company lawyer.⁹⁶

Furthermore, the court found that outside counsel's reports into the investigations and materials used to produce the reports are not privileged because they were not created for or used for the purpose of providing ENRC with legal advice.⁹⁷ However, slides prepared by outside counsel for the purpose of giving legal advice to ENRC's Board regarding investigation findings do fall under the legal advice privilege.⁹⁸ The High Court of Justice granted SFO's requested declaratory relief and ENRC was ordered to provide SFO with all requested documents with the exception of the slides indicating or containing factual evidence that were presented to ENRC by their hired outside counsel.⁹⁹

IV. THE EFFECT OF THE ERODING LEGAL PROTECTION FOR COMPANIES WHO OPERATE "ACROSS THE POND"

It should not come as a surprise that outcomes of foreign cases may have lasting effects, such as determining attorney-client privilege and work product protection. These effects may extend to multinational companies—affecting the way they do business. The extent of such effects may vary, especially when the decision comes from a lower foreign court case, which might not have broad and over sweeping precedent on the foreign jurisdiction as a whole.

A. United Kingdom Corporate Legal Privilege and Work Product Protection Restrictions Effect on Companies

A spokesperson for ENRC, after the *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.* decision, said it best:

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. [2017] EWHC 1017 (QB).

99. *Id.*

“[w]e [ENRC] are very surprised by this ruling and we will appeal today’s decision because the effect of this judgment is that a party who wishes to consult a lawyer in relation to an SFO dawn raid or criminal investigation is not entitled to the protections afforded by litigation privilege.”¹⁰⁰ This restriction on the litigation privilege severely limits a company’s ability to use an attorney during an investigation. Attorneys who rely on oral discussions during an investigation to prevent documents with legal advice from being seized may find the practice to be frustrating and more difficult for employees to follow in comparison to using written communication.¹⁰¹ It can also stop a company from being open and honest with the attorney assisting with the investigation, an important policy behind privilege,¹⁰² in fear the attorney will be ordered to disclose this information to an investigating agency. Without the ability to speak freely with counsel, companies may decide to turn a blind eye to allegations for fear of attorney-client communications being used against them.¹⁰³ It should be noted, however, that the new requirements set out in *SFO v. ENRC* are just that, “new” and the High Court has granted ENRC’s right to appeal.¹⁰⁴

*B. Germany Corporate Legal Privilege and Work Product Protection
Restrictions Effect on Companies*

Not only are companies who operate in Germany affected by the lessened privilege laws in Germany, but for the foreseeable future, they are also impacted by the laws of the European Union, when applicable. While in-house counsel may benefit from the legal professional privilege in certain German courts, it appears that only in-house counsel with specific instructions by the company to investigate a matter will be

100. Alexandra Rogers, *High Court Grants ENRC Right to Appeal Landmark Privilege Ruling in SFO Trial*, THE LAWYER (Oct. 11, 2017, 6:40 PM), <https://www.thelawyer.com/high-court-grants-enrc-right-appeal-landmark-privilege-ruling-sfo-trial/>.

101. See Pratt, *supra* note 44, at 173-74 (noting disadvantages to oral communication such as ineffectiveness compared to written communication, frustration, and the inability to bring relevant parties together).

102. See *Upjohn*, 449 U.S. at 389 (noting the purpose of the attorney-client privilege is to allow for “full and frank” communication to promote the interest of clients).

103. Robert J. Anello, *2008 Global Legal Practice Symposium: Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 309 (2008) (stating “that a corporation turns a blind eye to wrongdoing for fear it will come back to haunt them - is unacceptable.”).

104. Rogers, *supra* note 100 (According to the founding partner of Signature Litigation, Graham Huntley, “This is the first case in which the Court has had to consider whether litigation privilege is engaged in a criminal investigation involving the SFO. The effect of this decision is that it is much harder to claim litigation privilege in the criminal context than in a civil one. This is unprincipled and illogical.”).

covered by the legal professional privilege.¹⁰⁵ Since documents in the hands of corporate clients can be seized, in-house and outside counsel representing companies must ensure that they hold on to all copies and records of legal communications and documents they prepare.¹⁰⁶

As for the seizure of documents from in-house and outside counsel, the law is currently unclear.¹⁰⁷ As a practical matter, allowing documents prepared by attorneys to be seized will have a chilling effect on companies relying on attorneys for help during internal investigations.¹⁰⁸ The inability to prepare documents during an internal investigation, either by an attorney or by the company itself, which in turn limits a company's ability to investigate concerns, might lead to companies forgoing internal investigations altogether. Further, companies forgoing investigations is a likely outcome because the seizure of documents is extremely relevant in Germany where discovery is limited compared to common law jurisdictions.¹⁰⁹

C. European Union Corporate Legal Privilege and Work Product Protection Restrictions Effect on Companies

In addition to the legal privilege limitations that European Union Member States, such as Germany, place on companies doing business in the Member States, companies are also affected by the European Union privilege rules. Seemingly the most intrusive restriction the European Union applies is the inability for in-house counsel to claim attorney-client privilege.¹¹⁰ This may force companies doing business in the

105. Swaak, *supra* note 45 (stating “LPP may attach to in-house counsel only when there is evidence of a special relationship with the client, *wherefore the client has given actual instructions for a specific case, and is not just an in-house attorney doing all types of legal questions*” (emphasis added)).

106. *See* Pratt, *supra* note 44, at 162-63.

107. *See generally supra* note 9 (noting the District Court Braunschweig granted the privilege, protecting against seizure of documents during an internal investigation, while in a similar case also regarding documents created during an internal investigation, the District Court of Hamburg denied privilege and allowed the documents to be seized). *See also* Kennedy, *supra* note 60 (noting German's Federal Constitutional Court has temporarily barred Munich Prosecutors from using documents created by Jones Day for Volkswagen's internal investigation which they seized).

108. *See* Pratt, *supra* note 44, at 172-73 (noting that civil law countries do not practice extensive discovery and litigants are not typically asked to testify and the German Code of Civil Procedure does not require to “answer interrogatories and may not be compelled to testify.”); *Id.* at 172 (citing In-House Lawyer, 7 Eur. L.R. 493, 494 (Street & Maxwell, Dec. 1982) (noting that “a face to face meeting will give the lawyer an opportunity to understand and make an impression on the client” and will allow the client to make an impression on the lawyer)).

109. *See* Pratt, *supra* note 44, at 167.

110. *See* Case 550/07, Akzo Nobel Chems. Ltd. v. Comm'n, 2010 E.C.R. I-08301; *see also* Andrew Nash, Comment, *In-House but Out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union*, 43 ST. MARY'S L. J. 453, 486 (2012) (noting that “Akzo has essentially left in-house counsel out in the cold, unable to assert the attorney-client privilege . . . [and] [t]he “independence” requirement and fundamental distrust of the employer-employee relationship could

European Union to hire outside “independent” counsel to ensure the privilege will apply.¹¹¹

Not only are companies required to rely on outside counsel, but maintaining privilege under the European Union also requires the attorney to be a Community national and admitted to practice in a Member State.¹¹² This means that not all “independent” attorneys qualify for privilege, including American attorneys who are only barred in the United States.¹¹³ If companies do not hire outside counsel, in-house counsel must understand that their material may be subject to seizure and used as evidence.¹¹⁴ The result of this realization may encourage in-house counsel to limit documentation and weaken the assertiveness of their communications, even if it lessens the clarity and effectiveness of what they say.¹¹⁵

V. REASONS TO ADOPT THE UNITED STATES CORPORATE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

Today we lived in a globalized world¹¹⁶ where it is common for multinational companies with multiple legal entities to centralize legal services in the holding company’s legal department.¹¹⁷ For many multinational companies, this means in-house attorneys that make up the department are required to understand and comply with laws in various jurisdictions.¹¹⁸ The complexity of legal privilege and work product protection around the world makes it difficult and costly for in-house legal departments to provide adequate legal advice to their clients.¹¹⁹

serve as the death knell for full time in-house legal staff, especially for smaller corporations”).

111. Nash, *supra* note 110 at 486 (stating that corporations operating in the European Union may shift to relying exclusively on outside counsel for legal concerns).

112. Jonathan Barsade, Article, *The Effect of EC Regulations upon the Ability of U.S. Lawyers to Establish a Pan-European Practice*, 28 INT’L LAW. 313 (1994).

113. *Id.* (noting communications with United States attorneys will not be recognized as a protected privileged communication, unless of course the United States attorney has attained the status and credentials of a Member State lawyer”). See also Case 155/79, AM & S Europe Ltd. v. Comm’n, 1982 E.C.R. 1575.

114. Nash, *supra* note 110 at 485-86 (referencing Martine A. Petetin & Willard K. Tom, European Commission Hostility to Attorney Client Privilege Creates Trap for Unwary, 20 No. 6 ACCA Docket 74, 88 (2002)).

115. *Id.*

116. Ari-Veikko Anttiroiko, *The Political Economy Of City Branding* 19 (2014); Pratt, *supra* note 44, at 145-46 (noting companies’ responsibilities have grown geographically, starting after World War II and continuing as American companies expand to every continent).

117. Antonio Lordi, Article, *The Attorney-Client Privilege in the European Union and Italy: Time for a Change*, 11 DUQ. BUS. L.J. 47, 53-54 (2008).

118. *Id.*

119. Pratt, *supra* note 44, at 179 (noting privilege differences may require in-house counsel to communicate information orally or employ local counsel to maintain confidentiality).

Even learning the contours of privilege and work product protection in other jurisdictions can be a huge waste of time and money for in-house counsel as they may need to utilize outside counsel in those jurisdictions to protect legal communication and documents. Thus, one justification for adopting a standardized corporate privilege and work product protection, modeled by the United States, on both sides of the Atlantic is to simplify multinational companies' ability to receive legal advice.

Adopting a standard set of rules around the corporate attorney-client privilege and work product protection, including the protection of in-house counsel communication, just makes sense—the “beneficial impact on the business environment . . . is easy to imagine.”¹²⁰ The reason for global adoption of the United States corporate attorney-client privilege under *Upjohn* stems from the chief rationale of the privilege—to promote full and frank communication between in-house counsel and their client in order to provide legal advice in the interest and administration of justice.¹²¹ Without the privilege, companies might not involve counsel or they might not give counsel all the facts while investigating potential wrongdoings,¹²² which could lead to a company taking action without legal advice or, at least, without fully informed advice. It is also unfair for countries to exclude American attorneys from exercising privilege in Europe where European attorneys are able to invoke the privilege in the United States.¹²³

120. Lordi, *supra* note 117, at 60 ; See *The Case For In-House Legal Privilege In EC Law*, http://www.ecla.org/files/files/Profession/Legal%20Privilege/the_case_for_privilege.pdf (last visited Dec. 1, 2017) (stating there is a delay and expense attributed to hiring outside counsel in the European Union to protect corporate attorney-client privilege and the quality of advice from outside counsel as opposed to in-house is incomparably less because outside counsel lacks knowledge of the business).

121. *Id.* at 55-56 (noting “that business transactions require the assistance of a legal expert, the need for an attorney to have all of the possible information available to carry out their duties.”); see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating attorney-client privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).

122. *Fisher v. United States*, 425 U.S. 391, 403 (1976) (noting that clients would not confide in attorneys, making it difficult to receive wholly informed legal advice, if the client is aware damaging information provided to attorneys could be obtained from attorneys).

123. See Anello, *supra* note 103, at 305 (citing Richard E. Donovan, *International Criminal Antitrust Investigations: Practical Considerations for Defense Counsel*, 64 ANTITRUST L.J. 205, 223 (1995) (stating that “communications with U.S. attorneys will not be recognized as a protected privileged communication, unless of course the U.S. attorney has attained the status and credentials of a Member State lawyer”)); *Id.* at 313 (citing Roger J. Goebel, *Legal Practice Rights of Domestic and Foreign Lawyers in the United States*, in RIGHTS, LIABILITY AND ETHICS IN INTERNATIONAL LEGAL PRACTICE 51, 76 n.140 (Mary C. Daly & Roger J. Goebel eds., 2004) (noting the ABA considered the ruling in *AM&S* by the European Court of Justice to mean that communication with American lawyers would not be privileged because they are not subject to the European Union disciplinary rules and procedures)). *Id.* (citing Maurits Dolmans, *Attorney-Client Privilege for In-House Counsel: A European Proposal*, 4 COLUM. J. EUR. L. 125, 129 (1998) (stating “[t]he exclusion of United States attorneys from privilege protection in foreign countries is ‘unfair’ according to one commentator, because United States

Some scholars argue that the purpose of the attorney-client privilege is not appropriate in the “corporate context” because secrecy is impossible for entities comprised of multiple individuals.¹²⁴ Further, allowing the attorney-client privilege to cover companies dilutes the “truth seeking function of the judicial system.”¹²⁵ These arguments are not persuasive. Allowing the attorney-client privilege promotes truth seeking in the form of company investigations. As a prime example, during the Obama Administration, the head of the Department of Justice released a memorandum, the “Yates Memo,” asking United States companies to identify and investigate their employees who are responsible for or involved in alleged misconduct, their “bad actors,” and to come forward with any substantiating findings.¹²⁶ Without the recognized corporate attorney-client privilege and work product doctrine in the United States, companies would likely not seek the truth of allegations by conducting internal investigations because the documents created would be subject to seizure and communications might be disclosed.

The European Union, United Kingdom, and Germany are unable to expect their own companies to investigate bad actors and come forward if their records are subject to seizure and communications are subject to exposure in court—leaving them vulnerable and unprotected.¹²⁷ American companies are caught between a rock and a hard place when they want to investigate “bad actors” for the Department of Justice when their “bad actors” work for an operation in Europe. These American companies are put in a difficult situation because the “bad actors” conduct could be subject to European Union and Member States’ investigatory agencies. This situation could force a company to choose between (1) investigating and potentially reporting “bad actors” or (2) not investigating the conduct to keep information that could be used

courts do not categorically exclude foreign attorneys from enjoying the privilege”)); *see* Mitts & Merrill, Inc. v. Shred Pax Corp., 112 F.R.D. 349, 352 (N.D. Ill. 1986) (noting that courts will apply attorney-client privilege for foreign attorneys if such communication would be privileged under that foreign jurisdiction’s laws).

124. Nash, *supra* note 110, at 480-81.

125. *Id.*

126. Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, to Head of Dep’t Components & U.S. Att’ys, Individual Accountability for Corporate Wrongdoing 3 (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> (stating that for a company to be eligible for cooperation credit, it must disclose all facts relating to the corporate misconduct and identify all individuals involved in the misconduct).

127. Some smaller companies with business operations and investigations that fall under the European Commission jurisdiction may not be able to afford outside counsel to help investigate allegations of misconduct. *See generally* Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd., [2017] EWHC 1017 (QB) (investigations deemed non-adversarial will force material and communications regarding the investigation to fall outside the protection of the litigation privilege).

against them out of investigatory agencies' hands. The legal system should be promoting companies to do the right thing and self-report, not hindering their ability to investigate allegations for fear it would subject them to additional liability. The inability to claim privilege on communication and work product incentivizes companies to turn a blind eye to wrongdoing—a stance adverse to justice.

Further, the United States corporate attorney-client privilege allows companies to maintain the integrity of its business operations.¹²⁸ It allows corporations to monitor their employees' conduct and investigate misconduct allegations without fear the work created during those internal investigations will be used against the company criminally, or civilly.¹²⁹ Without the privilege, it is not a stretch to imagine that companies would ignore allegations of wrongdoing altogether for fear that any investigation would be used against them in the future.¹³⁰ Such practice, both those for and against the corporate privilege and protection would agree, is unacceptable.¹³¹

VI. ADVICE FOR COMPANIES OPERATING “ACROSS THE POND”

Unfortunately, multinational companies are currently unable to benefit from a standardized corporate attorney-client privilege and work product protection under the American guidelines. So, what can American companies with operations “across the pond” do to maintain confidentiality while investigating allegations of wrongdoing? First, a company must ensure that, at a minimum, the standards for privilege under *Upjohn* are met to protect both (1) communications between attorneys and employees and (2) work product created by attorneys. As evidenced by this Comment, the advice for a company will depend on which laws are applicable to the company, which is determined by the location of the company's alleged misconduct and/or business operations.¹³²

128. Anello, *supra* note 103, at 309.

129. *Id.* (noting the corporate privilege allows the monitoring of employees and “investigate potential misconduct without fear that the fruits of their efforts will be used against them criminally, administratively, or by civil plaintiffs”).

130. *Id.* (stating a corporation would turn a blind eye to misconduct “for fear it will come back to haunt them”).

131. *Id.*

132. Kenneth Winer, *Doing it right – Overseas: Compliance Programs Take on New Importance in a Global Economy*, AM. BAR ASS'N (1999), <https://apps.americanbar.org/buslaw/blt/9-2overseas.html> (stating that American companies with activities overseas are subject to both United States and foreign laws).

*A. How to Preserve the Corporate Attorney-Client Privilege and
Work Product Doctrine in the United States*

Under *Upjohn*, the Supreme Court laid out eight requirements to maintain attorney-client privilege for information between in-house counsel and the company.¹³³ Simplified, the requirements are: (1) the communication is information needed for the attorney to provide legal advice to the company; (2) the communication relates to matters within the employee's scope of employment; (3) the employee is aware the information being shared is for the attorney to provide legal advice to the company; and (4) the company intends for the communication to be kept confidential.¹³⁴ Therefore, a company may maintain attorney-client privilege with in-house counsel if the point of the communication is to receive legal advice, the employee understands the privilege is between the attorney and the company (not themselves), the employee only provides information that falls within their employment duties, and the employee does not communicate the same information to third parties or other employees who are not required to know it for employment purposes.

Additionally, the American Bar Association provides that in-house counsel should provide an *Upjohn* disclosure to a company's "directors, officers, employees, members, shareholders or other constituents" when the attorney knows or should reasonably know that the company's interests are adverse with whom the attorney is dealing.¹³⁵ The purpose behind this rule is to ensure the individual does not believe the attorney is representing them, therefore removing the privilege between the company and the attorney.¹³⁶ This confusion (when an individual believes they hold the privilege) can complicate the company's disclosure of information regarding "bad actors" if the "bad actors" attempt to block the dissemination of that information by claiming it is privileged. These relatively straight forward rules are not only easy to follow but are easy to demonstrate they are being followed in order to preserve the privilege.

133. *Upjohn*, 449 U.S. 383 at 393-95.

134. *Id.* at 393-95.

135. Model Rules of Prof. Conduct r. 1.13 (Am. Bar Ass'n, Discussion Draft 1983).

136. *See* Commonwealth v. Curley, 131 A.3d 994, 1007 (Pa. Super. Ct. 2016) (This case emerged as a result of the Jerry Sandusky sexual abuse scandal, the court found, that the testimony for the University of Pennsylvania State's counsel was improper against the defendant, the University of Pennsylvania State's former athletic director. The court held that communication between the former athletic director and counsel was privileged because counsel's conduct and communication with the defendant was for the purpose of providing legal advice and counsel failed to adequately inform the defendant that she represented the university, not the defendant's individual interests.).

B. Advice for Preserving the Corporate Legal Privilege and Work Product Protection Abroad

First and foremost, to understand how to protect company communication with attorneys or information created by attorneys during an internal investigation, a company must understand the specific laws governing the foreign jurisdiction.¹³⁷ Attorneys and companies should understand the factors courts in foreign countries use to determine whether privilege applies. As evidenced above, these laws are neither standardized nor simple. Once understood, protecting corporate attorney-client privilege and work product protection may require a company to hire outside counsel who meets the requirement as an “independent” attorney to conduct the investigation.¹³⁸ Outside counsel might also be necessary when a country does not recognize privilege for in-house counsel who are only barred in the United States.¹³⁹

Additionally, with the uncertain landscape of privilege in the United Kingdom, companies and their counsel would be wise to communicate orally, keeping minimal records during an investigation which could be seized.¹⁴⁰ This statement holds true for companies operating in Germany during internal investigations.¹⁴¹ Company attorneys acting in Europe should minimize the number of documents they create during investigations because such documents may be subject to seizure by the investigating agency.¹⁴² Attorneys should also inform their corporate clients that operating outside of the United States leaves attorney work product and attorney communication to uncertain protection.¹⁴³

Attorneys would be well advised to conduct, when possible, investigative activity in the United States to maximize protection under American law.¹⁴⁴ This includes, but is not limited to, interviewing employees, meeting with management, and creating attorney work

137. Pratt, *supra* note 44, at 179.

138. Case 550/07, Akzo Nobel Chems. Ltd. v. Comm'n, 2010 E.C.R. I-08301; Nash, *supra* note 110, at 486 (noting that the requirement to hire outside counsel “could serve as the death knell for full time in-house legal staff, especially for smaller corporations.”).

139. Nash, *supra* note 110, at 492-93 (referring to Richard E. Donovan, *International Criminal Antitrust Investigations: Practical Considerations for Defense Counsel*, in 64 ANTITRUST L.J. 205, 223 (1995)).

140. See Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd., [2017] EWHC 1017 (QB) (documents were allowed to be seized because they did not fall under the litigation privilege); see Pratt, *supra* note 44, at 179.

141. See Anello & Robert, *supra* note 1 (noting the Munich Regional Court found the raid and document seizure of Jones Day legal).

142. Anello & Robert, *supra* note 1.

143. *Id.*

144. *Id.*

product.¹⁴⁵ It should be noted, however, that such activities do come at a cost. Companies should balance the cost of these activities, like flying employees to the United States for interviews, against the potential disclosure of such interviews. Companies would also be wise to have a policy limiting communications around issues being investigated, especially internal communications that do not involve attorneys, as no attorney-client privilege would apply.¹⁴⁶ Such a policy should include a restriction on written communication to ensure unnecessary documentation which could be subject to seizure by government agencies during a “dawn raid.”¹⁴⁷ If attorneys do conduct interviews, such notes should implicitly set out legal advice arising from, or given during, such interviews.¹⁴⁸

VI. CONCLUSION

These are alarming and uncertain times for American multinational companies and attorneys operating in jurisdictions outside of the United States. The perceived normality of attorney-client privilege and work product protection in the United States is a concept not consistently adopted throughout the world. While the decision in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd.* has potentially created a new rule, the outcome is just that: a *potential* rule. Additionally, even if the Jones Day office raid is ruled illegal, it does not solve the issue in Germany for other District Courts have held similar raids to be legal. Attorneys that practice compliance should understand the parameters of the attorney-client privilege and work product protections for the multinational companies they represent. Jurisdictions outside of the United States should look at the policy behind the attorney-client privilege and work product doctrine to ascertain if their current laws align with the rationale. My guess is that most jurisdictions would realize their laws do not, and they would realize that switching to United States modeled rules would be in the best interest of justice for all.

145. *Id.*

146. *English High Court Limits Scope of Privilege for Documents Generated During the Course of Internal Investigations*, SIDLEY (June 1, 2017), <https://www.sidley.com/-/media/update-pdfs/2017/05/final--20170531-litigation-update.pdf>.

147. *Id.*

148. *Id.*; *The RBS Rights Issue Litigation*, [2016] EWHC 3161 (Ch) (to maintain privilege, there must be more than an attorney’s “train of inquiry”).