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Corporate Counsel

CARYL BEN BASAT AND JULIAN D. NIHILL

I. The Economic Espionage Act of 1996

The theft of trade secrets by foreign governments anxious to avoid the enormous expense of independent research is costing American industry, according to conservative estimates, tens of billions of dollars.¹ This relatively new phenomenon, called "economic espionage," has become a high priority for foreign intelligence operatives, both friend and foe, whose Cold War era efforts were primarily focused on the collection of military information.²

In early 1996 the FBI was investigating over eight hundred cases of economic espionage.³ Alleged perpetrators were from twenty-three different countries.⁴ Data in a variety of formats has been targeted for misappropriation, including bid proposals, production schedules, software, and schematic drawings.⁵ The common thread is the proprietary nature of the material. Unlike patented or copyrighted works, the value of trade secrets is in their unavailability to the public.⁶ Protection of this data, which is often the key to successful products and services, is essential to both the nation's economic health and security.⁷ Theft of trade secrets is by no means the exclusive domain of foreign intelligence agents, though. Private domestic competitors are coming

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1. H.R. REP. NO. 788, 104th Cong., 2d Sess. 5, 6 (1996); Sam Perry, *Economic Espionage and Corporate Responsibility*, CJ INTERNATIONAL ONLINE 1 (March-April 1995) <<http://www.acsp.uic.edu/OICJ/pubs/cji/110203.htm>>; *Economic Espionage, 1996: Hearings on Economic Espionage Before the House Judiciary Committee Subcommittee on Crime* (Statement of Louis J. Freeh, Director of the FBI), 104th Cong., 2d Sess. (May 9, 1996) <<http://www.fbi.gov/ecespio2.htm>>.

2. *Economic Espionage, 1996: Hearings on Economic Espionage Before the House Judiciary Committee Subcommittee on Crime*, *supra* note 1, at 3.

3. Douglas Pasternak and Gordon Witkin, *The Lure of the Steal*, 2 ONLINE U.S. NEWS (visited April 17, 1996) <<http://www.usnews.com/usnews/issue/spy.htm>>.

4. H.R. REP. NO. 788, *supra* note 1, at 5.

5. *Id.* at 4.

6. *Id.* at 4.

7. *Id.*

to see it as an acceptable alternative to research and development, and disgruntled employees are seeing it as an opportunity for both revenge and personal enrichment.⁸

The peculiar mismatch between new technological capabilities and the legal infrastructure regulating them has encouraged the expansion of economic espionage.⁹ Information can be duplicated, transmitted, and stored quickly, discreetly, and efficiently on computer diskettes or over the Internet.¹⁰ No goods or documents need ever be physically stolen or transported for a thief to reap the benefits of misappropriated proprietary information. Yet the federal statute most frequently used to prosecute economic espionage was, until recently, the Interstate Transportation of Stolen Property Act, 18 U.S.C. § 2314.¹¹ That statute was enacted in the 1930s to prevent criminals from transporting stolen property to other states and thereby evading local law enforcement's jurisdiction.¹² Its coverage is limited to the transportation of "goods, wares or merchandise."¹³ Since stolen information is not easily characterized as a "good, ware or merchandise," that statute has not been an effective tool for federal prosecutors in the war against economic espionage.¹⁴ In addition, while most states have civil remedies for the misappropriation of trade secrets, those remedies have not stemmed the tide of such misappropriation.¹⁵

On October 11, 1996, President Clinton signed the Economic Espionage Act of 1996, Pub. L. No. 104-294. The law was devised to directly and specifically address the growing problem of theft of trade secrets.¹⁶ It provides for both criminal charges and civil actions for injunctive relief, but the only party with standing is the United States.¹⁷ In addition, United States District Courts are vested with exclusive original jurisdiction over civil actions for injunctive relief.¹⁸

The law covers conduct committed within the United States. Its jurisdictional reach also extends to conduct committed outside the United States if the defendant is a United States citizen or permanent resident alien or an organization organized under American law, or if an act in furtherance of the misappropriation occurred within the United States.¹⁹ The law does not address a problem of growing concern to international corporate counsel, which is the misappropriation of American trade secrets abroad by foreign persons or entities. Limits imposed by the principle of sovereignty preclude such coverage, which can only come through international treaties and the enactment of local laws in the jurisdictions where such misappropriations are occurring.

The Economic Espionage Act identifies two separate offenses, economic espionage and theft of trade secrets.²⁰ The two are distinguished by the beneficiary of the misappropriation. The offense of economic espionage requires intent or knowledge that a foreign government, instrumentality, or agent will benefit.²¹ "Foreign instrumentality" is defined as "any agency, bureau,

8. *Id.* at 5.

9. *See id.* at 5, 6; Perry, *supra* note 1, at 2.

10. H.R. REP. NO. 788, *supra* note 1, at 5.

11. *Id.* at 6.

12. *Id.*

13. *Id.*, quoting 18 U.S.C. §§ 2314, 2315.

14. *See id.*

15. H.R. REP. NO. 788, *supra* note 1, at 6, 7.

16. *See generally* H.R. REP. NO. 788, *supra* note 1.

17. Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (to be codified in scattered sections of 18 U.S.C.).

18. *Id.* (to be codified as 18 U.S.C. § 1836).

19. *Id.* (to be codified as 18 U.S.C. § 1837).

20. *Id.* (to be codified as 18 U.S.C. §§ 1831, 1832).

21. *Id.* (to be codified as 18 U.S.C. § 1831).

ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm or entity that is substantially owned, controlled, sponsored, commanded, managed or dominated by a foreign government."²² "Foreign agent" is defined as "any officer, employee, proxy, servant, delegate, or representative of a foreign government."²³ If the offender knowingly engages in any of the prohibited conduct with the knowledge or intent to benefit these foreign entities, he is subject to a fine of up to \$0.5 million or imprisonment of up to fifteen years or both. If the offender is an organization, it is subject to a fine of up to \$10 million.²⁴ In addition, property derived from the proceeds or used to commit the prohibited conduct is subject to forfeiture to the United States.²⁵

The offense of theft of trade secrets requires the intent to convert a trade secret that is part of or connected to a product in interstate or foreign commerce, to the economic benefit of any nonowner of the secret.²⁶ It also requires intent or knowledge that the owner will be injured.²⁷ "Trade secret" is broadly defined as:

[A]ll form and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.²⁸

If the offender knowingly engages in any of the prohibited conduct, he is subject to a fine or imprisonment for up to ten years or both. If the offender is an organization, it is subject to a fine of up to \$5 million.²⁹ Also, as with economic espionage, the property derived from or used to commit the conduct is subject to forfeiture.³⁰

The prohibited conduct for both offenses can be summarized as taking, duplicating, or conveying without authorization, concealing or obtaining a trade secret, as well as receiving, buying, or possessing a trade secret with knowledge that it was obtained without authorization.³¹ In addition, both offenses include attempt, and also conspiracy if accompanied by an act in furtherance of the conspiracy.³²

The Economic Espionage Act explicitly excludes "... lawful activity conducted by a government entity of the United States . . .," as well as "the reporting of a suspected violation of law to any governmental entity of the United States . . . [with] lawful authority with respect to that violation."³³ It also explicitly permits federal judges to grant orders authorizing the interception of "wire, oral or electronic communications" for the investiga-

22. *Id.* (to be codified as 18 U.S.C. § 1839).

23. *Id.*

24. *Id.* (to be codified as 18 U.S.C. § 1831).

25. *Id.* (to be codified as 18 U.S.C. § 1834).

26. *Id.* (to be codified as 18 U.S.C. § 1832).

27. *Id.*

28. *Id.* (to be codified as 18 U.S.C. § 1839).

29. *Id.* (to be codified as 18 U.S.C. § 1832).

30. *Id.* (to be codified as 18 U.S.C. § 1834).

31. *Id.* (to be codified as 18 U.S.C. §§ 1831, 1832.)

32. *Id.*

33. *Id.* (to be codified as 18 U.S.C. § 1833).

tion of a suspected violation of the law.³⁴ In addition, it provides that the new remedies are not to preempt other remedies available through "... Federal, State, commonwealth, possession or territory law."³⁵

The Economic Espionage Act is a significant step in the direction of protecting trade secrets and other intellectual property from misappropriation. Since the law is new, and the technology creating the need for it is continually evolving, the responsibility for developing and refining its parameters will fall on the federal courts over the next few years.

II. Recent Developments in Attorney-Client Privilege*

A. INTRODUCTION

With the exception of the common law countries, the attorney-client privilege is typically embodied by a penal statute under which the disclosure of confidential information is considered a crime, or in ethical constraints imposed by the local bar association. In the absence of the wide ranging discovery available in common law countries, most civil law jurisdictions have not seen the need to develop a more sophisticated set of rules concerning the attorney-client privilege. As discovery becomes more widely available, many civil law jurisdictions, *e.g.*, France, Germany, Japan and the Netherlands, have seen developments in the law concerning attorney-client privilege.

England and Australia (but, surprisingly, not Canada) lead the common law jurisdictions with a slew of cases, many of them reflecting the changing role of lawyers as well as the increased intricacy of discovery in those countries.

B. AUSTRALIA

1. *The Evidence Act 1995*

The Evidence Act 1995 of the Commonwealth (the Act) was passed on February 7, 1995, and commenced operation on April 18, 1995. The Act governs the law of evidence for cases before the High Court of Australia, the Federal Court of Australia and the Family Court of Australia. It is intended that the various Australian states will adopt corresponding legislation to apply in their own courts. To date only New South Wales has done so.

Under the Act, the test to be applied in determining the existence of attorney-client privilege,

34. *Id.* (to be codified as 18 U.S.C. § 2516 (1) (c)).

35. *Id.* (to be codified as 18 U.S.C. § 1838).

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known as legal professional privilege in Australia, is the dominant purpose test. Prior to the enactment of the new legislation, there had been considerable discussion as to whether the test for legal professional privilege in Australia should be the sole purpose test as enunciated in *Grant v. Downs* (1976) 135 CLR 674, or the dominant purpose test which has been adopted in the United Kingdom. Under the sole purpose test, legal professional privilege is only available in the case of documents or communications which are brought into existence for the sole purpose of submission to legal advisers for advice, or for use in legal proceedings. Under the dominant test, which was set forth in the United Kingdom in *Waugh v. British Railway Board* [1980] AC 521, the test for the existence of the privilege is satisfied if the relevant purpose is the dominant purpose, notwithstanding that there may be other purposes.

Section 118 of the Act now provides that legal professional privilege will apply to confidential communications between a lawyer and a client made for the dominant purpose of providing legal advice to the client. Section 119 of the Act provides that legal professional privilege will also apply to confidential communications between a lawyer and client made for the dominant purpose of providing or receiving legal services in connection with pending or anticipated litigation. Under Sections 118 and 119, the privilege extends to documents prepared for the same purposes. Both sections also provide that the privileged communications or documents are not to be disclosed if the client objects. The Act also extends the law of privilege to communications, not involving lawyers, to or from an unrepresented party with the dominant purpose of preparation for or the conduct of proceedings.

2. Loss of Privilege

Section 122 of the Act provides that, subject to certain exceptions, attorney-client privilege will be deemed waived if the substance of the evidence is knowingly and voluntarily disclosed to another person. In *Ampolex Limited v. Perpetual Trustee Co. (Canberra) Limited* (1996) 137 ALR 28, the Supreme Court of New South Wales was required to consider what was meant by "disclosure of the substance of the evidence." In that case Ampolex was seeking a declaration relating to the conversion ratio of particular convertible notes. In response to a takeover bid Ampolex had distributed a statement to its shareholders and the company making the offer accompanied by an independent valuer's report. The independent valuer's report contained the following statement in relation to the conversion ratio: "Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position."

One of the parties in the proceedings served a notice on Ampolex requiring Ampolex to produce the documents containing the legal advice referred to on the basis that the statement contained in the valuer's report had disclosed the substance of the legal advice. The trial judge upheld the claim for access to the documents on the basis that there had been a knowing and voluntary disclosure of the substance of the legal advice within the meaning of Section 122(2) of the Evidence Act 1995 (New South Wales), which is identical in its terms to The Evidence Act 1995 of the Commonwealth. Ampolex then unsuccessfully attempted to obtain a stay from the Court of Appeal. Ampolex has now sought a stay from the decision of the Court of Appeal in the High Court.

The significance of the *Ampolex* decision is its potential application to the usual practice in litigation in Australia of one party informing the other party that it has counsel's opinion to support its position. In light of the *Ampolex* decision, it may be that such a statement may result in counsel's opinion, and all of the material with which counsel was briefed, becoming the subject of disclosure on the basis that reference to the existence of the supporting opinion gave rise to a loss of privilege.

C. AUSTRIA

While there have been no recent developments in Austrian case law concerning attorney-client privilege, there has been some discussion about a future change in law concerning the eavesdropping on an attorney's conversation with clients on an electronic (nonwire) basis. The discussion is currently held on a political level and draft legislation has not yet been presented to the parliament for comment.

D. CANADA

Recent civil procedure and evidence digests in this jurisdiction reveal no new developments concerning attorney-client privilege. The most recent developments in this area of law have pertained more to the protection of information provided to third parties during the course of the discovery process, which has been the subject of recent legislation known as the "implied undertaking rule."

E. CAYMAN ISLANDS, B.W.I

In the Cayman Islands, the confidential nature of client information is protected by both the common law and statute. The principal applicable statute is the Confidential Relations (Preservation) Law (1995 Revision) (Confidentiality Law). Despite the general protection afforded to attorney-client communications under the Confidentiality Law, under an order of the Proceeds of Criminal Conduct Law 1996 it is the duty of professional advisers to report suspicious transactions to the competent authorities.

F. ENGLAND

1. *Absolute Nature of Legal Professional Privilege*

In England the attorney-client privilege is referred to as the legal professional privilege. The House of Lords recently confirmed the absolute nature of the legal professional privilege in *R. v. Derby Magistrates' Court, ex parte B and another appeal*, 1 App. Cas. 487 (1996), which was heard on October 19, 1995. In this case, the court looked into the historical development of the legal professional privilege and the underlying principles on which it is based. At issue in *Derby* was whether the legal professional privilege was an absolute privilege or whether it should yield in the presence of greater public interests, when for example, the client could be shown to have "no recognizable interest in continuing to assert the privilege." The House of Lords confirmed that the privilege is an absolute privilege of the client (it cannot be waived by counsel) that applies to all oral and written communications between the client and client's counsel. The privilege is unlimited in duration (once privileged, always privileged), and does not expire when the client is no longer in danger of prosecution. The privilege is justified on the basis that without it, people would not properly be able to defend themselves because they would not seek assistance from counsel if that counsel might be compelled to testify. Lord Taylor of Gosforth CJ. concluded that the privilege is "much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests." The House of Lords held that the privilege cannot be overridden even if the consequence is to deprive a court of evidence relevant to a person's innocence or guilt on a murder charge. Although the Lords recognized the privilege could be limited or indeed wholly removed by statute, they confirmed that Parliament had never yet disturbed the privilege as recognized by the courts.

2. *Exception to the Legal Professional Privilege*

In the case of *In re L.*, the House of Lords held that litigation privilege cannot be relied upon in “nonadversarial proceedings” under the Children’s Act 1989. It remains to be seen whether this principle will be extended to other types of litigation which are considered to be “nonadversarial.”

Another development which, at first glance, appears to be of a highly technical nature but is, in fact, of considerable commercial significance is the ruling of the Court of Appeal in *GE Capital v. Bankers Trust*, in which it was held that where a document contains some material which is relevant to the issues in an action and some material which is not so relevant, the irrelevant material may be redacted or blanked out before the document is produced for inspection. The same rule applies where a document contains some privileged material. The full implications of this decision are only beginning to be realized. In the long term, it may make significant changes in the way in which lawyers in England prepare documents for the purpose of disclosure.

3. *Advice on Business Transaction*

In *Nederlandse Reassurantie Groep Holding NV v. Bacon & Woodrow* [1995] 1 All E.R. 976, the court considered whether legal professional privilege could be attached to general commercial advice on a transaction. The Court held that a solicitor’s professional duties were not restricted to advice on matters of law or construction, but included advice on the commercial wisdom of entering a particular transaction in respect of which legal advice was sought.

4. *Mistaken Disclosure of Privileged Documents*

The legal professional privilege in the context of the mistaken disclosure of privileged documents was addressed in *International Business Machines Corp. and another v. Phoenix International (Computers) Ltd.* [1995] 1 All E.R. 413. In this case the court considered the implications when documents are mistakenly disclosed and then inspected and copied by the other party. The defendants carrying out discovery under the pressure of time mistakenly disclosed documents that were covered by privilege, such as a legal bill and legal advice. The court was asked to exercise its equitable powers to issue an injunction restraining use of the documents and ordering their return on the basis that they were privileged and disclosed by reason of a mistake that would have been obvious to the hypothetical solicitor. The court granted the motion, stating that it was merely necessary to consider whether the reasonable solicitor would have realized that it had been disclosed by mistake. In reaching its decision the court took into account the nature of the disclosed documents, the complexity of the discovery, and the surrounding circumstances relevant to how it was carried out.

5. *Common Interest Privilege*

There have been a number of developments in the doctrine of “common interest privilege” defined by Lord Denning MR in *Buttes Oil Co. v. Hammer* (1981) 1 QB 233 as follows:

That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing along [*sic*] him—who have the self-same points as he—but these others have not been made parties to the action . . . each can avail himself of the privilege in aid of litigation . . . even though . . . when litigation is afterwards commenced, only one of them is a party to it.

In *Formica Ltd. v. ECGD* [1995] 1 Lloyd’s Rep. 692, Colman, J. held that a credit insurer and its insured have a common interest privilege in connection with attempts by the insured

to recover sums due from its customers. Accordingly the credit insurer was entitled to production of documents in connection with such attempts, even if such documents would otherwise be privileged.

In *Svenska v. Sun Alliance* [1995] 2 Lloyds Rep. 84, Colman, J. held that common interest privilege can apply to documents produced in connection with the giving of legal advice as well as those prepared in contemplation of litigation.

In *Commercial Union Assurance Co. plc v. Mander*, June 12, 1996, plaintiff insurers sued defendant reinsurers. The defendants denied liability on the grounds that no claim had in fact arisen under the reinsurance policy and that, in any event, they had avoided it. They sought discovery of the plaintiff's correspondence with its loss adjusters and solicitors on the grounds of common interest privilege. Moore-Bick, J. accepted that, in the normal course, common interest privilege would arise as between insurer and reinsurer whether there was a "follow the settlements" clause and the insurer was seeking to minimize loss for the benefit of both. However, he dismissed the application, on the grounds that the defendants could not at the same time seek to avoid the contract and seek to claim the benefit of it, by relying on common interest privilege which could only arise on the premise that the contract was still in existence.

G. FRANCE

1. *Attorney-Client Privilege in the Criminal Courts*

Attorney-client privilege has existed in France for many years. It was embodied in Article 378 of the former French Penal Code. Article 378 provided that no attorney could reveal confidential information which a client had given him in the course of its professional dealings. This applied to all testimonies in any court of law and therefore any divulgence by the attorney of such information, whether written or oral, was regarded as a criminal offense. The client could, however, allow the attorney to make divulgence under certain circumstances and there were also a number of exceptions which had been decided by the courts.

When the new penal code was elaborated and enacted on March 1, 1994, the provisions regarding attorney-client privilege were not substantially modified. Therefore the principles under which attorneys have been working for years in connection with privilege seemed very safe. However, this has not been the case recently.

Judges in the criminal courts and, more particularly, investigating magistrates (*juges d'instruction*) who are given very wide powers, have found that in a number of cases submitted to them, lawyers had helped their clients in committing a crime. As early as 1975 in the *Rocbenoir* case, the court found that the privilege did not exist when the attorney himself assisted the client in committing a fraud. In that case, the attorney was to be regarded as an accomplice and therefore guilty. Under circumstances where the attorney is guilty, the attorney-client privilege does not exist to the extent the documents found in the lawyer's offices are material in establishing the fault of the lawyer himself. The decision of the *Rocbenoir* Court was unanimously approved but it has not seemed that the full consequences of this decision were really understood at that time. Judges say that merely claiming that the attorney has been an accomplice is sufficient to warrant having possession turned over to the judge.

It is only recently that the matter has been recognized as a serious one, following investigations by a number of judges who were following the steps of their Italian counterparts in corruption cases. The matter became much more serious when the judges claimed that the attorney-client privilege exists only with respect to the services rendered by an attorney when defending his client in a pending criminal case. In other words, the position of these judges is that the privilege exists

only with respect to the criminal action in which an attorney is defending his client; when the attorney has acted as counsel to his client or possibly in the course of defense in a civil court, or even a different criminal, the privilege would not obtain. The matter had been confirmed by decisions of the Cour de Cassation, and the law, which has recently been modified, provides that the privilege applies in all matters ("en toutes matières" law n° 93.2 dated January 4, 1990).

Nevertheless a decision dated May 17, 1996, rendered by the Court of Appeals of Paris held that documents which do not concern the defense or the person indicted may not be considered as subject to the privilege.

A decision of the Cour de Cassation dated September 20, 1995, would seem however to cast a different light. In this decision, the Cour de Cassation set aside a decision of the Court of Appeals of Rennes according to which the Court of Appeals had to explain that letters and other documents which were found in a lawyer's office were covered by the privilege, in accordance with article 66.5 of the law of December 31, 1971, as amended by law 93.2 dated January 4, 1993. The court had to examine whether those documents were necessary to show that the lawyer was an accessory to the facts referred to in the criminal complaint.

2. *New Law*

Article 66.5 of the law of December 31, 1971, as amended by law 93.2 dated January 4, 1993, provides a limited confidentiality for all matters exchanged between lawyer and client. Despite the clarity of the law, the Criminal Court of Appeals has made a distinction between lawyers who are consulting and lawyers who are litigating, and has provided that the attorney-client privilege does not apply unless the lawyer is involved in litigation. Presently pending in the legislature, and passed by the Chamber of Deputy, is a new version of Article 66.5, which would make it clear that the attorney-client privilege applies regardless of whether the information is exchanged during consultations or during litigation. Even though the French Government has strongly opposed this amendment, it is very likely that the new law will be enacted. The new law would reaffirm the principle that a lawyer's communications with his client are entitled to full protection.

H. GERMANY

1. *Duty of Confidentiality Codified in § 43a BRAO*

Before 1994, the Federal Code for Lawyers (Bundesrechtsanwaltsordnung or BRAO) only imposed on the lawyer a general duty to work in a reliable, thorough, conscientious, and careful manner such that he proves himself worthy of the respect and trust of others. The duty to keep everything confidential that the lawyer was informed of in the course of his profession was merely implied but not explicitly set out. The amendment to the BRAO in 1994 added § 43a and explicitly laid down the duty of the lawyer to keep information obtained from clients confidential. This duty is very wide and encompasses all information that the lawyer receives in the course of exercising his profession. The duty does not apply, however, to facts that are obvious or to facts which do not need to be kept confidential. A breach of § 43a can be punished by the attorney's self-regulatory body with a fine of up to DM 50,000 (approximately \$34,000) or suspension from the bar. The Federal Court of Constitution decided on 9 August 1995 that the license to practice as an attorney can be revoked if information is passed on to third parties and can lead to an inhuman treatment of the client. The decision deals with East German lawyers who passed information to East German State Authorities. Their license was then revoked. Reference: *Anwaltsblatt* 1996, 104.

2. Confidentiality and "Bugging"

In political discussions, it has been recently suggested, via changes to the Constitution as well as the Criminal Procedure Code (StPO), to permit limited bugging of suspected criminals. It was originally uncertain whether this would include the possibility of bugging the offices of attorneys who represented suspected criminals. This idea has been dropped, but it is still proposed to allow bugging homes of suspected criminals. However, an attorney's office could be bugged if he, himself, was suspected of a crime.

One obvious implication is that any conversation between a suspected criminal and his lawyer either in his home or from his phone would be disclosed due to the bugging. There would be no protection to the basic confidential relationship between a lawyer and his client. This concept would supposedly protect the parties in a confidential relationship (*i.e.*, attorney-client) from being prosecuted with evidence obtained during the bugging process, but there is the possible complication of how information about third parties will be handled. Another potential problem is that even if the bugging data is not used as evidence against the attorney's client, it would be difficult to prove that the investigation authority had not used it to obtain further "legal" evidence.

I. HONG KONG

1. *The Legal Services Legislation Bill*

The only recent development in the law of Hong Kong concerning privilege between solicitor and client is contained in a bill currently before the Hong Kong Legislative Council. The Legal Services Legislation (Miscellaneous Amendments) Bill proposes, *inter alia*, that limited companies be allowed to register as "solicitor corporations" which would be authorized to do anything that only a solicitor may lawfully do (with the exception of anything that can only be done by a solicitor as a natural person). It is intended that this will pave the way for law firms with limited liability.

Should this aspect of the Bill become law, a section 7J would be added to the Legal Practitioners Ordinance (cap 159). The intended section 7J reads:

Solicitor-client privilege exists between a solicitor corporation and a client of the corporation in the same way that it exists between a solicitor and a client of the solicitor.

J. ITALY

There have been no significant legislative changes in the last two years related to the attorney-client privilege in Italy. In a recent unpublished decision by the Tribunal, a lawyer accused of being an aider and abettor to a public official in accepting a bribe in connection with the sale of a company was convicted and sentenced to prison based primarily on evidence obtained from wire-tapping telephone conversations between the lawyer and his client. Italian lawyers are dismayed by this recent decision, which is being appealed, because the conversations used to convict the lawyer were presumed to be confidential under the attorney-client privilege.

K. JAPAN

1. *New Civil Procedure Law*

Attorney-client privilege was recently acknowledged by statute for the first time in Japan under the new Civil Procedure Law, but this law merely reflects recent developments in case

law (involving doctor's privilege) and adds nothing new to the existing case law. Because the scope of discovery has been very limited in Japan, attorney-client privilege has not been a very important issue and up until now there have been no court cases dealing with this issue. The new Civil Procedure Law, however, is intended to expand the breadth of documents subject to discovery. As a result of this change, disputes and cases involving the issue of attorney-client privilege may increase in the future.

Before the enactment of the new Civil Procedure Law, privilege was mainly treated in connection with the disclosure of medical documents. There were several court cases which ruled that a doctor is not obligated to disclose documents which record communication with, or medical history or diagnosis of, his or her patients. In the absence of a specific statute concerning a doctor's privilege, the courts based their rulings on an interpretation of the current Civil Procedure Law (Art. 281) which stated that doctors, attorneys, and other professionals are not obligated to testify. Japanese lawyers have interpreted the rulings regarding the disclosure of medical documents to imply that correspondence with their clients is privileged.

The new Civil Procedure Law of Japan (1996 Legislation Number 109), which replaces the former Civil Procedure Law of Japan enacted in 1890, should be implemented within a few years. Statutory provisions regarding attorney-client privilege were included under Article 220.4 of the new Civil Procedure Law. Article 220.4 states that any document containing information obtained through the conducting of business by a doctor, dentist, attorney, patent attorney, notary public, or certain other government officials for which confidentiality has not been waived shall not be subject to submission to a court. As you can see, this provision is a reflection of the understanding of the case law currently held by Japanese lawyers regarding privilege. At this stage there are no extensive discussions as to how to interpret the language in Article 220.4, but the expansion of the scope of documents subject to discovery under the new law may result in greater scrutiny of documents which are considered privileged.

L. NETHERLANDS

1. *Scope of Attorney-Client Privilege*

The case law with regard to the attorney-client privilege in the Netherlands often centers around the question whether the information with regard to which the privilege is asserted falls within the scope of the privilege, *i.e.*, has been entrusted to the attorney in connection with his profession. It has been held that information which is communicated to the attorney during settlement negotiations is protected under the attorney-client privilege, unless these negotiations have resulted in the conclusion of an agreement (Decision of the Supreme Court of 12 December 1958, *Nederlandse Jurisprudentie* 1961, 270).

The scope of the privilege was at issue in a recent decision of the President of the District of Rotterdam (Decision of March 23, 1995, discussed in *Advocatenblad*, of May 26, 1995, pp. 473-76). In that case the question arose whether the attorney-client privilege (laid down in Article 53a of the Act on Government Taxation (*Algemene wet inzake rijksbelastingen*) which provides that those who have an obligation of secrecy may refuse to give assistance to the tax authorities when collecting taxes from third parties) could be asserted by an attorney who was asked by the tax authorities to provide them with information regarding the interest received on money, which he held in custody on behalf of his clients. According to the President, in general, information in connection with money held by the attorney on behalf of his client could not be regarded as being "entrusted to the attorney in connection with his function as

attorney." This might be different under special circumstances, but evidence supporting the existence of these circumstances was not presented; the attorney-client privilege could therefore not be asserted in that case.

In two cases which were decided on the same date by the Commercial Tribunal the attorney-client privilege was asserted by two attorneys in connection with a request by the Dutch Central Bank to provide it with the name and address of the foreign person from whom the attorneys had received a sum of money. The request was based on the Act on Foreign Monetary Relations (*Wet financiële betrekkingen buitenland*).

In the first case the attorney had only acted as a middleman. Upon receiving the money from his client, the attorney had transferred the money to a third party. In that case, according to the Commercial Tribunal, the attorney-client privilege could not be asserted, because by paying the third party it had become public that a payment was made to the attorney and by whom. Therefore, this was not information "entrusted" to the attorney, which would fall within the scope of the attorney-client privilege.

In the second case, however, the attorney did not transfer the money to a third party but kept it in his possession. The Commercial Tribunal decided that in that case the attorney-client privilege could be asserted. The rationale underlying the obligation of secrecy, *i.e.*, that each person must be able to seek advice or assistance from an attorney without having to fear that the information communicated to the attorney will become public, was a major consideration for the Commercial Tribunal in coming to its decision. The Commercial Tribunal dismissed the argument that the attorney-client privilege could not be asserted because the Act on Foreign Monetary Relations did not contain a specific provision granting the attorney-client privilege. According to the Commercial Tribunal, the specific interest underlying the obligation of secrecy outbalances the general legal provisions of the Act on Foreign Monetary Relations which had been formulated without taking this specific interest into consideration.

2. *The Competition Act*

On May 2, 1996, the Minister of Economic Affairs submitted a long expected Bill for a new Competition Act to Parliament. It is expected that this law will become effective during the course of 1997. The new Competition Act will be based on a prohibition system; competition restricting conduct, unless eligible for exemption, is prohibited. In this respect, this new Act differs from the present Economic Competition Act (in Dutch: *Wet Economische Mededinging*), which is based on an abuse system: competition restricting conduct is allowed, until determined otherwise. The new competition regime will be in close keeping with Articles 85 and 86 of the EC Treaty. The core of the new law will consist of two prohibition provisions: a provision containing a prohibition against arrangements restricting competition and concerted practices between companies, pursuant to which exemption is possible, and a provision containing a prohibition against the abuse of an economic dominant position by companies. Appeals against decisions rendered pursuant to the new Competition Act shall be made exclusively to the District Court in Rotterdam.

Under Netherlands administrative law, persons who have a statutory duty of confidence as a result of their profession cannot be forced to give access to documents which are in their possession as a result of the exercise of their profession. This is the basis for the attorney-client privilege. Under Article 51 of the new Act an extended attorney-client privilege for correspondence between attorneys admitted to the bar in any country in the world and their clients will apply. Pursuant to Article 51 of the proposed Act, the privilege covers attorney-client correspondence which is found at the premises of an undertaking. Documents which contain

a summary of advice obtained of outside counsel for internal purposes are also covered by the privilege. The new rule reflects the case law of the European Court of Justice in competition cases. *AM&S*, 155/79, ECR 1982, 1575; *Hilti*, T-30/89, ECR 1990, pp. 11-163.

M. PANAMA

There have been no recent developments under Panama law related to attorney-client privilege. An Executive Decree that was adopted by the President as part of the continuing effort to prevent drug-related money laundering in Panama may, however, impact the attorney-client privilege in Panama.

The Decree provides, among other things, that registered agents of Panama corporations are under an obligation to "collaborate" with the criminal investigative authorities (*funcionarios de instrucción*) and judges that are investigating or trying drug trafficking-related crimes, including money laundering. This Decree provides that a registered agent is under an obligation to "know its client" and keep on file sufficient information to identify him, when such information is requested. There are no reported cases interpreting this Decree or dealing with the more difficult issue regarding the extent to which such a regulatory provision can limit the attorney-client privilege, which is contained in a statute, namely the Judicial Code.

N. PEOPLE'S REPUBLIC OF CHINA

1. *The Lawyers Law*

The Standing Committee of the National People's Congress promulgated on May 15, 1996, the PRC, *Lawyers Law* (the *Lawyers Law*), which replaced the *Provisional Regulations of the PRC on Lawyers* as of January 1, 1997. Article 33 of the *Lawyers Law* includes the following provision regarding the obligation of PRC attorneys to maintain the confidences of their clients:

Lawyers shall maintain the confidentiality of any State secrets and commercial secrets of the parties concerned that they learn of in the course of their practice. Lawyers may not reveal the private affairs of the persons concerned.

Article 44 of the *Lawyers Law* provides that in instances where a lawyer reveals the commercial secrets or private affairs of a party, the Ministry of Justice (or its locally delegated branch) shall issue a warning or, in serious cases, confiscate any illegal income and require that the lawyer cease practicing for a period of between three months and one year.

In many respects, the *Lawyers Law* codifies existing practices and, at least with respect to a lawyer's obligation to safeguard the confidences of his clients, does not deviate dramatically from the *Provisional Regulations of the PRC on Lawyers*. Lawyers are obligated to "treat as confidential any State or personal secrets which might come to his knowledge in the course of his work," although unlike in the new *Lawyers Law*, penalties for a breach of this duty are not articulated.

2. *All-China Lawyers' Association*

One significant change brought about by the *Lawyers Law* is the formal recognition of the All-China Lawyers' Association (established in the mid-1980s). To that end, the *Lawyers Law* specifies that the organization shall provide education in, and conduct investigation and supervision of, professional ethics of lawyers. Many view this as a positive step towards self-regulation of lawyers in China, although it remains to be seen how the All-China Lawyers' Association will implement its investigatory and supervisory responsibilities. It is certainly possible that the All-China Lawyers' Association, perhaps in conjunction with the Ministry of Justice, will, in

the future, issue more detailed provisions regarding the attorney-client privilege to supplement the very broad provision under the existing regulations.

3. *Foreign Firms*

Foreign law firms in China are governed by the *Interim Provisions of the Ministry of Justice and the State Administration for Industry and Commerce on the Establishment of Offices of Foreign Law Firms in China* (July 1, 1992). These provisions primarily detail the registration requirements for foreign law firms and do not address the obligations of foreign lawyers to maintain the confidences of their clients. Nonetheless, foreign lawyers practicing in China are bound by the ethical standards of their home jurisdictions. The strength of these provisions is currently being tested in the PRC following a recent demand by the Ministry of Justice that all registered foreign law firms provide the Ministry with the names of their clients, the subject matter of the representation, as well as the approximate size of the projects. While foreign law firms have thus far avoided such disclosure by asserting that such information is privileged and confidential, it remains to be seen whether or not the Ministry of Justice will accept this line of reasoning and not press the foreign lawyers for disclosure.

O. SPAIN

1. *The New Criminal Code*

The attorney-client privilege is regulated, both as a right and as a duty, by the General By-laws for the Legal Profession of 1982 (*Estatuto General de la Abogacia*) and by the By-laws for Court Solicitors (*Estatuto General del los Procuradores de los Tribunales*), both enacted in 1982.

The latest development in Spanish law regarding this issue is contained in the new Criminal Code which has been in force since May 26, 1996.

Under this Code, professionals who disclose their clients' confidential information are subject to (i) four years of imprisonment and (ii) confiscation of their license to practice for a period of two to six years (the previous Code only contemplated a fine ranging from 100,000 to 500,000 Pesetas). The offended party must report this type of violation and may also release the offender from liability (this last aspect has lately been subject to many academic arguments). It is important to point out that the new Code refers to crimes committed by "professionals" without further defining this term.

P. SWITZERLAND

In Swiss legal ethics, much credence is given to a lawyer's independence as it is believed that outside influences are highly damaging to the degree of trust necessary for the lawyer-client relationship. *Zeitschrift für Schweizerisches Recht* (Journal of Swiss Law), Band 115, 1996 p. 311. Thus, the question of whether a lawyer who works for a corporation is entitled to claim the attorney-client privilege is subject to dispute. Questions also arise when a lawyer involved in a business enterprise wishes to claim the privilege. Although lawyers cannot incorporate in Switzerland, there is considerable discussion concerning the future possibilities of relaxing this and, in connection with this, further discussion regarding the extent to which such corporations should be able to claim the privilege. The law is not yet fully developed on this subject; nevertheless, there are a number of recent commentaries and cases concerning the right to claim the privilege where an issue of independence arises.

A lawyer involved in an investment or profit-making enterprise, particularly where he stands to enjoy a profit or benefit, cannot claim the privilege with respect to such undertakings. Hence, there are a number of Swiss Supreme Court decisions holding that where a lawyer is involved in a matter in which his role is more of a businessman than that of a lawyer, he cannot claim the privilege. Such matters tend to be determined on a case by case basis. Sometimes there is an evaluation as to whether the privilege is being claimed more for one's "lawyer-like" duties as opposed to "business-like" ones and granted accordingly.

It is worth noting that both decisions and regulations regarding the attorney-client privilege in relation to data banks and information protection in general are not yet developed; but they are being decided and are expected to be released in the near future.

Q. OTHER JURISDICTIONS

There have been no significant developments in attorney-client privilege in the last two years in the following jurisdictions: Argentina; Bahamas; Belgium; Bermuda; Bolivia; British Virgin Islands; Ecuador; Mexico; Monaco; Russia; Singapore; Trinidad; and Turkey.

