

Privileged Conversations: The Rise of Independence Agreements

Compliance and Ethics

Career Development



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Amy Chai, director of Advocacy of ACC, sits with down Veronica Pastor, deputy general

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counsel of ACC, as part of ACC's Privileged Conversations series***. Privileged Conversations deals with the importance of legal privilege for in-house counsel, a topic on which ACC and Veronica in particular have advocated extensively. The key discussion questions are: What are independence agreements, where do they fit in the global picture of legal privilege, and are they really the best way to ensure legal privilege remains a means to balance the private interests of clients with the public interest in the rule of law?***

Read the Spanish version of this article here.

Read the French version of this article here.

Legal privilege

Veronica Pastor: Thank you Amy. Legal privilege is one of the cornerstones of being a lawyer, and independence agreements have emerged as middle way between jurisdictions that believe it is impossible for an employed lawyer to ever act independently and those who see independence as part and parcel of the legal profession.

Chai: ***So, Veronica, what is legal privilege and how does it play out in the in-house context?***

Pastor: The term legal privilege refers to the principle that communications between an attorney and a client deserve special protection from disclosure, and that assuring the confidentiality of these exchanges is in the public interest. It is in the public interest because lawyers are, at their essence, representatives of justice and the rule of law in the work they do. All lawyers swear to uphold the law of the land in a solemn ceremony at the start of their careers. At the same time, lawyers are also duty-bound to faithfully represent their clients. This creates a tension, because there can be instances where those two obligations clash. Criminal proceedings are an obvious example, but the issue also arises in day to day in-house practice when lawyers are called upon to give advice and legal guidance on commercial or compliance issues.

Different jurisdictions

Chai: ***Different jurisdictions have answered this difficult question in different ways that run the gamut from "it's simply not possible" to "independence is guaranteed by law." In France, for example, there is a red line distinction between in-house legal counsel ("conseil juridique") and private practice lawyers who are members of the bar ("avocat"). Privilege only attaches to law firm practice. The justification for this distinction is based on the argument that an in-house lawyer lacks the requisite independence to serve as representative of the rule***

of law within a company because of his or her economic dependency on the employer. In France there is no easy way to go back and forth, to the point that when an avocat decides to join an in-house legal department, he or she must give up bar membership and lose the privilege, which goes along with it. Spain on the other hand has introduced legislation that says a lawyer is a lawyer, regardless of where they practice, and legal privilege is an intrinsic part of being a lawyer. This is of course the position that US lawyers are more familiar with. Our discussion is about independence agreements, which you described earlier as the middle way. So, what is an independence agreement, and where did it come from?

Pastor: In between these two approaches, there is a middle ground, and that is the independence agreement. This model was brought to the fore recently in a legal privilege case before the Supreme Court of the Netherlands – *Attorney General v. Royal Dutch Shell*. The case resulted from an international criminal investigation involving the work of lawyers across many offices of Shell in various European countries. The Netherlands has adopted the independence agreement middle way. Dutch lawyers who practice in house can avail themselves of legal privilege protection provided they have signed a private agreement with their employer where the employer guarantees the lawyer's independence. This is also known as a *Cohen statuut*. In that case we asked the court to recognize that at least some of the Shell lawyers were operating under the entirely reasonable assumption that their work was privileged, if their home jurisdiction was one that recognizes attorney-client privilege for in-house lawyers.

> At the core of legal privilege is the idea that a lawyer must and does exercise their duty to uphold the law independently of his or her financial interest.

At the end of the day, the court said that privilege is available to in-house counsel on the same basis that it is available to external lawyers. But to benefit from that privilege, in-house counsel must be as free as outside counsel to provide independent advice and, in particular, be free from any conflict of interest between their professional duties as a lawyer and their duties as an employee of the company. To prove independence, in-house lawyers working in the Netherlands – including foreign lawyers – must have an independence agreement in place. For foreign lawyers who find their work subject to a discovery request or a subpoena in the Netherlands, it's a bit more complicated. They must prove that both their home jurisdiction and the Netherlands afford privilege protection to the type of work in question and that they have a *Cohen Statuut*-type agreement in place in which their employer undertakes to respect the lawyer's right to observe rules of professional ethics and conduct, including those relating to confidentiality and privilege.

Independence agreements

Chai: ***In the ACC legal resources library you can find some templates for independence agreements of the type that the Netherlands Supreme Court was likely talking about. The Court agreed in part with Shell's and ACC's position, and in doing so, two things happened: it clarified the status on in-house counsel vis a vis privilege, at least in the Netherlands, and it opened a discussion on the best way to balance the private interests of clients with the public interest in the rule of law in the context of in-house legal practice.***

Pastor: Yes, I think that's fair to say.

Chai: ***But, ACC thinks independence agreements do not go far enough. It has made a public statement to that effect in social media. ACC says that, while independence agreements are a***

step in the right direction, they are not without issues. ACC has called for recognition of privilege for the work of in-house lawyers who are members of a national bar as carrying the same duties and rights as other forms of legal practice. ACC also supports extending the privilege to foreign lawyers who meet the same requirements as national lawyers. ACC asserts that recognizing in-house legal privilege on a par with law firm privilege is at its core a pro-business and pro-global competition issue. Can you explain that?

Pastor: When in-house lawyers don't have access to legal privilege protection, their companies are at a competitive disadvantage on the global stage. We hear this from our members. They tell us that in litigation cases companies from jurisdictions where lawyers lack privilege, like France, they feel at a distinct disadvantage in discovery when placed against companies from countries where privilege is recognized. That is one aspect, but there are two more. One is that the absence of in-house privilege forces companies to hire outside counsel at a significant cost for work that could be done better and more cost-effectively by their own legal department. And it also has an impact on legal talent recruitment and retention in multinational companies. Lawyers whose home office is in non-privilege countries will find that they are not assigned to the most important, difficult, and interesting multinational cases. This of course affects their opportunities for advancement. And the corollary is that the most talented lawyers, those with the most potential, will seek to move to other jurisdictions. To the point that some companies are choosing to relocate their entire legal departments.

Chai: Thank you, Veronica. I am Amy Chai and this is ACC's "In Brief – Advocacy Updates" on the topic of the rise of independence agreements as an instrument to protect legal privilege. We hope you have enjoyed this show. We hope to see you again soon in one of our programs!

Check out ACC?s Resource Library.

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