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NON-PRIVILEGED COMMUNICATIONS WITH FOREIGN IN HOUSE COUNSEL AND THEIR DISCOVERY IN U.S. LITIGATION

By

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In a recent case against a multinational Indian pharmaceutical company, I found that in many countries there is no attorney client privilege for communications between a corporate client and its in house counsel. That is the case in all circumstances in India and certain European countries. It is also true for a company operating in any of the 27 member nations of the European Union when under investigation for anticompetitive conduct.

These differences between foreign and US federal or state law raise conflicts of law and waiver issues. Where communications that took place in a foreign jurisdiction are privileged under US law, but not privileged under foreign law, are they discoverable in a US litigation? What about the reverse situation? Does production of communications with in house counsel which are not privileged in the country where they take place waive the privilege for those communications in a US litigation? Does a foreign secrecy law or "blocking" statute bolster a privilege claim? This paper addresses these questions.

I. Countries Where There Is No Privilege For Communications With In House Counsel:[1]

Albania	Germany	Malta
Austria	Hungary	Romania
Bulgaria	India	Russia
Croatia	Italy	Serbia
Cyprus	Latvia	Slovakia
Czech Republic	Lichtenstein	Slovenia
Estonia	Lithuania	Sweden
Finland	Luxembourg	Switzerland.
France	Macedonia	Turkey
		Ukraine

In these countries communications between those company employees who personify the corporate client[2] and in house counsel are not privileged. The logic for this rule, on its face circular, is that in house attorneys are employees paid to further the interests of their employer. It somehow necessarily follows that they lack independent judgment and are likely to subordinate the cause of justice to those interests. They are prohibited from becoming members of their country's bar; and they are not bound to rules of professional conduct that would otherwise

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[1] As to Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Luxembourg, Slovakia, Slovenia and Sweden, see Brief of Advocat General Kokott of European Commission ("Advocate General Br.") in Joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities delivered April 29, 2010, at ¶101, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=83189&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3330861

As to India, see Amarchand & Mangalds & Suresh A Shroff & Co., In House Counsel ant the Attorney-Client Privilege,.https://www.lexmundi.com/images/lexmundi/PDF/AttyClient/2007Atty_Client_Update/At_Client_INDIA.pdf.

As to Switzerland, see *In re Rivastigmine Patent Litigation, 237 F.R.D. 69, 76 (S.D.N.Y. 2006)* citing Robert Furter & Michael Kramer, Lex Mundi, Ltd., In-House Counsel and the Attorney-Client Privilege available at http://www.lexmundi.com/images/lexmundi/PDF/AttyClient/Switzerland.pdf; and Triplett Mackintosh & Kristen M. Angus, Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege, 38 Int'l Law. 35, 39-40, 53-54 (2004).

As to Albania, Austria, Bosnia and Herzegovina, Croatia, Iceland, Latvia, Lichtenstein, Lithuania, Macedonia, Malta, Russia, Serbia, Turkey and Ukraine, see Eversheds, Attorney Client Privilege in Europe, available at http://www.eversheds.com/documents/AttorneyClientPrivilege.pdf

As to Belgium, Denmark and Spain the law is unresolved. Advocat General Br. 102

[2] See *Upjohn v. United States*, 449 U.S. 383 (1981). (corporate client for purposes of attorney client privilege is determined on case by case basis and extends to employees beyond control group of corporation if they have relevant information necessary to secure legal advice).

require that they give priority to the overall integrity of the legal system.[3]

Such circular logic becomes more rational when viewed in light of the varying levels of training which qualify someone to perform the functions of an attorney in some foreign countries. In many foreign jurisdictions, an undergraduate course of legal study allows the student to serve as in house counsel offering advice on contract, regulatory and liability issues. But these lawyers do not serve an apprenticeship or take a bar exam that would be necessary to admit them to a bar of the court. They are therefore not bound by rules of professional conduct and arguably more likely to tell their clients what they want to here when evaluating the legality of their conduct.[4]

The denial of the privilege to in house counsel is also more understandable in countries which do not provide the same broad discovery rights as a US court. When there is no expectation that information will be discoverable in the first place, it is less likely that a need for attorney client privilege has been considered.[5]

II. Countries Where Communications With In House Counsel Are Privileged: [6]

Greece	Netherlands	Portugal
Iceland	Norway	Romania
Ireland	Poland	United Kingdom

With a very important exception, in these countries there is a privilege for communications with in house counsel, just as the privilege would be recognized in an American court. The exception is that, regardless of the law in a company's native country, such communications are not privileged in investigations conducted by the European Commission of allegedly anticompetitive practices.[7]

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[3] At least one federal court appears to agree with this rational. *Bank Brussells Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002).*

[4] See Preserving the Corporate Attorney Client Privilege: Here and Abroad, Robert J. Anello, 27 Penn State International Law Review, No. 2 at p. 302-303 (Fall 2008).

[5] Id. See Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D 92 101-2 (S.D.N.Y. 2002). (court considered Korean law that there was no attorney client privilege, but also that there were minimal rights to discovery; considering absence of privilege in a vacuum would have made discoverable in an American court what was neither discoverable in the first instance in Korean court nor discoverable because of attorney client privilege in an American court).

[6] As to Greece, Ireland, The Netherlands, Poland and Portugal, see Advocat General Br., n. 3, supra at ¶103, 135, 139, 152, 155. As to the UK, see *VLT Corporation v.Unitrode Corporation, 194 F.R.D. 8 (D. Mass 2000).* As to Iceland, Norway and Romania see Eversheds, n. 1, supra.

[7] The European Commission, the EU's executive and administrative branch, investigates possible breaches of European competition law through its antitrust enforcement agency, the Directorate–General for Competition. The Commission "has the power to search business premises and the homes of executives, and it can seize documents

The exception was established in *AM & S Europe Ltd. V. Commission of the European Communities, Case No. 155/79, 1982 E.C. R. 1575 ("AM&S").*[8] Under EU protocols, the court was required to adopt only those principles which were common to the laws of all EU member states. Since a review of those laws showed that in several countries, *e.g.*, France and Italy, communications with in house counsel were not privileged, the scope of attorney client privilege that was common to all member states did not include such communications. The Court said:

> . . . . [H]owever, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client *provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defense and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment . . .*
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> [I]t should be stated that the requirement as to the position and status as an independent lawyer. . . is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. [T]he protection thus afforded by Community law. . . to written communications between lawyer and client must apply without distinction to any lawyer entitled to practice his profession in one of the Member States, regardless of the Member State in which the client lives. (Id. at ¶21, 24, 25)

The AM&S decision was roundly criticized, and even the American Bar Association House of Delegates in 1983 passed a resolution that the Commission should extend the privilege to in house attorneys in EU countries. The ABA was especially concerned about the language that the privilege "must apply without distinction to any lawyer entitled to practice his profession in one of the Member States." The concern was that this meant that communications with a US or other non EU attorney, whether in house or independent, would not be privileged because they were not entitled to practice in an EU Member State. That concern has never been tested.[9]

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and other evidence. In addition, the Commission can compel investigated parties to provide information, and may also collect information from third parties." *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, 2010 WL 3420517 *2 (E.D. N.Y. 2010).*

[8] Available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=90571&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=3327440

[9] It would be illogical to conclude that the Court, in using merely these few words about lawyers in Member States, broadened the scope of its ruling to cover a situation that was not even before it. It would be totally inconsistent with the AM&S rationale for there being no privilege for communications with in house counsel. As opposed to in house counsel, outside counsel, whether based in or outside of a member country of the European Union, are not employees of their client. Their independence and fidelity to principles of justice beyond the narrow interest of their client at least theoretically should not be in question as a basis for denying a privilege for communications with them.

More recently, the European Court of Justice affirmed the A&M ruling in *Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Commission of the European Communities* ("Akzo").[10] A lower court, the European Union's Court of First Instance (now known as the General Court), considered in 2007 whether the privilege should apply to communications between a client chartered in the UK and its Dutch in house counsel.[11] Communications with in house counsel are privileged under both UK and Netherlands law. The in house counsel, as permitted by Netherlands law, was also a member of the Netherlands bar. He was therefore bound by the same ethics and rules of conduct as any attorney entirely independent of its client.

The General Court nonetheless ruled that under AM&S there was no privilege for in house counsel even if that counsel was a member of the bar. It rejected every argument that logically an in house attorney who was also a member of the bar would exercise independent judgment and feel ultimately bound to observe the rules of the profession if they were in conflict with the interests of his employer.

In affirming on appeal, the European Court of Justice said that even where an in house attorney is a member of the bar and bound by professional ethical obligations, he can not "be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence." *Akzo* ¶47. It insisted that a lawyer could be independent only if he was "structurally, hierarchically and functionally . . . a third party in relation to the undertaking [client] receiving that advice. " *Akzo* ¶168. Such was the ruling even though it conflicted with the law of both member states at either end of the attorney client communication.

The ruling implies that, unlike in house counsel, outside counsel receiving handsome sums in legal fees are somehow able to completely ignore their clients' commercial strategies when considering their ethical obligations. Skepticism abounds.

III. Practical Considerations Regarding-Non Privileged Communications With In House Counsel

Preserving the privilege. In countries where in house counsel is deemed to lack the requisite independence, the surest way to preserve confidentiality of a foreign company's communications in obtaining legal advice is for the company employees to deal only with outside counsel. Given the knowledge, experience and accessibility of in house counsel, this may not be practical, especially in the earliest stages of a particular problem where consultation with in house counsel is the logical starting point. It does, however, at least require a mindset within a company that it is better to bring in outside counsel sooner rather than later.

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[10] Case C-550/07 P, September 14, 2010 available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=3327696.

[11] Case T-125/03 and T-253-03, September 17, 2007, 2007 E.C. R. II-4471, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=62941&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=3327696

One way to retain the benefit of in house counsel's advice and to maintain confidentiality at the same time might be to go through a two step process making outside counsel act as a middle man between corporate employees and in house counsel. Step 1: A corporate manager, for example, could communicate with outside counsel. That communication would be privileged. Step 2: Outside counsel could then solicit input from in house counsel. That communication also would arguably be privileged, because the same non-independent employee status of the in house counsel which precludes privilege for communications between him and corporate managers should also qualify him as "the client" entitled to assert privilege for communications with outside counsel.[12]

Waiver. A foreign disclosure is not inadvertent as where a handful of privileged documents are included in a mammoth document production without resulting in the waiver of the privilege. Cf. Fed. R. Civ. P. 26(b)(5). Foreign disclosure is therefore not covered by the limited waiver for inadvertent disclosure provided by Fed. R. Ev. 502(b).[13] If discussions with in house counsel are disclosed in a foreign proceeding because they are not there privileged, should that disclosure then constitute a waiver when the same discussions are sought in an American litigation where the privilege otherwise applies?

A simple argument that such disclosure can not be a waiver is that a right can not be waived if it does not exist in the first place. In those foreign jurisdictions where communications with in house counsel are not privileged, disclosure by the corporation should not waive the privilege. A statement to that effect accompanying the disclosure could help sustain this argument.

Research, however, has not found a case where this argument has been made, or for that matter, any case where foreign disclosure has been followed by a waiver argument in a US court. Commentary suggests that the foreign disclosure should be viewed as only a "selective waiver" that does not extend to the US proceeding. Otherwise the privilege as defined in the US gets narrowed to the lowest common denominator of those foreign jurisdictions where it is not recognized. Note, Globalization's Erosion Of The Attorney--Client Privilege And What U.S. Courts Can Do To Prevent It, 87 Tex. L. Rev. 235, 255-264 (2008).[14]

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[12] See Upjohn Company v.United States, note 2, supra, 449 U.S. at 394-95; and compare *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington, 103 F.R.D. 52, 66 (D.D.C. 1984)* (patent agent who is supposedly an employee of an EU company is to be treated instead as an independent contractor whose communications with outside counsel are not privileged) with *Foseco Int'l Ltd. v. Fireline, Inc., 546 F. Supp. 22, 25-26 (N.D. Ohio 1982)* (communications regarding US patent application between British corporation's American patent counsel and its British patent agent acting on its behalf held privileged where agent acted at the direction and control of the corporation such that agent's communications were in essence communications between the British corporate client and its attorney.); *See also In Re Flonase Antitrust Litigation,* No. 08-CV-3301, Mem. Op. July 2, 2012 (E.D. PA) (attorney client privilege can extend to independent contractors who are functionally the equivalent of an employee).

[13] Even if deemed inadvertent, Fed. R. Ev. 502(b) would not apply to disclosure in a foreign proceeding. The Rule covers inadvertent disclosure only if it took place in a federal proceeding or to a federal office or agency.

[14] In considering what became Fed. R. Ev. 502, the Advisory Committee on Evidence Rules decided not to propose a selective waiver provision that would allow a corporation to cooperate with government agencies without waiving

Alternatively the act of foreign disclosure could be deemed to be involuntary vis a vis the privilege that covers the information in a US litigation.. If seeking legal advice is to encouraged and provided across borders of a world that is now "flat," finding a waiver because of a disclosure where there is no privilege would frustrate that fundamental objective everywhere else.

IV. Choice Of Law Issues Determining Whether Communications With Foreign In House Counsel Will Be Discoverable In An American Litigation.

The absence of attorney client privilege in foreign countries for communications with in house counsel raises the question of whether these communications are discoverable in federal or state litigation in the US.

The answer requires resolution of a conflicts of laws issue. Pursuant to Fed. R. Ev. 501, in cases in federal court based on federal law, privilege issues are decided by using federal common law.[15] In diversity cases in federal court, whether a communication is privileged is dictated by the appropriate state law, including that state's conflicts of law principles.[16] *Pearson v. Miller, 211 F 3d 57, 66 (3d Cir. 2000).*

When federal law applies: If the "vertical" choice of law between federal common law and state law leads to the application of federal common law to a privilege issue[17], then the court must determine if there is a conflict between the federal common law and the law of the foreign jurisdiction which might apply. If there is, it must make a "horizontal" choice of law by using an appropriate choice of law principle. But which principle?

The "touch base" principle. This principle has developed in patent cases. Under the law of most European countries and Japan[18], communications with patent agents are considered

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privileges as to other parties in subsequent litigation. See Advisory Committee Note to Fed. R. Ev. 502. The application of the concept to foreign disclosure is therefore questionable.

[15] Fed. R. Ev. 501 provides that except as provided by the Constitution, legislation or Supreme Court rule, privilege issues in federal court are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience;" but in civil actions "with respect to an element of a claim or defense as to which the State law supplies the rule of decision," the privilege issue "shall be determined in accordance with State law."

[16] Federal courts sitting in diversity must apply the forum's substantive law, including choice-of-law rules. *Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 495-96 (1941)*..

[17] There may be cases where both state law and federal common law govern separate issues, or where some evidence is relevant to both federal and state law claims in the same case. *See In Re Yasmin And Yaz (Drospirenone) Marketing, Sales Practices And Products Liability Litigation, 2011 WL 1375011 , *5 (S.D. Ill).* In the latter situation, the law recognizing the privilege has been applied to both claims, because it would make no sense to recognize the privilege for one claim, but disclose the information in the other. Id at *7-8.

[18] In Japan a *benrishi* is a patent agent, as opposed to a *bengoshi*, an attorney at law. Yet under Japanese law there is a privilege for communications with a benrishi. *VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 17 (D.Mass.2000).*

privileged because they provide counseling and advice comparable to that provided by an attorney. [19] On the contrary, in the United States, since patent agents are not attorneys, there is no privilege.

Federal courts have reasoned that whether a privilege applies to a communication with a foreign patent agent will depend on the extent to which the communication has a relationship to the United States. *Tulip Computers Int'l B.V. v. Dell Computer Corp., 210 F.R.D. 100, 104 (D. Del. 2002); VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 16 (D. Mass. 2000); Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc, 707 F. Supp. 1429, 1444-5 (D. Del. 1989).* If it touches base not at all with the US or only in some incidental way, a US court will give comity to the foreign privilege law; so a patent related communication will most often be privileged.[20]

If, however, the communication relates to the prosecution of a patent in the US or otherwise has more than an incidental connection to the US, then the federal court will either conclude that federal common law applies such that there is no privilege,[21] or it will go further and determine whether it is the US or the foreign country which has the "most compelling and direct interest" in the communication. *Astrazeneca Lp v Breath Limited, 2011 WL 1421800 (D. N.J.)* The determining factors will be the substance of the communication, the parties to it, where their relationship was centered and whether the application of foreign privilege law would be "clearly inconsistent with important policies embedded in federal law." *VLT Corp. v. Unitrode Corp., 194 F.R.D. at 16, citing Golden Trade S. r. L. v. Lee Apparel Co., 143 F.R.D. 514, 521 (S.D. N. Y. 1992).*[22] See *In re Rivastigmine Patent Litigation., 237 F.R.D. at 74; Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 1998 WL 158958, at *1 (S.D.N.Y); Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington, 103 F.R.D. at 65.*

Counsel interested in maximizing the chances that US privilege law will apply to their client's otherwise non privileged communications with their foreign in house counsel would want to establish some connection between the subject of the communications and activity taking place in the US. This could be done through some recitals in an letter that the matter to be the

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[19] "[M]any foreign countries treat their patent agents as the functional equivalent of an attorney and recognize what amounts to an attorney-client privilege for his communications with his clients." *Golden Trade, S.r.L. v. Lee Apparel Co.,* 143 F.R.D. 514, 519 (S.D. NY 1992). Presumably these patent agents are not employed in house. *See Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington, supra.*

[20] *Chubb Integrated Systems v. National Bank of Washington., 103 F.R.D. at 65; Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1169-70 (D.S.C. 1974).* Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).*

[21] *Chubb Integrated Systems v. National Bank of Washington, 103 F.R.D. at 66* (denying comity for British law recognizing privilege for communications with patent agents where communication related to US patent.)

[22] See *Duplan Corp. v. Deering Milliken, Inc., supra, 397 F. Supp. at 1169-70 (D.S.C. 1974)* (refusal to apply British and French law that communications with patent agents are privileged where the matter touches base with the US because honoring the privilege and thereby restricting discovery is contrary to policy of the Federal Rules of Civil Procedure intended to promote discovery.)

subject of communication relates to an inquiry from the US and that US counsel is also participating in or directing the project involved.

The "most significant relationship" principle. The Restatement (2d) Conflict of Laws §139 regarding "privileged communications" disfavors the exclusion of evidence based on attorney client privilege.[23] It provides 1) that if the communication is not privileged under the law of the jurisdiction which has the "most significant relationship" to it, then it is not protected from disclosure even if it is privileged under the law of the forum state; and 2) that if it is privileged under the law of the jurisdiction with which it has the most significant relationship, it is still not protected where it would not be privileged under the law of the forum. In either circumstance, section 139 gives a court leeway to protect the communication if there is some "strong public policy" of the forum or "some special reason" why the privilege should be given effect. Respected commentary is critical of the Restatement approach for allowing such vague exceptions. 23 Wright and Graham, Federal Practice and Procedure, Evidence §5435 at 866-8.

The Restatement approach would be a problem for a party claiming privilege in US litigation for communications with in house counsel in a country where there is no privilege. E.g., *AstraZeneca LP v. Breath Ltd., 2011 WL 1421800 (D.N.J.)* (communications with Swedish in-house counsel were not privileged under Swedish law and had merely "incidental connection" to United States; privilege issue held to be governed by Swedish law and privilege claim rejected) The party claiming privilege would have to show that there is a strong public policy for refusing to extend comity to the law of the foreign country and for honoring the privilege as if the communication occurred in the US.

Restatement (Third) of Foreign Relations Law § 442 (1987). Section 442 recognizes the authority of a United States court to order parties before it to produce discoverable material even if located in a foreign country, but to consider before doing so if compliance with the order would undermine important interests of the foreign state.[24] If the discovery sought is a communication with foreign in house counsel that is not privileged under the law of the country where it took place, it is discoverable, with the exception similar to section 139 of the Restatement (Second) Conflicts, that if it was generated "in connection with" a proceeding in the United States, then the US law of privilege would apply.

When state law applies: If a vertical choice of law results in state law governing the privilege issue, then state law, including state choice of law principles, apply. *Interphase Corporation v.Rockwell International Corporation, 1998 WL 664969 (N.D. Texas).*

[23] The Restatement (2d) Conflict of Laws, §10 provides that the entire Restatement is "generally applicable to cases with elements in one or more foreign nations."

[24] Apart from having a US court order a party to produce discoverable information located in a foreign county, such information can also be obtained for use in a US court through The Hague Convention, *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987). The Hague Convention expressly recognizes the right of the party from which discovery is sought to refuse to provide it based on either a privilege or a duty of nondisclosure under either the law of the state of origin of the request or of the state in which the evidence is sought. Restatement (Third) of Foreign Relations Law § 473 (1987)

Under Pennsylvania law, for example, a Pennsylvania court choosing between Pennsylvania's privilege law and that of a foreign country, would generally use the "interest analysis" approach to conflict questions and therefore would apply the privilege law of the jurisdiction with the most significant relationship to the privileged communication -- particularly when there was no connection between the communication and the forum. *Samuelson v. Susen, 576 F.2d 546, 551 (3rd Cir.1978).* Similarly, New Jersey courts would apply a "governmental interest test [that] seeks to apply the law of the jurisdiction with the greatest interest in governing the *specific issue*" in the case. *In re Diet Drug Litigation.*, 384 N.J. Super. 546, 562 (N.J. 2005). Delaware, however**,** is guided by section 139 of the Restatement, supra, such that it would choose the law of the jurisdiction disfavoring the privilege. *In re Teleglobe, 493 F 3d 345, 358-9 (3d Cir. 2007).*[25]

V. The Effect Of Secrecy Laws Or Blocking Statutes.

There are foreign laws requiring that professionals maintain the secrecy of information provided to them by their clients. *See e.g., Gucci America, Inc. v. Guess?, Inc., 271 F.R.D. 58, 2010 WL 3718948 at *67 (S.D. N.Y.)* These laws are comparable to an attorney's obligation to maintain confidentiality under the Rule 1.6 of the Rules of Professional Conduct. But they do not amount to the equivalent of a testimonial privilege. They create an ethical obligation by an attorney to his client, not an evidentiary privilege of non-disclosure. *In re Rivastigmine Patent Litig., 237 F.R.D. at 75-76; Bayer AG v. Barr Laboratories, Inc., 1994 WL 705331, at *5-6 (S.D.N.Y.).* Unlike a privilege, they do not give the client himself a basis for refusing to testify regarding communications with that professional, *Gucci America, supra* at *68; and they are not absolute because they can be overcome when there is an overriding need for information. *Bristol–Myers Squibb Company, v. Rhône–Poulenc Rorer, Inc., 188 F.R.D. 189 (S.D.N.Y. 1999)* Accordingly, they are generally of little weight when relied upon to claim that a testimonial privilege exists under foreign law.

There are also foreign "blocking statutes" which broadly prohibit the disclosure of information for use in the court of another country. For example, French Penal Code Law No. 80-538, provides:

> "Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith."

[25] For a review of the choice of law principles followed by most states in the context of a privilege analysis, although not necessarily involving a choice between the state law and the law of a foreign country, see *In Re Yasmin And Yaz (Drospirenone) Marketing, Sales Practices And Products Liability Litigation, 2011 WL 1375011 *9 (S.D. Ill.)*

See generally, 2 Litigation of International Disputes in U.S. Courts § 17:34 (2012). Such a blocking statute can not preclude an American court from ordering a party subject to its jurisdiction to produce discoverable evidence even if production would violate the statute. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court* 482 U.S. at 526; *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204-206 (1958).* The blocking statute does not create a testimonial privilege.