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Abstract

This Note discusses whether the attorney-client privilege applies to Japanese in-house legal personnel who are not members of any country's bar. Part I defines the attorney-client privilege, and explains what communications the privilege protects. Part I also compares the legal systems of Japan and the United States. Part II examines case law and commentary on the issue of applying the privilege to non-US attorneys who are not admitted to any bar. Part III argues that the arguments for applying the attorney-client privilege to non-US, non-bar in-house legal personnel are particularly effective considering the structure of the Japanese legal system. This Note concludes that US courts should apply the attorney-client privilege to Japanese corporate quasi-lawyers.

INVOKING THE U.S. ATTORNEY-CLIENT PRIVILEGE: JAPANESE CORPORATE QUASI-LAWYERS DESERVE PROTECTION IN U.S. COURTS TOO

*Jason Marin**

INTRODUCTION

In the multinational corporate world, corporations often enter into international transactions.[1] Japanese corporations frequently engage in transactions for the sale of goods in the United States.[2] Japanese corporations either sell products directly to distributors or through a U.S. subsidiary.[3] U.S. plaintiffs sometimes bring suit against the Japanese corporations.[4] Be-

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1. *See* Lucinda A. Low, *Virtually All Areas of Law Profession Face Globalization*, NAT'L L.J. Aug. 5, 1996, at C9 (explaining increase in international transaction frequency).

2. *See* Mitsuo Matsushita, *A Japanese View of U.S. Trade Law*, 8 Nw J. INT'L. L. & BUS. 29, 29 (1987) (explaining that United States is largest single nation market for Japanese products). Japanese products sold in the United States include cars, personal electronics, and fax paper. *See* Laura Fraedrich, *The Japanese Minivan Antidumping Case: How American Manufacturers Lost the Legal Battle But Won the War*, 2 GEO. MASON L. REV. 107, 107 (discussing legal issues arising out of competition between U.S. and Japanese minivan manufacturers); Zenith Radio Corp. v. United States, 710 F.2d 806 (involving legal issues arising with Japanese television manufacturer); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 2 (1st Cir., 1997) (discussing Japanese corporation sales of fax paper in United States).

3. *See* OBTAINING DISCOVERY ABROAD; ANTITRUST TRIAL PRACTICE HANDBOOK SERIES, ABA 14 (1990) (explaining non-U.S. corporation's use of U.S. subsidiaries, branches, and affiliates). Most major Japanese banks, manufacturing companies, and trading companies have U.S. subsidiaries. *See* E. Charles Routh, *Litigation Between Japanese And American Parties in* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 188, 189 (1978) (discussing bank and corporate subsidiary functions); *see generally In re: Japanese Electronic Products Antitrust Litigation*, (D.C. MDL No. 189) 723 F.2d 238, 251 nn.3 & 4 (3d Cir. 1983) *rev'd*, 475 U.S. 574 (1986) [hereinafter *Japanese Electronic Products*] (listing some subsidiaries of major Japanese corporations). Subsidiaries listed include Sony Corporation of America, a subsidiary of Sony Corporation; Mitsubishi International Corp., a subsidiary of Mitsubishi Electric Corporation; Matsushita Electronics Corporation of America ("MECA"), Matsushita Electric Trading Co., Matsushita Electric Corp., and Quasar Electronics Corp., subsidiaries of Matsushita Electric Industrial Co., Ltd. *Id.*

4. *See* Daiske Yoshida, Note, *The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals* 66 FORDHAM L. REV. 209, 209 (1997) (discussing significant increase in U.S. suits involving non-U.S. parties). For example, a plaintiff may challenge the selling practices of such Japanese corporations as violating the U.S. antitrust laws. *See* James W. Perkins, Comment, *In Re Japanese Electronic Products Antitrust Litigation: Sovereign Compulsion, Act of State, and the Extraterritorial Reach of the United States Antitrust Laws*, 36 AM.U.L. REV. 721, 721 (1987) (discussing frequency of U.S. antitrust suit against Japanese corporations); *see also* The Sherman Act, 15 U.S.C. §§ 1-

cause the suits involve U.S. law, assuming personal jurisdiction[5] can be found, the suits are brought in U.S. courts.[6] U.S. courts will apply the U.S. Federal Rules of Civil procedure,[7] including the rules for pre-trial discovery.[8] The United States has special

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7(1982)(defining and governing U.S. antitrust law); *see* The Clayton Act, 15 U.S.C. §§ 12-18 (1982)(covering monopolization through stock or asset acquisition). The focus of most U.S. antitrust cases tends to be on Sections 1 and 2 of the Sherman Act and Sections 3 and 4 of the Clayton Act. *See* Perkins, *supra*, note 4, at n.1 (explaining use of Clayton and Sherman Acts in antitrust cases). Japanese corporations are not excused from U.S. antitrust law. *Id.* (explaining applicability of U.S. antitrust laws). The antitrust acts will be applied to U.S. foreign commerce as long as a substantial direct and foreseeable effect restraining U.S. commerce exists. *See Foreign Trade Antitrust Improvement Act of 1982*, 15 U.S.C. § 6(a)(1982 & Supp. 1986) (creating stream of commerce jurisdiction for U.S. antitrust cases). This issue can also arise if the Japanese corporation sues a U.S. corporation in U.S. court. *See* Gary D. Fox, *Discovery from Japanese Companies*, 22 TRIAL 18, 18 (Aug. 1986) (discussing applicability of attorney-client privilege to Japanese corporate party to U.S. lawsuit, regardless of whether corporation is plaintiff or defendant). The actual issue of the case does not change the issues regarding applicability of the privilege. *Id.*

5. *See* Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction Over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 357 (1996) (examining issues of personal jurisdiction over non-U.S. parties in U.S. courts). A court must have personal jurisdiction over a party before the court can exercise any power over that individual. *See* Pennoyer v. Neff, 95 U.S. 714, 732 (1877). The court establishes valid personal jurisdiction over an individual in one of two ways first, the defendant may consent to the forum's jurisdiction; second, the defendant may have "minimum contacts" with the forum. *Id.*

6. *See* Yoshida, *supra* note 4, at 210 (explaining U.S. antitrust plaintiffs' preference for U.S. courts). The U.S. courts are preferable for a variety of reasons. *Id.* Procedural differences make it more likely that an antitrust plaintiff can win in U.S. court. *Id.* Juries in U.S. courts usually award larger damages than non-U.S. courts, and often award multimillion-dollar damages. *Id.* at 209

7. *See* FED. R. CIV. P. § 14 (1993) (governing procedure for U.S. civil trials). If a non-U.S. corporation or its U.S. subsidiary violates U.S. antitrust laws, it should be treated no differently than a domestic corporation. *Id.* By reaping the benefits of business contracts in the United States, the non-U.S. corporation should expect that they might be sanctioned under U.S. law. *Id.*; *see* Perkins, *supra* note 4, at 725 (considering U.S. antitrust law's application to non-U.S. parties). The United States and Japan have entered into a Friendship, Commerce and Navigation Treaty ("FCN Treaty"). *See* Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 (providing that Japanese companies engaging in business in United States will receive same treatment as U.S. corporations). The FCN Treaty does not protect a Japanese corporation from U.S. law, it only ensures that a corporation will receive equal treatment under the law. *See* Beth Ann Isenberg, Note, *The Evolving Conflict Between Employment Discrimination Laws and Immunity Under Title VII of the Civil Rights Act and Article VIII of the FCN Treaty Between The United States and Japan - The Papaila Case*, 60 ALB. L. REV. 1441, 1442 (1997) (examining the effects of the FCN treaty on employment discrimination actions involving Japanese corporations in U.S. courts).

8. *See* FED. R. CIV. P. 26-36 (providing rules for discovery in U.S. courts); *see Patent Protection in Japan*, East Asian Executive Reports, Dec. 15, 1997 [hereinafter E.A.E.R.]

discovery rules for non-U.S. parties to a dispute.[9] These special rules outline the procedure for applying the normal federal discovery rules to documents and individuals located in the non-U.S. country.[10] The U.S. Department of State[11] has defined a procedure for taking evidence under the federal rules both from willing and unwilling non-U.S. individuals.[12] Once discovery is underway, the U.S. party usually requests all documents relating to the case.[13] The Japanese corporation may resist producing

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(defining pre-trial discovery as devices which may be used prior to trial to discover facts and information relating to case and prepare for trial).

9. *See* OBTAINING DISCOVERY ABROAD, *supra* note 3, at 14 (explaining discovery rules' applicability to non-U.S. parties). Persons taking evidence from a non-U.S. jurisdiction can follow the Federal Rules of Civil Procedure or the guidelines of the The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention"). *See* Anna Torriente, *Obtaining Extraterritorial Discovery in U.S. Courts after Aerospatiale*, 25 ARIZ. ATT'Y 35 (1989) (showing difference between Federal Rules and Hague Evidence Convention discovery procedure); *See* THE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS T.I.A.S. 7444, 23 U.S.T. 2555 (1972) [hereinafter HAGUE EVIDENCE CONVENTION]. The Hague Evidence Convention is not the exclusive means of taking discovery from its signatories, but is the preferred method because of international acceptance of the procedures. *See* Torriente, *supra* note 9, at 35 (explaining international preference for Hague Evidence Convention's procedures).

10. U.S. Dep't. of St., *Obtaining Evidence in Japan* (1997) [hereinafter *Obtaining Evidence*] (providing rules for discovery from Japanese parties). If an individual or information requested is within the United States, the Federal Rules of Discovery are normally applied. *Id.* Also, while special procedures are used to apply the rules, the court does not change the rules themselves. *Id.*

11. *See* BLACK'S LAW DICTIONARY 980 (6th Edition, 1990) (defining Department of State as executive department of United States which is responsible for foreign affairs and trade).

12. *See Obtaining Evidence, supra* note 10 (stating special discovery rules' reach and limitations). While the special discovery procedures are available, there is no way to compel a non-U.S. defendant to comply with discovery. A willing individual is one who agrees to discovery voluntarily, while a non-willing individual is one who resists discovery. *Id.* This procedure also applies to individuals residing in the United States who are not U.S. citizens. *Id.*

13. *See* FED. R. CIV. P. 26(b)(1) (governing initial production requirements and scope). Rule 26 (b)(1) provides

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

the documents and claim the attorney-client privilege for work done by any corporate quasi lawyers.[14] The U.S. party may contest this claim on the grounds that the Japanese legal personnel are not admitted to the Japanese bar.[15] The court must then decide whether the attorney-client privilege applies to the Japanese legal personnel.[16]

This Note discusses whether the attorney-client privilege applies to Japanese in-house legal personnel who are not members of any country's bar. Part I defines the attorney-client privilege, and explains what communications the privilege protects. Part I also compares the legal systems of Japan and the United States. Part II examines case law and commentary on the issue of applying the privilege to non-U.S. attorneys who are not admitted to any bar. Part III argues that the arguments for applying the attorney-client privilege to non-U.S., non-bar in-house legal personnel are particularly effective considering the structure of the Japanese legal system. This Note concludes that U.S. courts should apply the attorney-client privilege to Japanese corporate quasi-lawyers.

I. *ATTORNEY-CLIENT PRIVILEGE AND DIFFERENCES BETWEEN U.S. AND JAPANESE LEGAL SYSTEMS*

The attorney-client privilege is one of the oldest common law privileges in the United States.[17] The Japanese legal system

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Id.

14. *See* Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442 (Del. 1982) (holding attorney-client privilege applies to non-bar in-house legal personnel); *but see* Honeywell v. Minolta, 1990 U.S. Dist. Lexis 5954 (N.J. 1990) (holding attorney-client privilege does not apply to non-bar in-house legal personnel). In both Japan and the United States corporations have quasi lawyers working in-house as legal personnel. *See* Alexander C. Black, *What Corporate Communications Are Entitled to Attorney-Client Privilege-Modern Cases* 27 A.L.R. 5TH 76, 95 (1997) (explaining excessive in-house legal communications required for corporation to function properly). Legal personnel are corporate individuals employed to work on legal documents and give legal advice. *See* Yoshida, *supra* note 4, at 211 (explaining that non-lawyer legal professionals have expertise in patents, tax, and corporate law). In many countries, non-bar legal professionals are the primary source of legal advice. *Id.*

15. *See Remy Martin*, 98 F.R.D., at 443 (claiming privilege for French in-house legal personnel). *Minolta*, 1990 U.S. Dist. Lexis, at *1 (claiming privilege for Japanese in-house legal personnel).

16. *See Minolta*, 1990 U.S. Dist. Lexis at *1 (considering application of attorney-client privilege to Japanese in-house legal personnel).

17. *See* Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-*

does not recognize an attorney-client privilege.[18] The existence of an attorney-client privilege is just one of a number of differences between the U.S. and Japanese legal systems.[19]

A. *Attorney-Client Privilege*

The attorney-client privilege is a privilege that protects information given to, or received from, an attorney while seeking legal advice.[20] This privilege does not extend to communications made by or to an attorney acting in a non-legal capacity, such as a business or personal adviser.[21] The attorney-client privilege is considered to be necessary for the U.S. legal system to function properly.[22] Japan does not have an attorney-client privilege, but it does provide some discovery privileges that create a limited counterpart for lawyers in Japan.[23]

Client Privilege in the United States and the European Community 27 CASE W. RES. J. INT'L L. 145, 166 (1995) (examining development of attorney-client privilege at common law).

18. *See* Junya Naito, *Joint Defense Privilege under Japanese Law*, July 7 Memo, at 3 (1997) (explaining Japanese lack of attorney-client privilege) (on file with the *Fordham International Law Journal*).

19. Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States* 1987 BYU L. REV. 627, 651 (1987) (explaining differences between U.S. and Japanese legal systems).

20. *See* Securities Exchange Council v. Gulf & Western Industries, Inc. 518 F. Supp. 675, 683 (D.C. Dist. 1981) [hereinafter Gulf & Western] (extending attorney-client privilege to legal advice only). Legal advice is defined as advice regarding compliance with the law. *Id.* Advice regarding purely business or personal matters is not legal advice, and is thereby not protected by the privilege. *Id.* at 681.

21. *See id.* at 683 (denying protection of attorney-client privilege to party failing to show advice given was legal advice). The attorney-client privilege also does not protect the underlying facts of the conversation, only the conversation itself. Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations*, 48 MERCER L. REV. 1169, 1170 (1997) (explaining attorney-client privilege unquestionably applies to U.S. in-house lawyers).

22. *See* Cynthia B. Feagan, *Issues of Waiver in Multiple-Party Litigation: The Attorney-Client Privilege and The Work Product Doctrine*, 61 UMKC L. REV. 757, 759 (1993) (explaining necessity of attorney-client privilege for U.S. lawyers to properly advise clients regarding U.S. law). This rational is based on three assumptions: that clients need to consult lawyers, that lawyers require all relevant facts to properly advise the clients, and that clients would not disclose these facts without the privilege. *See* Giesel, *supra* note 21, 1177 (recognizing that rational for attorney-client privilege is as old as privilege itself).

23. DAN FENNO HENDERSON, THE ROLE OF LAWYERS in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 27, 60 (Baum ed, 1997) (discussing limited discovery privileges under Japanese law).

1. Attorney-Client Privilege in the United States

The attorney-client privilege has a long history in the common law of the United States.[24] U.S. courts have defined a standard set of criteria which must be present for the privilege to be applied.[25] The attorney-client privilege does apply to U.S. in-house lawyers,[26] although the extent of this application is still questioned by some U.S. courts.[27]

a. Definition and Evolution

The origin of the U.S. attorney-client privilege traces to English common law.[28] The earliest recorded use of the attorney-client privilege was in 1888.[29] The attorney-client privilege is one of the oldest common law communication confidentiality privileges.[30] The U.S. Federal Rules of Evidence[31] provides that

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24. *See* Annesley v. Anglesea 17 How. St. Tr. 1139 (1743) (holding attorney-client privilege necessary for English legal system to function); *See also* Unites States v. Zolin, 491 U.S. 554 (1989) (noting attorney-client privilege is rooted in U.S. jurisprudence and derives from English common law prior to the birth of United States)

25. *See* United States v. United Shoe Mach. Corp., 89 F.Supp 357, 358 (D. Mass. 1950) (stating attorney-client privilege language which other U.S. courts have accepted as standard). The privilege applies only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been claimed and (b) not waived.

Id. at 358-59.

26. *See* Unites States v. Louisville & N.R.R., 236 U.S. 318, 336 (1915) (applying attorney-client privilege to communications with in-house lawyers).

27. *See* William L. Kandel, *House Counsel: Ethics, Privilege, and Risks in Employment Litigation*, 16 EMPLOYEE RELATIONS LAW JOURNAL 517, 521 (1991) (noting that while attorney-client privilege applies to corporate in-house counsel, many limitations to this application exist).

28. *See* Paul R. Rice, THE ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES at 9 (ed. 1993 & Supp. 1995) (discussing English common law origins of U.S. attorney-client privilege)

29. *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (recognizing and justifying attorney-client privilege). This is the first recorded use of the attorney-client privilege in the United States. *See* Hill, *supra* note 17, at 167-68 (tracing early attorney-client privilege use back to *Hunt* decision).

30. *See* Upjohn v. U.S., 449 U.S. 383, 389 (1981) (recognizing attorney-client privilege's historical importance as enabling attorneys to fully perform their duties).

a witness shall have all privileges granted at common law.[32] The attorney-client privilege is also embodied as confidentiality requirements in the rules of professional conduct of all U.S. states.[33]

b. Rationale Behind the Privilege

There are two major justifications for the attorney-client privilege.[34] The first is to encourage full and honest communi-

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31. *See* FED. R. EVID. (governing rules of admissibility and production of evidence in U.S. courts).

32. *See* FED. R. EVID. 501 (encoding all common law privileges). Rule 501 states that

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

Id.

33. *See* Carole Basri, *Update on How In-House Counsel Can Use and Expand The Privileges*, in METROPOLITAN CORPORATE COUNSEL 48 (1996) (explaining codification of attorney-client privilege). All states have adopted some form of the attorney-client privilege. *See* Hill, *supra* note 17, at 168 n.108 (explaining confidentiality rules of Model Code and Model Rules). By 1992, thirty-five states and the District of Columbia had adopted the version of the privilege from the Model Rules. *Id.* The Model Rules state that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ." *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (1992) [hereinafter MODEL RULES] (providing rules by which all attorneys must abide while within jurisdictions employing the rules). Other states have adopted the privilege from the Model Code. *See* Hill, *supra* note 17, at 168 n.108 (explaining difference between Model Rules and Model Code attorney-client privilege). The Model Code states "a lawyer should preserve the confidences and secrets of a client." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Cannon 4 (1983) (defining confidences as information protected by privileges under applicable law and secrets as information gained in professional relationship where disclosure would be embarrassing or would likely be detrimental to clients). There are few situations when a U.S. lawyer is allowed to reveal the confidence of a client, most notably to prevent a future crime or presentation of false evidence to a court. *See* Unites States v. Zolin, 491 U.S. 554, 560 (1989) (explaining exceptions to confidentiality requirements of Model Rules and Model Code).

34. *See* H. Lowell Brown, *The Dilema of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFFALO L. REV. 777, 782 (1996) (analyzing application by U.S. courts of attorney-client privilege to U.S. in-house lawyers).

cation between attorneys and their clients[35] and thereby encourage broader observance of the law.[36] Without the attorney-client privilege, there is little motivation for an individual to fully disclose information to his attorney.[37] The second justification is that the client should have autonomy as to who can have access to his or her confidential information.[38] Individuals communicating with their attorneys must reasonably expect and intend the communications to be confidential in order to qualify for the privilege.[39]

The party asserting the attorney-client privilege generally must prove that the conversation was between a member of the

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35. *See Upjohn*, 449 U.S. 389 (applying attorney-client privilege to in-house attorney-made documents circulated to all employees). When attorneys give sound legal advice, they promote the advancement of public ends by their clients. *Id.* at 384. Sound legal advice cannot be rendered if the attorney is uninformed. *Id.*

36. *Id.* The U.S. Supreme Court has stated that the goal of improving compliance with the law through uninhibited communication is the basis for the attorney-client privilege in many ways. *Id.* The Supreme Court stated that the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (noting that professional privilege's purpose is to maximize representation by lawyers). The Court also held that the attorney-client privilege's purpose is to encourage clients to make full disclosure to their attorneys. *See* Fisher v. United States 425 U.S. 391, 403 (1976). The Court has explained the attorney-client privilege as being "[f]ounded 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 such disclosure." *See* Hunt v. Blackburn, 128 U.S. 470 (1888) (explaining necessity of attorney-client privilege for lawyers to perform their legal functions efficiently).

37. *See* Giesel, *supra* note 21, at 1172 (explaining traditional attorney-client privilege justification is to prevent non-disclosure by clients based upon fear of communication by attorney to third parties). Clients might not disclose information if their attorney could be required to reveal this information later. *Id.* Similarly, a lawyer would be less likely to aggressively seek information from clients if that lawyer knew there was a chance that a court might force the lawyer to reveal this information. *See* Hill, *supra* note 17, at 173. Clients would also have problems working within the U.S. legal system if their lawyers gave them improper advice based on incomplete disclosure by the clients. *Id.*

38. *See id.* at 172 (considering whether corporations, and their in-house counsels expect their communications to be confidential). One critic does not feel that autonomy regarding who has access to their communications should be applied to corporations. *Id.* This opinion holds that the attorney-client privilege is especially inappropriate when dealing with in-house counsel. *Id.*

39. *See* Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442, 444 n.5 (Del. 1982) (analyzing attorney-client privilege application criterion). Communications meet this standard if "[t]he communicators did not expect the recipients to share the information other than perhaps with outside counsel." *Id.*

bar or his subordinate[40] and a client.[41] The communication must also have been both for the acquisition of legal advice and not have been made in the presence of others.[42]

c. Application to In-House Counsel

The U.S. Supreme Court held that the attorney-client privilege does apply to in-house lawyers who are U.S. lawyers.[43] Some states, however, still do not grant in-house counsel broad attor-

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40. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 994 (defining one's subordinates as individuals occupying lower positions in recognized scales); *see also* Yoshida, *supra* note 4, at 216 n.46 (recognizing that attorney-client privilege is applied to agents of U.S. lawyer while individuals are working for lawyer).

41. *See* Charles R. Stevens, *Multinational Corporations and the Legal Profession: The Role of the Corporate Legal Department in Japan, in* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 34, 38 (1978) (quoting recognized attorney-client privilege requirements). The standard wording of the privilege requires that "[t]he asserted holder of the privilege is or sought to become a client and . . . the person to whom the communication was made is . . . a member of the bar or his subordinate." *See* United States v. United Shoe Mach. Corp., 89 F. Supp 357, 358 (D. Mass. 1950) (analyzing attorney-client privilege requirements).

42. *See United Shoe*, 89 F. Supp, at 358 (explaining that attorney-client privilege requirements are necessary to survive in complex legal environment of United States). The terms of the privilege require "[t]he communications . . . [be made](3)(b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services . . . ." *Id*; *see also* Burroughs Welcome Co v. Barr Laboratories, Inc., 143 F.R.D. 611, 615-16 (E.D.N.C. 1992) (listing examples of communications not protected by attorney-client privilege). The attorney-client privilege is not extended to the following classifications of documents:

> 1) Client authorizations to file applications and take other steps necessary to obtain registration;
> 2) Papers submitted to the Patent Office;
> 3) Compendiums of filing fees and requirements in the United States and foreign countries for various types of applications;
> 4) Resumes of applications filed and registrations obtained or rejected including dates and file or registration numbers;
> 5) Technical information communicated to the attorney but not calling for a legal opinion or interpretation and meant primarily for aid in completing patent applications;
> 6) Business advice such as that related to product marketing;
> 7) Communications whose confidentiality [the client] has waived;
> 8) Communications which pass through an attorney who acts only as a conduit for a third party;
> 9) Transmittal letters or acknowledgment of receipt letters devoid of legal advice or requests for such advice and disclosing no privileged matters.

Id.

43. *See Upjohn*, 449 U.S. at 390 (finding no difference between in-house lawyers and independent counsel for purpose of applying attorney-client privilege). If the privilege was not extended to in-house counsel, it would make "it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal prob-

ney-client privilege protection.[44] Application of the attorney-client privilege to in-house counsel has been limited in three ways.[45] The privilege will not protect business advice given by the legal counsel,[46] communications given or seen by a non-necessary individual,[47] or information used previously in the corporations defense.[48] The U.S. Supreme Court has not decided, however, how the attorney-client privilege applies internationally.[49]

2. Japanese Counterparts to U.S. Attorney-Client Privilege

Japan has rules which piece together a limited attorney-client privilege.[50] Japan has an ethics code which applies to all Jap-

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lem" and "threatens to limit the valuable efforts of corporate counsel to ensure their clients compliance with the law." *Id.* at 392.

44. *See* Yoshida, *supra* note 4, at 214 (explaining that some states do not recognize the privilege for in-house counsel communications with corporate employees); *see also* Henderson v. Nat'l R.R. Passenger Corp., 113 F.R.D. 502 (N.D. Ill. 1986) (holding that corporate in-house counsel do not expect their communications to be confidential and are therefore not eligible for attorney-client privilege protection).

45. *See* United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984) (creating limitations on application of the attorney-client privilege for U.S. in-house counsel); *See also* Basri, *supra* note 33, at 49 (explaining U.S. in-house lawyer attorney-client privilege application is important because it encourages trust in corporate in-house counsel by managers and directors of client corporations, who become more inclined to seek legal advice).

46. *See Wolosoff*, 196 N.J. Super. at 553 (limiting attorney-client privilege to legal advice, regardless of legal status of individual giving it); *See also* Basri, *supra* note 33, at 49 (recognizing in-house legal personnel privilege application limitations). *Id.* If legal and business advice are mixed, they must be distinguished on the document in order to be protected. *Id.*

47. *See Wolosoff*, 196 N.J. Super. at 553 (limiting protection to communications held in presence of necessary individuals); *See also* Basri, *supra* note 33, at 49 (defining non-necessary individual as anyone without reasonable interest in communication). This limitation addresses the expectancy of confidentiality. *Id.* If access to the document or information is not limited, the individuals involved made no reasonable attempts to keep it confidential. *Id.*

48. *See Wolosoff*, 196 N.J. Super. at 552 (recognizing potential attorney-client privilege waiver by in-house legal personnel). Once the information is revealed to the opponent and the court, the privilege has been waived. *Id.*

49. *See* Lawrence B. Friedman, *More Foreign Firms File IP Claims in U.S. Courts*, NAT'L. L. J., Oct. 28, 1996, at C34 (explaining that except for cases involving non-U.S. patent agents, U.S. courts have not determined whether to extend attorney-client privilege to communications with non-U.S. lawyers, even when communication would be privileged in wholly domestic contexts).

50. *See* Henderson, *supra* note 23 at 60 (discussing Japanese rules of confidentiality for lawyers governed by local bar association rules); *see also* Naito, *supra* note 18, at 4 (explaining that Japanese law requires Japanese lawyers to maintain information received from clients as confidential).

anese lawyers,[51] which are known as *bengoshi*.[52] The ethics code provides that *bengoshi* have a right and an obligation to maintain the confidentiality of any facts or documents acquired during the course of his duties.[53] Any documents possessed by the *bengoshi* are free from seizure[54] or discovery,[55] however documents created by a *bengoshi* and held by the client do not receive this protection.[56] Similarly, Japan's old Code of Civil Procedure[57] ("CCP") grants a privilege for any information given or received in the course of professional duties by a *bengoshi*, *benrishi*,[58] doctor, dentist, or other professional.[59] This privilege,

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51. *See* BENGOSHI HO [Lawyers Law], Law no. 205 of June 10, 1949 (Japan) (governing rights and limitations of *bengoshi* under Japanese law); *see* EHS Vol II, CA, No. 2040 (providing English translation of the *Bengoshi Ho*). The *Bengoshi rinri* (Lawyers Ethics) is contained in the *Bengoshi Ho* and proscribes unseemly advertising, delaying litigation, conflicts of interest, and other similar activities. *See* Henderson, *supra* note 23, at 60 (explaining that while *Bengoshi rinri* and *Bengoshi Ho* are not applicable to in-house legal personnel, most individuals follow rules and guidelines contain within them).

52. *See* Henderson, *supra* note 23, at 28 (translating *bengoshi* as lawyer). Although *bengoshi* has been commonly translated as lawyer, barrister would be a more accurate translation. *See* Richard S. Miller, *Apples v. Persimmons: The Legal Profession in Japan*, 39 J. LEGAL ED. 27, 28 (1989) (noting that U.S. equivalent of barrister is litigator); *see also* West, *supra* note 85, at 1458 (explaining *bengoshi* roles). A barrister is a British lawyer who argues before the court. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 151 (defining barristers as British bar members).

53. *See* BENGOSHI HO, *supra* note 51, art. 23 (defining *bengoshi* secrecy rights and responsibilities). The *Bengoshi Ho* asserts that "a lawyer or a person who was previously a lawyer shall have the right and responsibility of maintaining the secrecy of any facts he came to know in performing his business. Provided that this shall not apply when otherwise provided for by laws." *Id.*

54. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 1359 (defining seizure as taking of property by governmental officials under authority of courts).

55. *See* Naito, *supra* note 18, at 3 (summarizing Japanese discovery privileges that protect documents held by *bengoshi*). The protection of documents held by *bengoshi* extends even to a seizure by the Japan Federal Trade Commission ("JFTC"). *Id.*

56. *See id.* (describing the extent of Japanese document privileges for *bengoshi* and technical secrets).

57. *See Minji Sosho-ho* (Code of Civil Procedure), Law no. 29 of 1890, as amended by Law no. 30 of Apr. 2, 1992 (Japan) [hereinafter CCP] (establishing rules for civil trials in Japanese courts); *see* EHS Vol II, LA, No. 2300 (providing English translation of the CCP).

58. *See* Yoshida, *supra* note 4, at 220 (defining *benrishi* as Japanese patent agents and explaining their functions); *see also* E.A.E.R., *supra* note 8, at n.2 (analyzing Japanese systems of patent prosecution and protection).

59. *See* CCP, *supra* note 57, art. 281 (setting forth right against testifying to information which professionals receive during performance of professional duties). A witness may refuse to testify in the following situations:

> In case a doctor, dentist, pharmacist, druggist, mid-wife, [*bengoshi*] (including a foreign solicitor), patent attorney, advocate, notary public or an occupant of

however, does not prevent the non-professional in the conversation from being required to testify regarding the conversation.[60] The New CCP[61] grants a privilege for work done primarily for the benefit of the holder of a document.[62] One scholar believes that this defense will allow certain attorney generated documents to be privileged.[63]

B. *Difference Between Japanese and U.S. Legal Systems*

There are many differences between the Japanese and U.S. legal systems.[64] The legal education systems of the two countries and the process by which lawyers become licensed creates major differences between the systems.[65] The differences in education lead to a difference between the types of individuals that are called lawyers in Japan and the United States.[66] Finally the civil trial procedure rules, especially those for pre-trial discovery, differ greatly between the two countries.[67]

1. Legal Education

Legal education in Japan is different than that in the United

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a post connected with religion or worship or a person who was once in such profession is questioned regarding the facts which came to his knowledge in the course of performance of his duties and which should be kept secret . . . .

Id.

60. *See Obtaining Discovery Abroad*, *supra* note 3, at 138 (restricting application of attorney-client privilege to individuals who are professionals). A professional is an individual engaged in an occupation requiring a high level of training and proficiency. *See* BLACKS LAW DICTIONARY, *supra* note 11, at 1210 (defining professional as individuals engaged in learned professions)

61. *See* MINJI SOSHO-HO (Code of Civil Procedure) Law No. 109 of 1996 (effective Jan 1, 1998) (Japan) [hereinafter NEW CCP] (revising Japanese civil trial procedures). *See also* Caryl Ben Basat *International Legal Developments in Review: 1996 Business Transactions and Disputes*, 31 Int'l Law. 245, 255 (1997) (explaining equivalent of attorney-client privielge under New CCP).

62. *See* NEW CCP, *supra* note 61. art. 220 (creating primary use beneficiary discovery exception); *see also* Naito, *supra* note 18, at 2 (summarizing New CCP).

63. *See* Naito, *supra* note 18, at 5 (explaining that Japanese courts have not yet applied New CCP privileges to in-house legal personnel).

64. *See* Henderson, *supra* note 23, at 50-52 (discussing how differences between U.S. and Japanese legal systems create difficulties for U.S. corporations attempting to do business in Japan).

65. *See* Miller, *supra* note 52, at 30 (explaining that Japanese legal education predominantly occurs at lower levels of school than U.S. education).

66. *See* Henderson, *supra* note 23, at 31 (analyzing Japanese bar and non-bar legal professionals).

67. *See* Torriente, *supra* note 9, at 36 (contrasting U.S. common law and civil law discovery systems).

States.[68] The most notable difference between the Japanese and U.S. legal education systems may be that a law degree in Japan is predominantly an undergraduate one.[69] Law courses are often electives, and are mixed with liberal arts and political science courses.[70] In Japan, many students of law have no intention of taking the bar,[71] but rather intend to gain employment from a corporation or the government.[72] Even law professors are seldom licensed to practice law.[73] Much of the difference in education is attributed to the low passing rate of the Japanese bar exam,[74] and the fact that most corporations will hire graduates directly from law school without requiring them to take the bar exam.[75] Corporations place these graduates into positions simi-

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68. *See* Miller, *supra* note 52, at 29 (contrasting U.S. and Japanese legal education systems).

69. *See id.* at 30 (comparing Japanese law major to U.S. english and economics majors).

70. *See* Henderson, *supra* note 23, at 56 (listing course requirements for Japanese legal degree). The Japanese law degree curriculum usually requires that a student take constitutional law, administrative law, civil law, commercial law, criminal law, criminal procedure, civil procedure, and international law. *See* Kato, *supra* note 19, at 629 n.4 (listing Japanese Education Department recommended law curriculum courses). Elective courses usually include labor or social law, economic or industrial law (including antitrust), bankruptcy law, judicial administration, foreign (comparative) law, legal history, philosophy of law, sociology of law, criminology, political science, science of public administration, political history, and economics. *Id.* Scholars maintain that legal courses in Japan use a lecture format and do not present students with analytical training. *See* Kato, *supra* note 19, at 631 (explaining Japanese legal education's focus). The focus of Japanese undergraduate legal courses is on the interpretation of legislative texts and legal theories. *Id.* U.S. law school courses, however, focus more on problem analysis. *Id.* The training offered at U.S. law schools involves analysis of cases through the Socratic Method, or interactive teaching. *See id.* at 630. U.S. legal education is unique in this aspect and most non-U.S. nations use lecture style classes. *Id.* at 630 n.7. U.S. legal education teaches students to be more problem oriented than Japanese law students. *Id.* at 630. The presence of a jury system creates a requirement that U.S. law students learn arguing skills. *Id.* at 631. Because there is no jury system in Japan, Japanese legal students do not need these skills. *Id.*

71. *See* Miller, *supra* note 52, at 30 (explaining goals of Japanese undergraduate law students).

72. *See id.* at 30 (listing small amount of undergraduate law students considering law as prospective occupation).

73. *See id.* at 29 (describing Japanese legal professors' as non-*bengoshi*). Often, undergraduate legal courses are taught by political scientists rather than law professors. *Id.*

74. *See* Edward I. Chen, *The National Law Examination of Japan*, 39 J. LEGAL EDUC. 1, 5 (1989) (describing Japanese entrance and bar exams). In 1984, the passing rate of the Japanese entrance exam was only 1.9%. *Id.* at 9.

75. *See* Miller, *supra* note 52, at 31 (describing Japanese corporate hiring prac-

lar to an in-house attorney in the United States.[76] Those graduates who want to become *bengoshi* must take the *shiho shiken*[77] in order to attend the Legal Training and Research Institute ("LTRI").[78] The *shiho shiken* is the hardest part of the Japanese legal education and only about two percent of applicants pass.[79]

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tices). Japanese society does not consider legal personnel any less prestigeous because they have not taken the entrance exam. *Id.*

76. *See id.* at 31 (comparing U.S. and Japanese in-house legal personnel work).

77. *See* Henderson, *supra* note 23, at 56 (explaining *shiho shiken* and its purpose). The *shiho shiken* is the equivalent of the U.S. law schools' Law School Admissions Test ("LSAT"). *Id.* Passing the *shiho shiken* is the primary requirement to become a *bengoshi*. *Id.*

See generally Chen, *supra* note 74 (explaining *shiho shiken* in great detail). The *shiho shiken* is given to applicants to students in two stages. *Id.* at 5. The first stage is a written exam which any Japanese citizen may take. *Id.* This exam tests individuals on materials equivalent to a second year undergraduate curriculum in law. *Id.* at 5-6. Individuals who pass this exam, or who are exempted from taking it, may take the second exam. *Id.* at 6. Exemptions to the first exam are given to individuals who have a baccalaureate, have graduated from a higher education institution, have passed the exam at an earlier date, or who possess qualifications equivalent to the other three. *See* THE EDUCATION LAW, Law No. 26 of 1947 (defining educational standards and regulations). The second exam consists of written and oral sections. *See* Chen, *supra* note 74, at 6 (explaining the second stage of the *shiho shiken*). The written portion of the exam tests the individual's knowledge of the constitutional and civil code as well as criminal or civil procedure. *Id.* The exam also has two sections which test on topics of the individual's choice. *Id.* One section tests the individual on one of civil or criminal procedure (the one not tested earlier), administrative law, bankruptcy law, labor law, public or private international law, or criminal policy. *Id.* The other section tests the individual on his or her choice of political science, economics, public finance, accounting, psychology, economic policy, or social policy. *Id.* If an individual passes the written exam, then he or she is then orally examined by teams of two examiners on each of the same subjects. *Id.* at 7. The individual is quizzed on each subject for fifteen to twenty minutes. *Id.* The examiners determine which individuals pass the exam, and deliberately limit the number who do so, by setting a maximum number of passing applicants. *Id.* The number of passing individuals is limited because of financial reasons. *See* Fujita, *supra* note 90 (discussing governmental financial *bengoshi* expenses). Once admitted to the Legal Training and Research Institute ("LTRI"), the student becomes a legal apprentice and gets a monthly stipend equivalent to a first year civil servant's salary as well as family support. *See* Chen, *supra* note 74, at 18 (noting governmental requirement that LTRI students take no employment).

78. *See* Ted Holden, *The Japanese Solution: Kill all the Lawsuits*, BUS. WK., Apr. 13, 1992, at 64 (showing small percentage of applicants admitted). The LTRI is the only graduate level law school in Japan. Henderson, *supra* note 23, at 56 (describing LTRI purpose and unique status). Students who enter the LTRI begin long specialized training. *Id.* Only graduates of LTRI can become *bengoshi*. *See* J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 632 (1985) (explaining LTRI limitation on *bengoshi* numbers).

79. *See* Henderson, *supra* note 23, at 56 (stating how passing rate affects number of *bengoshi*). Some figures state that of 30,000 applicants approximately 500 pass. *See* Mark A. Behrens, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, But*

At LTRI, law students learn the analytical approach to law taught at U.S. law schools.[80] Almost all of the students who are admitted to LTRI pass the exit exams and graduate.[81] By contrast, in the United States, there are a large number of graduate law schools making it easier for U.S. students to enter law school than students in Japan.[82] The difficulty of law school exams and the U.S. bar, however, limits the number of U.S. lawyers.[83]

2. Attorneys

One particularly important issue regarding the difference between U.S. and Japanese legal systems is the difference between U.S. and Japanese attorneys.[84] There are far more licensed lawyers in the United States than in Japan.[85] While the

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Access to Recovery is Limited by Formidable Barriers, 16 U. PA. J. INT'L. BUS. L. 669, 678 (1995) (examining entrance exam passing rates). The number of applicants admitted has increased in recent years, and in 1995, over 700 were admitted. *See* Henderson, *supra* note 23, at 56 (noting small increase in number of applicants admitted to LTRI since 1991). In contrast the U.S. passing rates ranged between 66% and 89.9% (by state) by 1995 figures. *See* AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE U.S. 39-40 (1994) [hereinafter AMERICAN BAR ASSOCIATION] (examining U.S. bar exam passing rates by state).

80. *See* Miller, *supra* note 52, at 37 (explaining LTRI training). The training at LTRI consists of two years classroom study, eight months at court, four months at a procurators office, four months at a law office and finally four more months class study. *See* Henderson, *supra* note 23, at 56 (describing five LTRI training stages and their purposes in Japanese legal education system).

81. *See* Chen, *supra* note 74, at 18 (noting that most students pass LTRI exit exams, and those who fail may wait one year and take these exams again).

82. *See* BARRON'S GUIDE TO LAW SCHOOLS 11-23 (12th ed., 1997) (surveying all ABA-accredited law schools). The United States currently has 179 ABA accredited law schools. *Id.* The large number of law schools gives a wide variety of individuals access to legal education. *Id.* at 44.

83. *See* AMERICAN BAR ASSOCIATION, *supra* note 79, at 66 (calculating average annual U.S. law school admittance and graduation statistics). There were 128,989 students admitted to law school in a juris doctor program in 1995, while only 39,710 received their J.D. in the same year. *Id*; *see also* Law School Admission Council, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 5 (1997) (analyzing U.S. law school admittance and graduation statistics and arriving at same results as American Bar Association).

84. *See* Miller, *supra* note 52, at 27 (discussing difference between roles of lawyers in U.S. and Japanese legal systems).

85. *See* Holden, *supra* note 78, at 64 (comparing larger number of U.S. lawyers to smaller number of Japanese lawyers); *see also* Nancy L. Young, Comment, *Japan's New Products Liability Law*, 18 LOY. L. A. INT'L & COMP. L. J. 893, 904 (1996) (analyzing effect on litigation of small number of attorneys); Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1458 (1994) (noting that number of lawyers affects derivative actions). The limited number of attorneys makes it unlikely for a shareholder to learn of his or her liabilities. *Id.* at 1426. Japan had only 15,541 licensed lawyers in 1995 while the United States had over

large U.S. population is proposed as a main cause of this disparity,[86] scholars contend that the different structures of the legal profession in the two countries is the true cause.[87] In the United States, licensed lawyers perform various services in a wide range of areas.[88] In Japan, however, *bengoshi* perform only a limited number of services.[89] The most notable service is that only *bengoshi* may argue before a court.[90] The rest of the functions

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850,000. *See* Henderson, *supra* note 23, at 30 (setting forth lawyer numbers per capita in Japan and United States). This means that Japan had approximately one lawyer for every 8000 people while the United States had one for every 300 people. *Id.*

86. *See* Miller, *supra* note 52, at 28 (analyzing various proposed reasons for difference in number of lawyers between Japan and the United States).

87. *See* Henderson, *supra* note 23, at 31-32 (discussing differences between organizations of legal professions in United States and Japan).

88. *See id.* at 31 (describing functions performed by U.S. lawyers). U.S. lawyers are involved in management, government, and business. *Id.* Lawyers often are placed in managerial positions, such as the head of a department. *Id.* Many U.S. political offices are held by lawyers. *Id.* In the business world, U.S. lawyers hold positions in many industries at all levels, including positions as salespersons, business executives, real estate or stock brokers, and full time investors. *See* Miller, *supra* note 52, at 28 (discussing wide range of occupations in which U.S. lawyers are engaged that fall outside the normally understood boundaries of legal profession, including musicians, poets, and teachers as well as positions in business). U.S. lawyers are also intricately involved in the drafting of documents. *See* Henderson, *supra* note 23, at 32 (explaining U.S. lawyer's function as primary drafter of legal documents). In Japan, *bengoshi* are rarely involved in any of the U.S. lawyers' capacities except litigation. *See* Kato, *supra* note 19, at 647-51 (describing functions of *bengoshi* in Japan).

89. *See* West, *supra* note 85, at 1458 (listing *bengoshi* functions). The *bengoshi* fill the roles of judges, procurators (civil litigators), and government attorneys (criminal prosecutors). *See* Miller, *supra* note 52, at 31 (explaining limited *bengoshi* work areas).

90. *See* Miller, *supra* note 52, at 28 (explaining effect of lawyers law on non-*bengoshi*). The *Bengoshi Ho* does not prohibit corporations from employing non-*bengoshi* to perform legal work or give legal advice. *See* BENGOSHI HO, *supra* note 51, art. 72 (granting *bengoshi* exclusive right to perform legal work for general public). *See also* Yasuhiro Fujita, *Honsha hombu no bukacho wa Beikoku no In-House Counsel tomaji Attorney-client privilege o shucho dekiruka* [Do *Bucho* (Managers) or *Kacho* (Department Heads) of Legal Department of the Headquarters of a Japanese Company Have the Same Attorney-Client Privilege as That of In-House Counsels in a U.S. Company?], 21(4) SHOJI HOMU 410, 410 (1993) (presenting arguments for granting attorney-client privilege protection to Japanese in-house legal personnel). In the United States, however, state law prohibits non-lawyers from practicing law in any capacity. *See e.g.* NY CLS JUD § 484 (1997) (prohibiting non-lawyers from practicing law in New York State). Section 484 provides in the relevant part

> No natural person shall ask or receive, . . . compensation for appearing . . . as attorney in any court or . . . for preparing . . . instruments affecting real estate, . . . or any other instrument affecting the disposition of property after death, . . . or pleadings of any kind in any action brought before any court . . . or make it a business to practice for another as an attorney . . . .

Id.

performed by U.S. licensed attorneys are performed by other legal professionals in Japan.[91] These quasi-lawyers have earned their LL.B.[92] from a Japanese undergraduate university, but did not take the bar exam.[93] The individuals who work in-house for a corporation often supplement their education with lectures, and generally spend their entire career in a Japanese corporations' legal department.[94]

3. Discovery Systems

Japan and the United States have different legal systems.[95] The United States is a common law country.[96] Japan is a civil law country.[97] Although both countries have discovery, the rules

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91. *See* Henderson, *supra* note 23, at 32-36 (defining quasi-lawyers as Japanese legal professionals who have not taken Japanese bar exam). The quasi-lawyers include *Zeirishi* (tax agents), *Ben-rishi* (patent agents), *Shiho Shoshi* (judicial scriveners), *Konin Kaikeishi* (certified public accountants), *Gyosei Shoshi* (governmental scriveners), *Kosho-nin* (notaries), and *Kigyo Homu-in* (in-house counsel). *See* Miller, *supra* note 52, at 28-29 (explaining quasi-lawyer expertise areas); *See also* Kato, *supra* note 19, at 651 (describing quasi-lawyer functions and roles in society).

92. *See* Miller, *supra* note 52, at 30 (defining LL.B. as undergraduate Japanese legal degree).

93. *See id.* (tracking quasi-lawyer education). Most graduates of undergraduate law programs consider taking the bar an unnecessary waste of time and effort. *Id.* at 31. A corporation in Japan will usually hire the best law students directly out of undergraduate school. *Id.*

94. *See* Stevens, *supra* note 41, at 38 (suggesting most corporations are members of International Business Law Institute). The International Business Law Institute holds weekly meetings and lectures to which all members can send their legal personnel. *Id.* The International Business Law Institute also has an extensive law library which member's legal personnel may use. *Id.*

95. *See* Torriente, *supra* note 9, at 36 (discussing differences between civil law legal systems and U.S. legal system).

96. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 189 (explaining common law legal systems as being comprised of law based on tradition and prior decisions). Common law countries use a system based on the concept of following prior decisions to enable the courts to define the law. *See* Martin A. Voet, *Patent Litigation in Civil Law Countries*, 366 PLI/Pat 95, 98 (1993). The decisions are made after weighing evidence presented in an adversarial trial. *Id.* at 98. Judges in this system are chosen from the body of lawyers. *Id.* Many present and former members of the British Commonwealth are common law countries, including the United States, the United Kingdom, Ireland, and Australia. *Id.* at 97.

97. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 168 (defining civil law as law based on statutes concerning private rights and remedies); *see also* Gregory P. Sreenan, *Blocking Statutes and Their Effect on American-Style Discovery Abroad*, 25-FALL BRIEF 59, 61 (1995) (explaining that Japan follows civil law traditions); *see also* Voet, *supra* note 96, at 98 (explaining decisions of court in civil law legal systems as based predominantly on written arguments presented by parties to judges). Judges in civil law countries have little or no advocacy experience. *Id.* Instead they are appointed as judges directly out

governing discovery in the two countries vary greatly.[98] The United States offers extensive pre-trial discovery,[99] the rules of which are derived from British common law.[100] Japanese discovery, however is handled entirely at the trial stage and is based strongly on the German system.[101] Japanese pre-trial discovery is more limited than that of the United States, and is used only for the preservation of evidence.[102]

a. U.S. Pretrial Discovery

The U.S. rules of discovery are designed to provide parties to a litigation with all facts relevant to the case.[103] The current discovery rules were developed through the decisions of U.S. courts, and English courts before the United States existed.[104] The U.S. rules are codified in the Federal Rules of Civil Proce-

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of law school or equivalent educational body. *Id.* Civil law countries include France, Italy, Spain, Belgium, and countries that were their colonies, including those in Latin America, South America, and French Africa. *Id.* at 97. Germanic countries such as Germany, Austria, and the Netherlands are also civil law countries. *Id.* at 97.

98. *See* Todd B. Carver, *ADR-The Competitive Imperative*, 561 PLI/Lit 59, 63 (1997) (noting disadvantages of bringing international suit in Japanese court instead of U.S. court due to discovery limitations).

99. *See* Behrens, *supra* note 79, at 706 (discussing various U.S. discovery forms including depositions, written interrogatories and document requests). The U.S. litigant has extensive means to investigate his or her opponent's case. *Id.*

100. *See* Black, *supra* note 14, at 95 (explaining history of attorney-client privilege in United States).

101. *See* West, *supra* note 85, at 1417 (1994) (explaining Japanese trial discovery procedures). Discovery in Japan is handled by the judge. *Id.* This is not uncommon as few countries other than the United States have extensive pre-trial discovery. *See* Marcy Shienwold, Comment, *International Products Liability Law*, 1 TOURO J. TRANSNAT'L L. 257, 258 (1988) (showing that U.S. discovery system is unlike systems used in other areas of world).

102. *See* Ethan Horowitz, *Foreign Trademark Practice*, C602 ALI-ABA 27, 57 (1991) (reviewing non-U.S. discovery practices in various nations). Preservation of evidence is a limited procedure for a court to examine witnesses or property that may not be available at the time of trial. *See* Itsuko Mori, *The Difference Between U.S. Discovery and Japanese Taking of Evidence*, 12 INT'L LAW. 3, 3 (1989) (explaining that preservation of evidence is mostly used when evidence will be lost through death or disappearance of key witnesses). Article 343 of the old CCP provides, "[t]he court may, if it considers that there exist such circumstances as making the use of evidence in question difficult unless examinations thereof is made beforehand conduct examination of evidence on motion in accordance with the provisions of this Chapter." *See* CCP, *supra* note 57, art. 343 (providing for preservation of evidence in cases in Japanese courts).

103. *See* Hickman v. Taylor, 329 U.S.495, 515 (1947) (stating that parties' use of attorney-client privilege to determine relevant information is acceptable use).

104. *See* Sreenan, *supra* note 97, at 59 (comparing U.S. pretrial discovery to discovery systems of other nations, including England).

dure.[105]

i. History and Purpose

The U.S. rules of pre-trial discovery are derived from English common law.[106] The U.S. rules have developed well beyond the English common law, and are much broader.[107] U.S. pre-trial discovery is designed to allow a party to develop his or her case after the complaint is filed.[108] It is also designed to increase the likelihood of settlement[109] and reduce the risk of surprises[110] during the trial.[111] It is much broader than discovery in other countries, even countries that are based on common law.[112] Individuals involved in the Japanese legal system criticize U.S. style discovery as resulting in unnecessary law suits.[113]

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105. *See* FED. R. CIV. P. 26-37 (defining discovery procedures for civil trials in U.S. courts).

106. *See* Hickman v. Taylor, 329 U.S. at 515 (describing U.S. pre-trial discovery origins). U.S. pre-trial discovery rules have their earliest origins in the English Chancery Practice's equity bill of discovery. *Id.*

107. *See* Donald C. Dowling Jr., *What to do When You Need Discovery Abroad* 2(1) FEDERAL DISCOVERY NEWS (1995) (discussing increase necessity of international discovery in U.S. cases). Discovery is handled more strictly in all non-U.S. countries, where it is handled predominantly at the trial stage. *Id.*

108. *See* Young, *supra* note 85, at 899 (explaining broader use of discovery by U.S. courts than Japanese courts in order to discover relevant facts). The purpose of broad use of discovery is to provide a party with access to anything that will be evidence in his case. *See Hickman*, 329 U.S. at 515 (explaining conflict between attorney-client privilege and discovery purpose).

109. *See* Maurice Rosenberg, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988: IV. The Federal Rules in Practice: Federal Rules of Civil Procedure in Action: Asserting Their Impact.* 137 U. PA. L. REV. 2197, 2198 (1989) (examining application of Federal Rules of Civil Procedure since enactment).

110. *See id.* at 2198 (explaining that with secrets and important information revealed, realistic negotiations would begin). *See also* Edward J. Imwinkelried *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 250 (1986) (explaining that pre-trial discovery's primary function is to allow defendants to prepare to meet any evidence plaintiffs bring).

111. *See* Sreenan, *supra* note 97, at 59 (explaining purposes of U.S. discovery as supporting search for truth by full disclosure of relevant facts).

112. *See* Dowling, *supra* note 107, at 44 (explaining other countries' strict discovery rules). Non-U.S. common law countries place restrictions on the amount and type of discovery that is allowed. *Id.* Civil law countries have stricter rules which allow little pre-trial discovery. *Id.* In these countries, discovery is handled almost exclusively by the judge during the trial. *Id.*

113. *See* Young, *supra* note 85, at 899 (discussing Japanese beliefs and concerns about U.S. style discovery). Japanese scholars believe that fishing expeditions for information are legally sanctioned by the U.S. discovery rules. *Id.*

ii. Current Status

The Federal Rules of Civil Procedure[114] ("FRCP") govern U.S. pre-trial discovery.[115] These procedures include document requests,[116] written interrogatories,[117] permission to enter land for inspection,[118] physical and mental examination,[119] requests

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114. FED. R. CIV. P. (governing all parts of U.S. civil trials, including jurisdiction, discovery, and damages).

115. *See* Behrens, *supra* note 79, at 706 (identifying U.S. discovery forms).

116. *See* FED. R. CIV. P. 34(a) (governing document production). Rule 34(a) states that

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

Id.

117. *See* FED. R. CIV. P. 33 (providing for discovery by written interrogatories). Rule 33 allows any party, without leave of the court or written stipulation to

> serve upon any other party written interrogatories, not exceeding 25 in number including all discrete sub-parts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party.

Id.

118. *See* FED. R. CIV. P. 34 (governing entry upon land for inspection). Rule 34 requires a party

> to permit entry upon the designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon within the scope of Rule 26(b).

Id.

119. *See* FED. R. CIV. P. 35 (governing physical and mental examinations of persons). Rule 35 states that

> when the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Id.

for admission,[120] and the taking of depositions.[121] Discovery from non-U.S. defendants is either taken according to these rules[122] or according to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[123] ("Hague Evidence Convention").[124] Because Japan is not a signatory to the Hague Evidence Convention, in a case involving Japanese and U.S. parties both parties must take evidence according to the

120. *See* FED. R. CIV. P. 36 (governing requests for admission). Rule 36 states that

> [a] party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26 (b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

Id.

121. *See* FED. R. CIV. P. 30 (governing depositions upon oral examination). Rule 30 states that "(1) a party may take the testimony of any person, including a party, by deposition upon oral examination without leave of the court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena." *Id.* Subsection (2) lists situations in which permission of the court is needed for the taking of a deposition. *Id.*

122. *See* FED. R. CIV. P. 4(f) (governing service upon individuals in other countries). Rule 4(f) provides that

> [u]nless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service abroad of Judicial and Extrajudicial Documents; or
>
> (2) if there is not internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice.

Id. The Federal Rules of Civil Procedure must be used in conjunction with the guidelines of the State Department. *See Obtaining Evidence, supra* note 10, at 2 (explaining use of federal discovery rules in cases involving Japanese parties).

123. *See* HAGUE EVIDENCE CONVENTION, *supra* note 9 (providing for pretrial discovery for parties of different nations).

124. *See* Jacques E. Soiret, *The Foreign Defendant: Overview of Principles Governing Jurisdiction, Venue, Extraterritorial Service of Process and Extraterritorial Discovery in U.S. Courts*, 28 TORT & INS. L.J. 533, 566 (1993) (explaining application of Hague Evidence Convention to cases involving parties of different nationalities). The Hague Evidence Convention is not an exclusive means of taking evidence from non-U.S. parties. *See generally* Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522 (1987) (noting that language of Hague Evidence Convention allows for other forms of evidentiary taking, though these types are not defined); *see also* Soiret, *supra*, at 571 (explaining discovery procedures under Hague Evidence Convention, with focus on letters of request as preferred form of discovery).

FRCP.[125]

Depositions of non-U.S. defendants are taken in one of four ways.[126] These methods are called notice,[127] commission,[128] stip-

125. *See* Fox, *supra* note 4, at 18 (summarizing procedures for discovery from Japanese corporations). Japan and the United States are both signatories to the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civl or Commercial Matters. *See* CONVENTION ON SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 658 U.N.T.S. 163 [hereinafter HAGUE SERVICE CONVENTION] (governing service of summons, complaints and subpoenas between convention signatories). This treaty provides methods for service of documents between Japan and the United States. *Id.* However, the equivalent methods for discovery have been accepted only by the United States and not Japan. *See Obtaining Discovery Abroad*, supra note 3, at 8 (listing Hague Evidence Convention signatories). As of 1990, the signatories to the Hague Evidence Convention were the United States, Argentina, Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxemburg, Mexico, Monaco, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, and the United Kingdom. *Id.*

126. *See* Soiret, *supra* note 124, at 567 (listing and defining methods of discovery under U.S. Federal Rules of Civil Procedure).

127. *See* FED. R. CIV. P. 28(b) (governing notice depositions in other countries). Rule 28(b) states in relevant part that "depositions may be taken in a foreign country . . . on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States." *Id.* *See* Soiret, *supra* note 124, at 567 (explaining notice deposition procedure and use). Notice depositions are depositions taken in the presence of an individual who is authorized to administer oaths in the country of the subject of the deposition. *Id.* They are called notice depositions because notice must be given for this type of deposition in the same way as depositions of U.S. citizens. *See* FED. R. CIV. P. 30(a) (governing taking of depositions under oral examination). Rule 30(a) states that

> (1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) The attendance of witnesses may be compelled by subpoena as provided in Rule 45.
>
> (2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without written stipulation of the parties
>
> (A) a proposed deposition would result in more than ten depositions being taken under this rule . . .;
>
> (B) the person to be examined already has been deposed in the case; or
>
> (c) a party seeks to take a deposition before the time specified in Rule 26(d). . . .

Id. *See* FED. R. CIV. P. 31 (governing depositions upon written questions). Rule 31 provides that "(1) [a] party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45." *Id.* Depositions may also be taken in the presence of one authorized by the court hearing the case if the non-U.S. court approves of the choice. *See* Soiret, *supra* note 124, at 567 (explaining U.S. deposition procedures under FRCP).

128. *See* FED. R. CIV. P. 28(b) (governing commission depositions in other countries). Rule 28(b) states in relevant sections that "depositions may be taken in a foreign country . . . before a person commissioned by the court, and a person so commissioned

ulation,[129] or letters rogatory.[130]

The FRCP also allows for a request for production of documents from a non-U.S. party.[131] The breadth of this rule has created much controversy.[132] Other nations contest that requiring their citizens to produce documents and individuals that exist outside the United States for inspection in a U.S. court violates international law.[133] U.S. courts generally hold that these

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shall have the power by virtue of the commission to administer any necessary oath and take testimony." *Id.* *See* Soiret, *supra* note 124, at 568 (explaining commission deposition procedure and use). Commission depositions are also identical to depositions of U.S. citizens, but they are held before someone commissioned by the U.S. court. *See id.* at 568 (describing Federal Rules of Civil Procedure procedures for depositions by commission). The court must follow any restrictions set by the individual's country, but the court is free to commission whomever it wants to take the deposition. *Id.* In Japan, parties will often use a consular officer, an officer appointed by different nations, for this purpose. *See* Sreenan, *supra*, note 97, at 61 (explaining function and nature of blocking statutes as designed to prevent U.S. courts from imposing U.S. discovery rules on citizens of other nations). If used for depositions, a consular officer can also be used to obtain any documents related to the case that are in the public registry. *Id.*

129. *See* Soiret, *supra* note 124, at 569 (describing stipulation deposition procedure as having simplest requirements for taking depositions). A stipulation deposition allows a deposition to occur anywhere, anytime, and before anybody as long as the other party stipulates that the deposition is acceptable. *Id.*

130. *See id.* at 568 (explaining letters rogatory as formal request from U.S. courts to non-U.S. courts to perform some judicial function). Letters rogatory are complex discovery procedures by which a court requests by formal letters that a non-U.S. court take the deposition following that court's rules. *See id.* at 569 (describing letters rogatory procedure). Even if the non-U.S. country does not require that an individual take an oath before a deposition, the transcript of the deposition testimony is admissible in U.S. courts. *Id.* Letters rogatory are complicated because the Japanese do not have their own rules for depositions. *See* Behrens, *supra* note 79, at 706 (summarizing Japanese discovery procedures and their effect regarding discouraging litigation). The Japanese discovery system allows for the taking of voluntary depositions, but not involuntary ones. *Id.* *See generally* Henderson, *supra* note 23 (showing limitations of Japanese discovery procedures).

131. *See* FED. R. CIV. P. 34 (making no distinction between U.S. and non-U.S. parties with regard to compliance with requests for document production).

132. *See* Joseph P. Griffin, *Beyond Aerospatiale: A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure*, COMMENTARIES ON THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, ABA Section of International Law and Practice 75, 78 (1992) (explaining difficulty that terms create regarding balancing of U.S. and Foreign interests).

133. *See* Soiret, *supra* note 124, at 569 (noting complaints presented by other nations regarding breadth of U.S. discovery rules). Some nations have enacted blocking statutes for the specific purpose of preventing U.S. style international discovery. *See* Torriente, *supra* note 9, at 37 (explaining French use of blocking statutes to protect French citizens from U.S. discovery). Blocking statutes are laws enacted to defeat the broad nature of U.S. discovery. *Id.* The French blocking statute, for example, states that

requests for documents do not create violations of international law.[134]

U.S. federal courts can issue a subpoena requiring individuals who are in other nations to appear before the court to testify.[135] Issuance of subpoenas is allowed when an individual's testimony is necessary in the interests of justice[136] or, in a civil action, when no other form of testimony from the person would be admissible.[137] Issuance of a subpoena, however, only applies to U.S. residents or citizens, and U.S. courts have no means to subpoena an alien[138] living abroad.[139]

> [s]ubject 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.

See FRENCH PENAL CODE No. 80-538 (criminalizing use of U.S. style pre-trial discovery in France). The U.S. Supreme Court has held that blocking statutes do not deprive U.S. courts of the power to order individuals subject to the courts jurisdiction to comply with an evidence request if it would violate a blocking statute. *See* Aerospatile, 482 U.S. at 544 n.29 (discussing blocking statute effects on U.S. court jurisdictional power).

134. *See* Soiret, *supra* note 124, at 570 (showing U.S. courts consideration of sovereignty issues in cases involving non-U.S. parties). U.S. courts have considered the sovereignty issues involved, but most have held that the rules do not create a problem. *Id.*

135. *See* Walsh Act, 28 U.S.C. § 1783 (1948) (governing subpoena of individuals in other countries for depositions). Section 1783 (a) provides that

> [a] court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him . . . .

Id.

136. *See id.* (using "necessary for the interest of justice" to mean situations where court cannot properly administer laws without issuing subpoena).

137. *See id.* (explaining Walsh Act requirements for subpoena of non-U.S. parties). Section 1783 allows non-U.S. party subpoenas when

> the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

Id.

138. *See* BLACK'S LAW DICTIONARY, supra note 11 at 46 (defining alien as non-national born person not qualified as citizen of subject nation).

139. *See* Soiret, *supra* note 124, at 571 (discussing limitations of federal court power to subpoena U.S. citizens or aliens residing in United States).

b. Japanese Pretrial Discovery

The Japanese rules of discovery have mixed origins.[140] The rules are now used in a limited fashion to ensure that relevant evidence is not lost before trial.[141] Japanese discovery is governed by the CCP.[142]

i. History and Purpose

Japanese civil procedure, including discovery rules, has developed over Japan's long history.[143] Three key developments shaped Japan's current civil rules.[144] The Japanese civil code was first influenced by the Chinese legal system.[145] European law, especially German law, later influenced the Japanese code.[146] Lastly, the civil code received a heavy U.S. influence after World

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140. *See* Behrens, *supra* note 79, at 671 (outlining historical origins of Japanese legal system).

141. *See* Young, *supra* note 85, at 899 (explaining limited use of pre-trial discovery in Japan to ensure that evidence is available for presentation at trial).

142. *See* CCP, *supra* note 57, Chp. III, art. 257-351 (governing presentation of evidence and pre-trial discovery for Japanese civil trials).

143. *See* Jason F. Cohen, *The Japanese Product Liability Law: Sending A Pro-Consumer Tsunami Through Japan's Corporate and Judicial Worlds*, 21 FORDHAM INT'L L.J. 108, 112 (1997) (analyzing development of Japanese legal system).

144. *See* Sheinwold, *supra* note 101, at 275 (describing development of Japanese legal tradition as paralleling Japanese culture). The Japanese legal system and Japanese culture share many similar characteristics. *Id.* at 277. In both the legal system and the culture, the Japanese focus on the group as the basic social unit. *Id.* Japanese society is also more accepting than U.S. society of individual inequality. *Id.* In feudal Japan, the individual had no recourse at law if he or she disagreed with a superior. *Id.* The Japanese philosophy emphasized obedience to superiors and protection of inferiors, rather than concerns for the self. *Id.* Japanese acceptance of individual inequality and of the group as the social unit creates a legal focus on the individual's duties to the group as opposed to his or her individual rights. *Id.* This legal focus is one of the factors, together with procedural limitations, that promotes dispute resolution over litigation in Japan. *Id.*

145. *See Id.* at 275 (explaining China's influence on Japanese legal system). Japan learned from the Chinese the methods of centralizing the emperor's power, reducing the aristocracy's power, and nationalizing land ownership. *Id.* These methods were important to Japanese legal development because they made it possible for Japan to remain in isolation for five centuries. *See id.* at 216. During this isolation period, the Japanese legal system developed without outside influence and developed its unique character. *Id.*

146. *See* Sreenan, *supra* note 97, at 61 (explaining German influence on Japanese civil procedure). The Japanese system of taking evidence exclusively at trial is derived from the German system. *Id.* The Japanese decided to adopt the German civil code in 1896 in an attempt to modernize their own code. *See* Shienwold, *supra* note 101, at 276 (explaining Japan's adoption of German civil code in response to rising importance of Japanese merchant class). Modernization of the Japanese civil code became necessary

War II.[147] The majority of pre-trial discovery the CCP allows is solely for the preservation of evidence.[148] Discovery in Japan is designed to introduce known facts to the judge, not to discover unknown facts.[149]

ii. Current Status and the New CCP

The Japanese rules of discovery are contained in the CCP.[150] There is no Japanese system for written interrogatories.[151] Document discovery is limited to a party's ability to require the opponent to produce other documents if the requesting party has a legal interest in the documents[152] and can identify the docu-

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after Commodore Perry landed in Japan in 1853 and ended Japanese isolation in the late nineteenth century. *Id.*

147. *See* Behrens, *supra* note 79, at 674 (explaining World War II's effects on Japanese legal system). After World War II, during the reconstruction of Japan, the Allies replaced many of the elements of the Japanese legal system with those of the U.S. legal system. *Id.*

148. *See* Young, *supra* note 85, at 899 (explaining use of Japanese pre-trial discovery for preserving evidence). Preservation of evidence is a procedure by which a court can receive discovery outside of the normal evidentiary hearings. *Id.* Preservation of evidence is only allowed when a witness is seriously ill or when the property in question is going to be changed or destroyed. *See* CCP, *supra* note 57, art. 343 (providing for the preservation of evidence in cases of urgency). Article 343 provides that "[t]he court may, if it considers that there exist such circumstances as making the use of evidence in question difficult unless examinations thereof is made beforehand, conduct examination of evidence on motion . . . ." *Id.*

149. *See* Mark F. Wachter, *Patent Enforcement in Japan: An American Perspective for Success*, 19 AIPLA Q.J. 59, 76-77 (1991) (explaining methods of evidence preservation in Japanese patent infringement cases). The pre-trial discovery process is only allowed when the evidence in question is in imminent danger of being destroyed, such as when a piece of real property is being renovated or demolished. *Id.* at 76. If the evidence is likely to exist at the time of the trial, pre-trial discovery will not be allowed. *Id.*

150. *See* Sreenan, *supra* note 97, at 61 (explaining origin of Japan's Code of Civil Procedure); *see also* CCP, *supra* note 57, (establishing Japanese civil trial rules including discovery rules). Chapter III of the CCP (articles 257-351) governs rules of evidence. *Id.* The CCP is modeled after the German civil code. *See* Sreenan, *supra* note 97, at 61 (explaining German civil code influence on CCP's rules for taking evidence at trial).

151. *See* Nobutoshi Yamanouchi, *Understanding the Incidence of Litigation in Japan: A Structural Analysis*, 25 INT'L LAW 433, 447 (1991) (discussing Japanese discovery complications including lack of interrogatories, requests for admissions, depositions, and document requests). The Japanese court does accept any pleading not controverted in court as being admitted. *Id.* This non-controverted admission is then treated as evidence for the case. *Id.*

152. *See* Ramseyer, *supra* note 78, at 631 (listing Japanese document production requirements). There are no procedures to require a non-party individual who will not be interviewed to disclose documents or information. *See* Yamonouchi, *supra* note 151, at 446 (defining non-party limitation of Japanese court's power to compel compliance with discovery). In the United States, however, the court can issue a subpoena requir-

ments in detail.[153] In Japan, a party cannot refuse production of a document if the possessing party previously used the document,[154] if the requestor has a contractual right to demand its production,[155] or if the requestor is a party to the document.[156] These categories for required production of documents cause many problems due to their vague terms.[157] The court can require the production of specific documents if it so desires.[158] Similarly, on site inspections occur only with special authorization by a court.[159] Because the required production of docu-

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ing a non-party individual to comply with discovery requests. *See* FED. R. CIV. P. 30 (governing witness subpoena power of U.S. courts)

153. *See* CCP, supra note 57, art. 313 (defining document request requirements and restrictions). Article 313 states that "a motion applying production of a document shall clearly indicate the following matters: (1) Indication of the document; (2) Gist of the Document; (3) The holder of the document; (4) The fact to be proved; and (5) The ground of obligation for production of the document." *Id.*

154. *See* CCP, *supra* note 57, art. 312 (1) (creating previously cited document production requirement). Article 312 (1) requires an individual to produce a document where ". . . the party himself is in possession of the document to which he has referred to in litigation." *Id; see also* Naito, *supra* note 18, at 3 (explaining that CCP Article 312(1) prevents parties from resisting production of documents they have previously used in presenting their case).

155. *See* CCP, *supra* note 57, art. 312(2) (creating entitled document production requirement). Article 312(2) requires a party to produce a document when ". . . the person going to prove is entitled to require the holder of the document the delivery thereof or to demand the perusal thereof." *Id; see* Naito, *supra* note 18, at 3 (explaining that documents required under CCP Article 312(2) include documents such as accounting documents which requestor is entitled to peruse because he or she is shareholder of the corporation).

156. *See* CCP, *supra* note 57, art. 312(3) (creating benefactor document production requirement). Article 312(3) requires an individual to produce a document when: ". . . the document has been drawn for the benefit of the person going to prove or for the legal relations between him and the holder thereof." *Id; see also* Naito, *supra* note 18, at 3 (giving contracts as examples of documents protected by CCP Article 312(3)).

157. *See* Yamanouchi, *supra* note 151, at 446 (explaining that vagueness of categories has been source of many discovery disputes). The vagueness of the terms exists because of the Japanese legal system, as a civil law system, does not require judges to follow previous decisions in interpreting statutes. *See* Voet, *supra* note 96, at 98 (explaining civil law legal systems' statutory interpretation). Some documents can fall into one of more categories. *See* Yamanouchi, *supra* note 151, at 446 (providing examples of documents causing confusion under Japanese discovery rules). Medical records, for example, can fall into either the "benefactor" or the "entitled-to-the-document" exceptions. *Id.*

158. *See* Sreenan, *supra* note 97, at 61 (summarizing Japanese discovery and blocking statutes). The court can impose fines against an individual who does not comply with a document production order. *Id.* These fines are non-penal in nature. *Id.*

159. *See* Voet, *supra*, note 96, at 101 (analyzing limitations of Japanese discovery regarding inspection of locations and objects). On-site examinations, the process by which a party can enter the property of another party to examine something for pur-

ments is limited, corporations assume that nothing will be discovered in a case.[160] In order to assist courts in countries besides Japan, Japan enacted a law in 1905 that empowered the Japanese courts to compel oral testimony and written document production for non-Japanese cases.[161]

Most Japanese discovery is handled at the trial stage.[162] Evi-

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poses of obtaining evidence, are only authorized in extreme cases and are not common. *Id.*; *See* FED. R. CIV. P. 34 (providing for on-site inspections in U.S. cases).

160. *See* Naito, *supra* note 18, at 6 (recognizing exception for Japanese Fair Trade Commission ("JFTC") cases). The JFTC is the Japanese governmental agency which enforces antitrust law. *See* Jonathan D. Richards, *Japan Fair Trade Commission Guidelines Concerning Distribution Systems and Business Practices: An Illustration of Why Antitrust Law Is a Weak Solution to U.S. Trade Problems with Japan*, 1993 WIS. L. REV. 921, 923 (1993) (discussing JFTC guidelines and exemptions from normal discovery limitations). The JFTC can search a place of business and take all documents related to a case with no exception. *See* LAW RELATING TO PROHIBITION OF PRIVATE MONOPOLY AND METHODS OF PRESERVING FAIR TRADE, Law no. 54 of Apr. 14, 1947, art. 46 (establishing Japanese antitrust law and granting JFTC right to seize documents); *see* EHS Vol II, KA-KJ, No. 2270-2279 (providing English translation of this law). This right is conditioned in that

> [t]he Fair Trade Commission may, in order to conduct necessary investigations with regard to a case, take such measure as mentioned in the following each item;
>
> (1) To summon and question persons connected with a case or witness, or cause them to submit their view or report
>
> (2) To summon experts and cause them to give expert testimony
>
> (3) To order persons holding accounting books, documents, and other matters to submit the same, and retain such submitted matters;
>
> (4) To enter any place of business, or other necessary places of the persons connected with a case and examine conditions of business operation, accounting books, and other matters

Id. Only documents held at a *bengoshi*'s office are immune to this search. *See* BENGOSHI HO, *supra* note 51 art. 23 (listing *bengoshi* privilege protecting documents from JFTC seizures).

161. *See* ACT RELATING TO THE RECIPROCAL JUDICIAL ASSISTANCE TO BE GIVEN AT THE REQUEST OF FOREIGN COURTS, Law No. 63 of Mar. 13, 1905 (Japan) [hereinafter JUDICIAL ASSISTANCE ACT] (requiring Japanese courts to assist non-Japanese courts by compelling testimony or document protection when assistance is necessary and appropriate); *see Obtaining Discovery Abroad*, *supra* note 3, at 140 (providing English translation). The Judicial Assistance Act requires that "[a] [Japanese] court shall, at the request of a foreign court, render judicial assistance in serving documents or taking evidence in connection with cases on civil or criminal matters." *Id*; *see also* Sreenan, *supra* note 97, at 61 (focusing on documents necessary to resolution of non-Japanese case).

162. *See* Sreenan, *supra* note 97, at 61 (explaining Japanese evidence presentation as involving examination by judges of witnesses and documents). Evidence and arguments are not presented in a consecutive fashion in Japanese courts, but are introduced in short hearings which are scheduled separately. *See* Kato, *supra* note 19, at 632 (describing Japanese system by which one party presents evidence and arguments at one hearing and other party responds to arguments and presents counter evidence at another hearing until all evidence has been presented). Often more than twenty hearings are needed before all of the parties finish introducing all the evidence. *Id.* Eviden-

dence is presented to the judge at evidentiary hearings.[163] The Japanese court can examine any witness it desires during the trial.[164] Witnesses, however, are rarely used in trials and most evidence is submitted in documents.[165] Non-disclosure privileges are also set forth in the CCP.[166]

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tiary hearings in Japan are often scheduled months apart from each other. *See* Miller, *supra* note 52, at 34 (explaining that one judge rarely presides over all evidentiary hearings of one case, leading to further delays until judgment is rendered).

163. *See* Wachter, *supra* note 149, at 77 (explaining Japanese trial discovery as being comprised mostly of signed written statements presented to judges, although the court may allow oral testimony). Japanese procedural law states that evidentiary hearings are supposed to occur in concentrated or continuous evidentiary hearings. *See* Takeshi Kojima, *Civil Procedure Reform In Japan*, 11 MICH. J. INT'L. LAW 1218, 1227 (1990) (analyzing strengths and weaknesses of Japanese civil procedure). These hearings are supposed to be held over the shortest time possible until all the evidence is presented. *Id.* In practice, however, the hearings are spread over time, usually approximately one every seventy five days. *Id.* Lawyers play little or no role in the Japanese evidentiary proceeding, which is handled by the judge. *See* Mori, *supra* note 102, at 4 (explaining that in Japan judges direct all disclosure and production requests).

164. *See* CCP, supra note 57, art. 271 (granting Japanese courts power to examine witnesses). Except as otherwise provided, the court may examine any person as a witness. *Id.* Article 272 governs the examining of government officials and states "in the event that the court is to examine a government official or a person who was a government official as witness regarding official secrets, it shall obtain approval from the competent supervising government agency." *Id.* Article 273 governs examination of ministers of state and provides "in the event that the court is to examine the Prime Minister or ministers of state or persons who once occupied such office as witness regarding official secrets, it shall obtain approval from the Cabinet." *Id.* Article 274 governs the examination of a member of the Diet and states "in the event that the court is to examine a member of the House of Representatives or the House of Councillors or a person who was such member as witness regarding official secrets, it shall obtain approval from the respective House." *Id.*

The court can impose penalties if the witness does not appear in court. *See* CCP *supra* note 57, art. 277 (granting courts power to penalize non-appearing witnesses). Article 277 states that "the court may, in case a witness did not appear without justifiable causes, order him, by ruling, to bear the court costs incurred thereby and further impose upon him a non-penal fine not exceeding a hundred thousand yen." *Id.*

165. *See* James A. Forstner, *Patent Litigation in Japan, China and Korea*, 366 PLI/PAT 13, 16 (1993) (explaining that actual Japanese trial procedure occurs more slowly than provided for in CCP). Most Japanese judges consider witnesses to be time consuming and not worth delaying the trial. *Id.* Only court appointed expert witnesses are normally allowed to testify. *Id.* An expert witness is defined as "[a]ny person of learning and/or experience necessary to give an expert testimony. . . ." *See* CCP, *supra* note 57, art. 302 (providing for obligation of one defined by Japanese court as court expert to give expert testimony).

166. *See* Shienwold, *supra* note 101, at 278 (focusing on importance of protecting industry secrets from disclosure in Japan). The CCP provides that a witness may refuse to testify "[i]n case he is questioned with respect to matters relating to a technical or professional secret." *See* CCP, *supra* note 57, art. 281 (providing grounds under which witnesses may refuse to testify without incurring fines or imprisonment).

As of January 1998, the New CCP[167] came into effect in Japan.[168] The New CCP requires individuals to produce all documents relevant to a case unless the document would criminally incriminate the holder,[169] contains information the holder received in the line of duty as a professional,[170] or is for the holder's benefit.[171]

II. *APPLICATION OF ATTORNEY-CLIENT PRIVILEGE TO JAPANESE QUASI-LAWYERS IN U.S. COURTS*

The application of the attorney-client privilege to non-U.S. non-bar members presents many issues.[172] U.S. courts have two published decisions which address this issue.[173] The question arises more frequently, however, in commentary and there are many arguments presented about why courts should or should not apply the attorney-client privilege.[174]

A. *Case Law Relevant to Non-U.S. Quasi-Lawyers*

Only two cases have included a discussion of the application

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167. *See generally* NEW CCP, *supra* note 61 (revising and governing procedures by which civil trials are run in Japan).

168. *See* Naito, *supra* note 18, at 4 (explaining that New CCP provides for broader use of document production in Japanese civil proceedings).

169. *See* NEW CCP, *supra* note 61, art. 220 (creating personal incrimination privilege). The new CCP states that production is excused if "[t]he document contains information which may cause criminal prosecution upon the party or his family." *Id.*

170. *See* NEW CCP, *supra* note 61, art. 220 (defining personal use discovery exception). The New CCP states that production of a document is excused if "[t]he document includes description of facts that he, being or having been an attorney, patent attorney, notary, doctor, dentist, and so forth, has obtained in the exercise of professional duties and which facts should remain confidential (including technical or professional secrets)" *Id.* This provision reaffirms the theory that the protection of professional and industry secrets are important to the Japanese. *See* Shienwold, *supra* note 101, at 278 (discussing Japanese use of discovery privileges to protect industry).

171. *See* NEW CCP, *supra* note 61, art. 220 (providing exception to required discovery for documents for personal use). The New CCP states that production is excused if "[t]he document is primarily used for the benefit of the holder." *Id.*

172. *See* Yoshida, *supra* note 4 (analyzing many issues arising when considering application of attorney-client privilege to non-bar quasi-lawyers from various non-U.S. countries).

173. *See* Renfield Corp. v. E. Remy Martin & Co., 98 F.R.D. 442 (Del. 1982) (discussing French in-house legal personnel who are not members of French Bar); *see also* Honeywell v. Minolta, 1990 U.S. Dist. Lexis 5954 (N.J. 1990) (discussing Japanese in-house legal personnel).

174. *See* Hill, *supra* note 17, at 182 (discussing issues involved in application of attorney-client privilege to in-house and non-bar legal personnel).

of the attorney-client privilege to non-bar, in-house personnel in their published decision.[175] One of these cases, *Renfield Corp. v. E. Remy Martin & Co.*,[176] held in favor of applying the attorney-client privilege to non-bar in-house legal personnel.[177] In the other case, *Honeywell v. Minolta*,[178] the court disagreed with the *Remy Martin* holding, and determined that the privilege does not apply to non-bar individuals.[179]

1. The Remy-Martin Decision

Remy Martin is the case most supportive of the application of the attorney-client privilege to non-bar in-house attorneys.[180] The issue in *Remy Martin*, arose in the context of an antitrust case against a French corporation.[181] The U.S. District Court examined the French legal system, and concluded that France had no equivalent to the U.S. bar.[182] The court did find that France had a two-tiered system of *avocats*[183] who argue before the courts and *conseils juridiques*[184] who only tender legal advice.[185] These

175. *See Remy Martin*, 98 F.R.D. at 445 (applying the attorney-client privilege to French in-house legal personnel based on their functional equivalence to U.S. lawyers); *but see Minolta*, 1990 U.S. Dist. Lexis 5954 at *9 (denying the privilege to Japanese in-house legal personnel because they were not de facto attorneys).

176. 98 F.R.D. 442 (Del. 1982)

177. *See Remy Martin*, 98 F.R.D. at 446 (examining if French in-house legal personnel are lawyers for purposes of attorney-client privilege application).

178. 1990 U.S. Dist. Lexis 5954 (N.J. 1990)

179. *See Minolta*, 1990 U.S. Dist. Lexis, at *8 (examining whether Japanese in-house legal personnel are lawyers for purposes of attorney-client privilege application).

180. *See Remy Martin*, 98 F.R.D. at 444 (applying protection of attorney-client privilege to documents produced by French in-house legal personnel).

181. *See id.* (determining attorney-client privilege applicability with international parties). Specifically, a U.S. company and its subsidiary brought an antitrust suit against the French company E. Remy Martin which had offices both in the United States and France. *Id.* at 442. The corporation claimed the attorney-client privilege to resist the production of many documents prepared by their in-house legal personnel. *Id.* The court recognized that the documents confidential intent, so the issue became whether the privilege applied to French in-house legal personnel. *Id.* The plaintiff contested this privilege on the basis that the in-house legal personnel were not members of a bar. *Id.*

182. *See* Black, *supra* note 14, at 160 (discussing *Remy Martin* court's comparison of U.S. and French legal systems' organization). In France, three types of legal professionals perform different functions that would all be handled by lawyers in the United States. *Id.*

183. *See Remy Martin*, 98 F.R.D. at 444 (concluding that *avocats* are French individuals who provide legal advice and can argue before French court, but may not be employed by any person or organization).

184. *See id.* (determining that *conseils juridiques* are French individuals who are al-

two forms of attorneys are on an official list of practicing French attorneys.[186] The French government forbids in-house legal personnel from being on this list.[187]

The *Remy Martin* court recognized that because the in-house counsel could not be on this list,[188] their membership to a bar would not be the relevant criterion for determining the application of the attorney-client privilege.[189] The court, instead, used a functional criterion for this purpose.[190] The court felt that the relevant question was whether the individual was competent to render legal advice and was permitted by law to do so.[191] To be eligible for the attorney-client privilege protection, an individual must generally perform similar functions to U.S. lawyers.[192] The French in-house legal personnel have legal training,[193] are employed to give legal advice,[194] with permission to do so as determined under French law.[195] The French in-house personnel also perform many of the same functions as U.S. lawyers.[196] Be-

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lowed to provide legal advice and may be employed by other *conseils juridiques*, but who are not allowed to argue before courts).

185. *See id.* (comparing U.S. attorneys to French legal personnel). U.S. attorneys do the work of both *avocats* and *conseils juridiques* as well as the work performed by the French in-house legal personnel. *Id.*

186. *See* Fujita, *supra* note 90 (explaining that Remy Martin court held that French list of *avocats* and *conseils jurisdiques* is not equivalent of U.S. bar).

187. *See Remy-Martin*, 98 F.R.D. at 444 (recognizing right of French in-house legal personnel to provide legal advice to corporations which employ them).

188. *See* Fujita, *supra* note 90 (explaining plaintiff's argument that removal from French list meant that French in-house legal personnel could not be members of French bar). *Id.*

189. *See Remy-Martin*, 98 F.R.D. at 444 (analyzing criterion for privilege application as expectation that communications would be confidential and that lawyers or their functional equivalent are parties to this conversation).

190. *See id.* (creating test based on function of an individual, or functional equivalence test, for application of attorney-client privilege).

191. *See id.* (defining necessary requirements for privilege application as being legal education combined with purpose of employment being for individual to provide legal advice and perform functions similar to U.S. attorneys).

192. *See* Black, *supra* note 14, at 161 (explaining that French in-house lawyers perform similar functions to U.S. in-house lawyers by giving legal advice on matters significant to corporation). The *Remy-Martin* court does not define which functions need to be similar for application of the attorney-client privilege. *Id.*

193. *See* Fujita, *supra* note 90 (discussing the Remy Martin court's acceptance of sufficiency of education of E. Remy Martin's legal personnel).

194. *See* Black, *supra* note 14, at 160 (recognizing E. Remy Martin's in-house legal personnel were employed to give legal advice).

195. *See* Fujita, *supra* note 90 (noting French law does not prohibit French in-house legal personnel from giving legal advice).

196. *See* Yoshida, *supra* note 4, at 243 (showing Remy Martin court applied attor-

cause these factors were met, the court applied the attorney-client privilege.[197] Courts and scholars refer to this test as the functional equivalence test.[198] The *Remy-Martin* court also stressed the importance of the intention and reasonable expectation of the document's holder that the documents in question would remain confidential.[199]

2. The Minolta Decision

One court rejected the application of the functional equivalence test to Japanese in-house lawyers.[200] In *Honeywell v. Minolta*,[201] the U.S. District Court did not accept the functional equivalence test,[202] and stated that it would only apply the attorney-client privilege if the employee was a *de facto*[203] attorney.[204] The court began its analysis by noting that the employee never

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ney-client privilege because of substantive legal advisory work). *See also* Fujita, *supra* note 90 (discussing Remy Martin court's analysis of French in-house legal personnel work).

197. *See Remy Martin*, 98 F.R.D. at 444 (holding lack of U.S. bar membership not determinative for applicability of attorney-client privilege). Renfield argued that French lawyers could not be experts on U.S. law, and thereby should be denied the attorney-client privilege. *Id.* at n.6. The court refused to accept Remy Martin's argument. *Id.* at 444. The court held that "[w]hile the fact that a lawyer is not a member of the bar of a United States jurisdiction may be relevant in determining whether a communication is for the purposes of securing legal advice, it is not necessarily determinative of that issue." *Id.*

198. *See Minolta*, 1990 U.S. Dist. Lexis 5954 at *6 (explaining and analyzing *Remy Martin* holding).

199. *See Remy Martin*, 98 F.R.D. at 444 (holding that parties' expectation of confidentiality of information is most important criterion for application of attorney-client privilege).

200. *See Minolta*, 1990 U.S. Dist. Lexis 5954 at *7 (finding that functional equivalence test is not generally accepted in U.S. Court of Appeals for Third Circuit).

201. *See id.* (questioning attorney-client privilege applicability to Japanese in-house legal personnel). The *Minolta* decision was in a case on appeal from a district court order denying Honeywell's request to take the deposition of one of Minolta's in-house legal personnel. *Id.* While Minolta did not dispute that the employee did not belong to the bar, Minolta argued that the employee was the functional equivalent of a U.S. lawyer under the functional equivalence test from *Remy Martin*. *Id.*

202. *See id.* (explaining court's reluctance to apply test). The Third Circuit had never applied the functional equivalence test as a general proposition. *Id.*

203. *See* BLACK'S LAW DICTIONARY, supra note 11, at 287 (defining *de facto* as the state of affairs which must be accepted for all practical purposes, so that *de facto* attorneys would be individuals who though not legally attorneys, are such for all practical purposes).

204. *See Minolta*, 1990 U.S. Dist. Lexis 5954 at *7 (limiting attorney-client privilege application to specific language used in standard wording of statute).

received a license to practice law in any country.[205] The court then looked at the employee's education,[206] and determined that it was insufficient to find him a *de facto* attorney.[207] The court concluded by stating that the presence of licensed *bengoshi* conflicts with the idea of considering a non-licensed individual a *de facto* attorney.[208]

B. *Commentary*

While there are only two published cases regarding application of the attorney-client privilege to non-bar non-U.S. in-house legal personnel,[209] the application of the privilege has been the subject of much discussion.[210] Many scholars and judges have written about this issue.[211] The scholars have supported both sides of the issue.[212]

1. For the privilege

Scholars argue that there are three major reasons that U.S. courts should apply the attorney-client privilege to Japanese in-house counsel.[213] The most common arguments that these

205. *See* Black, *supra* note 14, at 162 (discussing *Minolta* court's focus on lack of bar membership in denying attorney-client privilege to in-house legal personnel).

206. *See Minolta*, 1990 U.S. Dist. Lexis 5954 at *9 (finding employee's education consisted of Bachelor's of Science and attendance at lectures and seminars on law).

207. *See id.* (holding Minolta's in-house legal personnel were not *de facto* attorneys for purposes of applying attorney-client privilege).

208. *See id.* at *7 (limiting use of functional equivalence test to individuals from non-bar countries).

209. *See Remy Martin*, 98 F.R.D. at 442 (considering application of attorney-client privilege to non-bar in-house legal personnel); *but see Minolta*, 1990 U.S. Dist. Lexis at 5954 (discussing criterion for application of attorney-client privilege).

210. *See* Hill, *supra* note 17, at 182 (presenting various arguments for and against application of attorney-client privilege to European, non-bar, in-house legal personnel in U.S. courts).

211. *See* Fujita, *supra* note 90 (arguing for application of attorney-client privilege to Japanese in-house legal personnel); Fox, *supra* note 4, (disfavoring application of privilege to Japanese legal personnel); Rosenberg, *supra* note 109 (arguing that attorney-client privilege must be applied equally to all legal personnel); Chen, *supra* note 74 (explaining reasons application of attorney-client privilege would be appropriate); Kato, *supra* note 19 (discussing qualification of Japanese legal personal for attorney-client privlege protection); Yoshida, *supra* note 4 (discussing application of attorney-client privlege to in-house legal personnel).

212. *See* Yoshida, *supra* note 4, at 220-24, 247 (arguing for application of attorney-client privilege to Japanese quasi-lawyers). *But see* Miller, *supra* note 52, at 37 (proposing that Japanese quasi-lawyers are not equivalent to U.S. lawyers).

213. *See* Fujita, *supra* note 90 (listing arguments supporting attorney-client privilege applicability to Japanese in-house legal personnel).

scholars pose are questions of fairness concerned with unequal application of the attorney-client privilege.[214] Other scholars see the issue differently and argue for the privilege to be applied because of the roles of *bengoshi* and quasi-lawyers in the Japanese legal system.[215] Still other scholars argue that the attorney-client privilege should be applied to the Japanese in-house legal personnel as subordinates of U.S. attorneys who assist the U.S. attorneys on matters involving U.S. law and the United States.[216]

a. Arguments About Fairness

The most common fairness argument is that Japanese litigants should have no less protection from discovery simply because their legal system is different.[217] Those supporting this argument state that Japanese litigants should have access to the same privileges and defenses as U.S. litigants.[218] If a U.S. party invokes the attorney-client privilege, the U.S. party should be estopped[219] from denying the opponent the protection of the privilege.[220] The court must be fair and cannot only protect one side of a legal dispute.[221]

In an article based on fairness, one scholar presented many other fairness arguments.[222] This scholar contends that because the non-*bengoshi* legal personnel have undergraduate law degrees and perform the same work as U.S. lawyers,[223] they should

214. *See* Fox, *supra* note 4, at 19 (illustrating need for fair treatment of Japanese parties in U.S. litigations).

215. *See* Miller, *supra* note 52, at 28-31 (explaining that quasi-lawyers perform same functions as U.S. attorneys).

216. MECA/Customs Investigation Documents for Presentation to U.S. Attorney on June 10, 1991 [hereinafter MECA] (arguing attorney-client privilege expansion for Japanese in-house counsel working with U.S. lawyers).

217. *See* Miller, *supra* note 52, at 38 (supporting Japanese litigants access to U.S. discovery privileges)

218. *See* Fujita, *supra* note 90 (arguing for equal application of attorney-client privilege to all parties).

219. *See* BLACK'S LAW DICTIONARY, *supra* note 11, at 382 (defining "estopping something" as precluding it from occurring).

220. *See* Fox, *supra* note 4, at 21 (arguing that attorney-client privilege must be applied equitably when both parties claim its protection).

221. *See* Rosenberg, *supra* note 109, at 2200-01 (noting that courts must question if procedural rules are applied fairly and equally to similarly situated persons).

222. *See* Fujita, *supra* note 90 (questioning in-house counsel's ability to be professional or independent when rendering legal advice). The scholar wonders if the attorney-client privilege should ever be applied to in-house personnel, regardless of whether such individuals are members of the bar. *Id.*

223. *See id.* (explaining non-*bengoshi* education and function).

receive the attorney-client privilege.[224] The privilege is applied to U.S. in-house lawyers only when they are performing legal functions.[225] Because the non-*bengoshi* legal personnel are usually performing legal functions exclusively,[226] the scholar claims that application of the attorney-client privilege is appropriate.[227] These non-*bengoshi* perform legal functions because of the limited number of individuals allowed into the LTRI each year.[228] The scholar states that if it were possible for more individuals to be *bengoshi*, then the *bengoshi* would instead perform the legal functions.[229] These non-*bengoshi* who studied law as undergraduates are more likely to specialize in the area of law questioned in the litigation.[230] The qualifications of the non-*bengoshi* individuals are also supported by the fact that many legal texts and materials are available outside of law school in Japan.[231] These books are written by non-*bengoshi* experts, who also teach a majority of the LTRI courses.[232] In this article, the commentator also reiterates the importance of the lack of pre-trial discovery for internal documents in Japan.[233] This scholar recognizes that the expectation of confidentiality is extremely important to the application of the privilege,[234] and claims that the expectation

224. *See id.* (describing similarities between U.S. attorneys and Japanese *bengoshi*).

225. *See* Black, *supra* note 14, at 105 (discussing cases finding performance of legal function is the most important criterion). Courts have refused to apply the attorney-client privilege when no evidence was presented as to the capacity of the individual at the time of the communication. *Id. See also Gulf & Western*, 518 F.Supp. at 683 (denying privilege application without evidence as to status of individual as legal advisor).

226. *See* Fujita, *supra* note 90 (explaining that in-house non-*bengoshi* specialize in legal matters for their corporation). The communications and advice prepared by the non-*bengoshi* are treated as highly confidential by the corporation. *Id.*

227. *See id.* (determining non-*bengoshi* meet attorney-client privilege criterion).

228. *See* Chen, *supra* note 74, at 8-9 (explaining and analyzing LTRI application and acceptance rates). In 1984 the LTRI admitted 453 students, only 1.9% of over 23,000 applicants. *Id.*

229. *See* Fujita, *supra* note 90 (explaining reasons for the functions of non-*bengoshi*).

230. *See id.* (describing Japanese legal area specialization methods). The individuals will take courses and attend lectures which will prepare them for specific tasks their corporation will need. *Id.*

231. *See id.* (comparing law book sales between United States and Japan). Ten percent of books sold in Japan are legal books while in the United States few legal books are sold to the general population. *Id.*

232. *See id.* (describing non-*bengoshi* authored law books). Most LTRI students studied using text books authored by non-*bengoshi*. *Id.*

233. *See id.* (explaining limited discovery's effect on expectation of attorney-client privilege).

234. *See* Upjohn v. U.S., 449 U.S. 383, 383 (1981) (holding attorney-client privi-

that nothing will be discovered in Japan should be sufficient to meet the confidentiality expectation.[235] The legal author does not, however, believe that the attorney-client privilege is without limits, and would apply it only to high ranking legal personnel.[236]

b. Arguments Relating to *Bengoshi* Function

Scholars pose other arguments supporting the application of the attorney-client privilege to quasi-lawyers in Japan.[237] These scholars, in asserting these arguments are concerned with the distinct roles of *bengoshi* and quasi lawyers in Japan, extended the privilege to the non-*bengoshi* in-house personnel because it is rare for *bengoshi* to work in-house.[238] *Bengoshi* do not normally work in-house because they must obtain permission from the Japanese bar to work full-time for a company.[239] Others claimed that admission to the bar is not the most important criterion for

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lege applies when communications with corporate attorneys were not disclosed to any other individuals); *see also* Sandtrade, Ltd. v. General Electric Co., 150 F.R.D. 539 (E.D.N.C. 1993) (holding that documents receive protection of the attorney-client privilege when shared only with those who need to know information contained within documents); *see also* Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 697 (E.D. Va. 1987) (holding that communications must be made under circumstances from which individuals may reasonably assume information will remain in confidence).

235. *See* Fujita, *supra* note 90 (describing difficulties obtaining documents in Japanese law suit).

236. *See id.* (endorsing limitation of attorney-client privilege protection to *Bucho, Jicho,* or *Kacho*). *Bucho, Jicho, and Kacho* are the equivalents of managers, assistant managers, and department heads respectively. *Id.*

237. *See id.* (explaining roles of quasi lawyers and *bengoshi* in light of requirements for application of attorney-client privilege).

238. *See id.* (analyzing *bengoshi* employment positions in Japanese corporations). In 1992, only 17 *bengoshi* were employed as in-house legal personnel. *Id.* at 5. Individuals working in-house have better access to information regarding the client and more power regarding decisions made by the corporation, putting them in a better position to promote corporate compliance with the law. *See* Hill, *supra* note 17, at 187 (explaining advantages in-house legal personnel have over independant counsel regarding influsense over corporate officers).

239. *See* Hill, *supra* note 17, 187 (explaining statutory *bengoshi* employment limitations). A *bengoshi* must get permission from his local bar association in order to work in-house. *See* BENGOSHI HO, *supra* note 51, art. 30 (3) (barring *bengoshi* from running profit making businesses or from being employed by such businesses). Article 30 (3) of the *Bengoshi Ho* provides that "[a] lawyer shall be barred, unless he obtains the permission from the bar association to which he belongs, from running any profit-making business, or becoming an employee of the operator of such a business, or an executive member of any profit-making juristic person, or director or employee thereof." *Id.*

application of the attorney-client privilege.[240] If bar admission was not the most important criterion for application of the privilege it could be extended to non-bar individuals whenever the other requirements of the attorney-client privilege are met.[241] While not discussed in the context of non-U.S. attorneys, a similar question has been analyzed by courts in the context of applying the attorney-client privilege to U.S. lawyers not admitted to the local bar.[242] Some U.S. courts consider the question of local bar admission to be completely immaterial.[243] After reviewing the public policy on the issue,[244] one court determined that it is not desirable to require attorneys to pass the bar for every location where the attorneys wish to practice.[245] This court considers the legal function part of the analysis to be the most important.[246] Supporters of this approach state that there are advantages to using a functional equivalence approach.[247] The supporters claim that the functional equivalence test is applied

240. *See* Kandel, *supra* note 27, at 522 (explaining relative unimportance of lack of bar membership to application of attorney-client privilege). One court has stated that "[a]dmission to the bar is, in my mind, immaterial to the obligations of house counsel. The issue, I believe, is whether one is acting as an attorney and receiving confidential communications . . . ." *See* International Business Machines Corp. v. Murray, 2 Ct. LR 6 (Stamford Super. July 30, 1990) (holding that attorney-client privilege protected communications prepared by in-house counsel not member of the local bar).

241. *See* Kandel, *supra* note 27, at 517 (analyzing limiting effect of attorney-client privilege on employment litigation frequency). The other criterion which would be considered would be whether the communication was made for securing legal advice and without the presence of strangers. *Id.*

242. *See id.* (recognizing potential expansion of applicability of attorney-client privilege *IBM* decision creates for anyone acting in capacity of legal advisor).

243. *See* Georgia-Pacific Plywood Co. v. U.S. Plywood Corp., 18 F.R.D. 463, (S.D.N.Y. 1956) (holding that U.S. lawyer who was working as in-house corporate counsel, but was not admitted to local bar of state of corporation, still qualified for attorney-client privilege).

244. *Id.* (explaining that decision of whether to apply attorney-client privilege to attorneys who were not members of bar raised issues regarding desirability of having attorneys take bar exams of all states in which they have clients). The court recognized that denying the attorney-client privilege would create an incentive for in-house personnel to acquire local licenses. *Id.* at 465.

245. *See id.* (determining that policies favoring application of attorney-client privilege outweighed advantages of requiring local bar membership from in-house counsel).

246. *See* Black, *supra* note 14, at 160 (explaining *Georgia-Pacific* decision). The *Georgia-Pacific* court's analysis supports the functional equivalence test of the *Remy Martin* court. *See Remy Martin*, 98 F.R.D. at 444 (holding that individual must be functional equivalent of U.S. attorney for attorney-client privilege application).

247. *See* Yoshida, *supra* note 4, at 243 (explaining the advantages of applying *Remy-Martin* court's functional equivalence test as focusing on nature of communications without removing traditional requirement of expectation of confidentiality).

more predictably, allowing corporations to predict which documents will be protected.[248] The functional equivalence test places importance on the nature of the communication that the protection is sought for,[249] allowing individuals with comparable educational backgrounds and who perform functions equivalent to that of U.S. lawyers to receive the protection of the privilege.[250]

Other scholars focus on the work *bengoshi* do not perform.[251] They claim that if courts apply the privilege to *bengoshi* exclusively, the courts will be granting protection to very few legal documents in Japan.[252] The in-house, legal personnel provide corporations with the necessary legal advice for business transactions involving the United States.[253] The in-house personnel are also involved with drafting contracts, serving in the same capacity as U.S. lawyers.[254] The application of the attorney-client privilege to U.S. in-house lawyers encourages corporations to obtain legal advice and better compliance with the law by their corporations.[255] Scholars contend that if the privilege is not applied to Japanese in-house legal personnel, Japanese corporations will be less inclined to seek legal advice and therefore be less able to comply with U.S. law.[256]

c. Arguments Concerning U.S. Subordinates

One argument for the application of the attorney-client

248. *See id.* (discussing corporate benefits from ability to predict when court will apply attorney-client privilege).

249. *See id.* at 244 (explaining functional equivalence test analysis of communications' nature as concerning legal advice).

250. *See Remy Martin*, 98 F.R.D. at 444 (extending attorney-client privilege application to equivalent non-bar non-U.S. personnel).

251. *See* Kato, *supra* note 19, at 651 (explaining importance of quasi-lawyers' roles regarding performance of many functions which lawyers perform in United States).

252. *See* Fujita, *supra* note 90 (examining limited documents receiving attorney-client privilege if courts do not grant quasi-lawyers privilege).

253. *See* MECA, *supra* note 216, at tab 12 (describing function of Matsushida Electric International's in-house legal personnel).

254. *See* Kato, *supra* note 19, at 651 (explaining functions not performed by *bengoshi*). It is rare for *bengoshi* to draft contracts or other legal documents. *Id.* This work is left to the quasi lawyers and in-house legal personnel. *Id.*

255. *See* Basri, *supra* note 33, at 48 (emphasizing need for corporate communications with in-house counsel to be protected if corporations are to comply with U.S. law).

256. *See* Hill, *supra* note 17, at 186 (explaining effects of European Union denial of attorney-client privilege to in-house legal personnel on ability to become participants in world markets).

privilege states that any interaction between Japanese in-house legal personnel and U.S. lawyers, whether independent counsel or in-house counsel at the corporations' U.S. subsidiary, the privilege should extend to the in-house legal personnel.[257] U.S. courts have recognized this extension of the privilege for clerks and secretaries,[258] U.S. and non-U.S. patent agents,[259] and other non-lawyers working as agents of U.S. lawyers.[260] The attorney-client privilege applies if the non-lawyer is acting as a translator or intermediate for U.S. lawyers.[261]

2. Arguments Against the Privilege

Those who argue against applying the attorney-client privilege to non-bar in-house legal personnel consider different aspects of the issue.[262] These arguments are often concerned with a strict interpretation of the requirement that the communication be with a member of the bar.[263] Other arguments address

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257. *See* Black, *supra* note 14, at 163 (explaining attorney-client privilege extension to U.S. attorney subordinates, including secretaries and paralegals). Extending the attorney-client privilege to Japanese in-house legal personnel is not unreasonable, as much of the work they do in connection to the United States involves working with U.S. attorneys. *See* MECA, *supra* note 216, at tab 12 (explaining subsidiary functions of Japanese in-house legal personnel working for U.S. attorneys).

258. *See* U.S. v. Kovel, 296 F.2d 918, 921 (2nd Cir. 1961) (recognizing that assistance of secretaries, file clerks, operators, and other agents is indispensable to ability of lawyers to perform legal services properly); *See also* Sandtrade, Ltd. v. General Elec. Co., 150 F.R.D. 593 (1993) (extending attorney-client privilege to non-lawyers assisting the U.S. lawyer in gathering and distributing requested legal advice); *see also* United Shoe Mach. Corp., 89 F.Supp 357, 360 (D. Mass. 1950) (extending protection of attorney-client privilege to documents prepared by clerks of corporation's general counsel).

259. *See* Burroughs Welcome Co v. Barr Laboratories, Inc., 143 F.R.D. 611, 617 (E.D.N.C. 1992) (applying attorney-client privilege to non-U.S. patent agents not belonging to bar).

260. *See* Yoshida, *supra* note 4, at 216 n.46 (listing examples of non lawyer's receiving protection of attorney-client privilege as agents, interpreters, or intermediaries of U.S. lawyers). *See* Virginia J. Harnisch, *Confidential Communications Between Clients and Patent Agents: Are They Protected Under the Attorney-Client Privilege?* 16 HASTINGS COMM. ENT. L. J. 433, 434 (1994) (examining U.S. court extention of attorney-client privilege protection to representative of U.S. lawyers).

261. *See Burroughs Welcome*, 143 F.R.D. at 617 (holding that if non-U.S. non-lawyer is serving as lawyer's functionary, communications are privileged); *see also* MECA, *supra* note 216, at tab 12 (presenting arguments for attorney-client privilege application to Japanese in-house legal personnel).

262. *See* Yoshida, *supra* note 4 (examining arguments against applying attorney-client privilege to any non-U.S., non-bar, legal personnel).

263. *See* Feagan, *supra* note 22, at 760 (explaining need to strictly construe attorney-client privilege because of its implicit supression of searches for truth).

the concern that because there are no equivalent privileges in Japan, Japanese corporate communications cannot meet the expectation of confidentiality requirement of the attorney-client privilege.[264] When considering functional equivalence as a reason for applying the attorney-client privilege, some scholars assert that quasi-lawyers do not have an education equivalent to that of U.S. lawyers.[265] Finally, some scholars discuss the theory that in-house legal personnel cannot give corporations professional, legal counseling due to their lack of independence.[266]

a. Strict Language Interpretation

One reason for denying the attorney-client privilege is found in the wording of the privilege itself.[267] The language of the attorney-client privilege states that the privilege is only applicable to a communication with one who is a member of a bar of a court.[268] Arguments concerned with language believe that courts must strictly interpret the privilege must be strictly interpreted to prevent creation of a zone of silence.[269] Proponents of the strict interpretation arguments consider that strict interpretation of the language is important because the attorney-client privilege frustrates the search for truth.[270] Some U.S. cases hold that lack of local bar membership is a sign that an individual is not acting as an attorney.[271] If U.S. bar members are denied the

264. *See* Hill, *supra* note 17, at 193 (arguing, in context of European nations, that non-bar in-house counsel who are not subject to bar-related disciplinary actions for violating confidences of clients should not receive protection of attorney-client privilege).

265. *See* Kato, *supra* note 19 (describing Japanese quasi-lawyer legal education and comparing this education to that of U.S. lawyers).

266. *See* Fujita, *supra* note 90 (questioning in-house legal personnel's ability to counsel corporate clients professionally).

267. *See Gulf & Western*, 518 F. Supp. at 682 (holding need for strict interpretation of attorney-client privilege wording).

268. *See Upjohn*, 449 U.S. at 358 (providing standard accepted wording of attorney-client privilege).

269. *See Gulf & Western*, 518 F. Supp. at 682 (finding blanket application of privilege for corporations unacceptable); *See also The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L.REV. 665, 668 (1983) (fearing possibility of protecting all corporate communications). A zone of silence is created by giving in-house councel all documents so the attorney-client privilege on all documents. *Id*; *see also* Hill, *supra* note 17, at 180 (explaining zone of silence as universal protection of corporate documents which over application of attorney-client privelege could create).

270. *See Burroughs Welcome*, 143 F.R.D. at 615 (explaining need for strict interpretation of attorney-client privilege language for proper application).

271. *See* Black, *supra* note 14, at 161 (discussing cases denying privilege to non-local bar U.S. in-house lawyers); *see also* American Cynamid Co. v. Hercules Powder Co.,

protection of the attorney-client privilege based on their lack of membership to the local bar, some scholars maintain the privilege should not be extended to non-U.S. individuals who are not members of their national bar.[272] Japanese, in-house quasi-lawyers are not admitted any bar,[273] and thereby this line of logic would deny them the protection of the attorney-client privilege.[274]

b. Expectation of Confidentiality and Lack of Japanese Privileges

Because the attorney-client privilege is partially based on the expectation of confidentiality,[275] some commentators argue that the Japanese in-house lawyers must be denied the privilege.[276] One reason these commentators give is the lack of a comparable privilege in Japan.[277] There are no Japanese statutes that protect nationals from testifying at oral depositions or impose penalties for doing so.[278] If such statutes existed, it would be reasonable to extend the U.S. equivalent of these statutes to Japanese individuals.[279] Neither the old nor the new Japanese CCP list in-house lawyers as part of a class that should receive any sort of privilege.[280] Such an omission is generally viewed as in-

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211 F. Supp. 85 (Dist. Del. 1962) (holding that in-house patent officers did not get privilege due to lack of local bar membership); *see also United Shoe*, 89 F. Supp. at 360 (denying protection of attorney-client privilege to members of corporate patent departments who were not members of any state's bar).

272. *See* Black, *supra* note 14, at 85 (describing lack of local bar membership application to Japanese non-bar legal personnel).

273. *See* Kato, *supra* note 19, at 653 (explaining that Japanese quasi-lawyers receive their qualifications through exams that are less competitive than Japanese Bar).

274. *See American Cynamid*, 211 F. Supp. at 85 (recognizing lack of local bar membership not conclusive, but probative when determining applicability of attorney-client privilege).

275. *See* Black, *supra* note 14 (discussing many applications of confidentiality requirements for attorney-client privilege).

276. *See* Fujita, *supra* note 90 (explaining argument that attorney-client privilege only applies to non-U.S. individuals who have privileges in their native counrty).

277. *See* Fox, *supra* note 4, at 20 (examining Japanese statutes for privileges); *But see* Basat, *supra* note 61, at 254 (claiming that new CCP provides for attorney-client privilege, but that this privilege has not been interpreted by Japanese courts).

278. *See id.* (recognizing that lack of privileges in Japan is due to low level of discovery under Japanese civil procedure).

279. *See* Fujita, *supra* note 90 (recognizing and rejecting argument that many civil law countries do not recognize attorney-client privilege, so individuals from these nations should not be granted privilege in U.S. courts).

280. *See* CCP, *supra* note 57, art. 281 (listing professionals receiving testimony priv-

tentional,[281] resulting in Japanese in-house lawyers having no expectation of confidentiality and having no reason for the extension of the attorney-client privilege.[282]

c. Japanese Legal Education is Not Equivalent

While the Japanese in-house legal personnel do have a legal education,[283] many scholars feel it does not meet the same standards as the U.S. education.[284] The focus of the Japanese legal education is different from that of U.S. legal education and students are taught to understand theory as opposed to analytical reasoning.[285] Proponents of this argument claim that Japanese legal education does not subject students to rigorous analytical or ethical training.[286] Most students can pass Japanese legal courses without attending class because only a few courses require attendance.[287] Graduates of undergraduate law programs may lack the critical skills needed for the attorney-client privi-

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ilege, including doctors, dentists, midwives, and *bengoshi*). *See also* Naito, *supra* note 18, at 3 (explaining CCP testimony privilege and defining the individuals who receive its protection).

281. *See* Naito, *supra* note 18, at 3 (noting that CCP grants privilege to non-Japanese lawyers who have received permission to practice in Japan, but not to in-house counsel).

282. *See id.* at 2-4 (explaining effects of Japan's new CCP). The theory that Japanese in-house legal personnel have no expectation of confidentiality loses strength with adoption of the new CCP. *Id.* The new CCP allows protection for any documents primarily for the benefit of the holder. *See* NEW CCP, *supra* note 61, art. 220 (granting privilege to documents primarily for holder's benefit). This provision may be interpreted to extend privilege to documents created by in-house legal personnel for entirely internal use. *See* Naito, *supra* note 18, at 5 (explaining uncertainty about application of New CCP Article 220). There are no court decisions using this article yet, so it is unknown if the court will apply it to in-house legal personnel. *Id.*

283. *See* Kato, *supra* note 19, at 629 (examining differences between U.S. and Japanese legal education systems).

284. *See id.* at 630 (considering U.S. legal education better education than Japanese legal training).

285. *See id.* at 630-31 (describing U.S. and Japanese law classes). Japanese law classes are taught in the lecture method and focus on interpretation of legal texts, while the U.S. law classes focus on analysis of cases taught through the Socratic method. *Id.*

286. *See* Miller, *supra* note 52, at 37 (examining Japanese legal education). U.S. ethical training involves the application of prinicpals to actual fact patterns to determine practicle results. *See* Brown, *A Lawyer by any Other Name: Legal Advisors in Japan, in* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 1983 ? 233 (Lincon & Rosenthol ed., 1983) (contrasting U.S. legal education with Japan's which focuses on memorization of statutes and codes).

287. *See id.* (finding extensive absenteeism in Japanese law classes).

lege to apply.[288] Especially in the case of non-bar legal personnel, it is difficult to distinguish between legal and non-legal work done by in-house legal personnel.[289] The attorney-client privilege only applies to legal work, and some scholars believe that courts should not apply the privilege when the individual's work is a mix between business and legal work.[290]

d. Lack of Independence

Some scholars are concerned with the lack of independence of in-house legal personnel.[291] Proponents of this argument claim that in-house legal personnel are overly influenced by their employers.[292] They fear that the in-house legal personnel's dependency on the corporation for a job will result in their professional judgment being impaired.[293] With in-house legal personnel, the corporation also may exercise direct control over the individual.[294] Scholars contend that combining the issues of di-

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288. *See* Kato, *supra* note 19, at 631 (discussing skills learned through U.S. and Japanese legal education).

289. *See* Kandel, *supra* note 27, at 526 (describing mixed nature of in-house legal personnel work); *see also* Giesel, *supra* note 21, at 1172 (explaining that in-house legal personnel, especially non-bar legal personnel, are often involved in all areas of corporation's work, making it difficult to determine whether communications are legal or non-legal in nature). It is possible to distinguish between legal and non-legal advice within a communication, and a U.S. court may apply the privilege to the legal part of a communication without protecting non-legal information. *Id.*

290. *See* Black, *supra* note 14, at 145-51 (citing cases denying privilege to documents containing mixed business and legal advice); *see also* Kramer v. Raymond Corp., 1992 U.S. Dist. Lexis 7418, 7419 (1992) (declining to apply attorney-client privilege to minutes of corporation's liability management team which was guided by in-house counsel because information contained in reports was actually business advice); *see also* National Farmers Union Property & Casualty Co. v. District Court, 718 P.2d 1044, 1049 (1986) (holding that memorandum from outside counsel to in-house counsel was not privileged because information contained in memo was related to business concerns not legal issues); *see also In re* Grand Jury Subpoena, 599 F.2d 504, 512 (1979) (refusing to apply attorney-client privilege to internal investigations done at request of in-house counsel because this investigation was not inherently related to legal advice).

291. *See* Securities Exchange Council v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 680 (D.C. Dist. 1981) (questioning validity of attorney-client privilege application to in-house legal personnel).

292. *See* Hill, *supra* note 17, at 182 (concerned with corporate influence on in-house legal personnel's ability to make independent legal judgments without consideration of corporate buisness needs).

293. *See* Fujita, *supra* note 90 (doubting ability of in-house legal personnel to counsel corporation professionally due to in-house counsels' interest in financial success of their corporation).

294. *See* Hill, *supra* note 17, at 182 (explaining possiblity of corporate control over decision making power of in-house legal personnel).

rect control and impairment of professional judgment present a strong argument against applying the privilege.[295]

III. *JAPANESE IN-HOUSE LEGAL PERSONNEL QUALIFY FOR APPLICATION OF THE U.S. ATTORNEY-CLIENT PRIVILEGE*

If courts apply the functional equivalence test to the Japanese in-house, legal personnel, it will show that they perform a similar function to U.S. lawyers. Courts will be ignoring the requirement of bar membership, in favor of the requirement that the advice rendered be legal in nature. This application will recognize the amount of legal advice that in-house legal personnel provide for a corporation. It will also show that the in-house legal personnel have legal training and are employed specifically for the purpose of giving legal advice. Because these are requirements for attorney-client privilege, application of the privilege recognizes that one can receive the equivalent of U.S. legal education without attending the equivalent of a U.S. law school. The functional equivalence test[296] is applicable in the case of Japanese in-house legal personnel, because the distinctions between in-house legal personnel and *bengoshi* is very similar to the distinctions between French in-house counsel and independent lawyers discussed in *Remy Martin*.[297] The services provided by the French *avocat* and *conseil juridique* are similar to those provided by the Japanese *bengoshi*.[298] Neither French nor Japanese law forbids in-house legal personnel from providing legal advice for their corporation.[299] The only distinction is that in France, in-house legal personnel are forbidden from the bar while in Japan, the lack of bar membership is promoted predominantly by

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295. *See id.* (explaining concern over application of attorney-client privilege to in-house legal personnel because corporation is individual's only client, and may have a strong influence on this lawyer's professional judgment).

296. *See supra* notes 190-92 and accopmanying text (discussing functional equivalence test).

297. *See supra* notes 183-87 and accompanying text (discussing distinctions between French in house counsel and either *avocats* or *conseils juridique*).

298. *See supra* notes 183-84 and accompanying text (discussing functions of French *avocats* and *conseils juridique*); *see also supra* notes 89-90 and accompanying text (discussing *bengoshi* functions).

299. *See supra* notes 90, 195 and accompanying text (discussing Japanese and French laws regarding permission of in-house legal personnel to render legal advice to corporation).

the corporations themselves.[300]

While *bengoshi* are experts on Japanese law and receive their license after extensive studying, the in-house legal personnel are the Japanese experts on U.S. law.[301] They have either studied U.S. law or are working in conjunction with U.S. lawyers.[302] In either situation, these individuals will be giving the legal advice enabling compliance with U.S. law that the privilege is designed to promote. Applying the privilege only to *bengoshi* will result in Japanese corporations getting flawed advice on U.S. law, and good advice on Japanese law. In order for the corporations to receive substantial adequate advice regarding U.S. law, courts must extend the privilege to the in-house legal personnel.

Quasi-lawyer expertise on U.S. law also means that in-house legal personnel do not have the equivalent education of U.S. lawyers. Even though non-*bengoshi* do not attend LTRI, their education regarding U.S. law is not any less than that of *bengoshi.* Legal education received at LTRI prepares students to become *bengoshi,* who are experts on Japanese law.[303] The extent of the *bengoshi*'s knowledge of U.S. law often is gained during undergraduate study.[304] The non-*bengoshi,* however, often supplement this education with lectures and study guides.[305] The non-*bengoshi* have a better understanding of U.S. law, making them more appropriate recipients of the attorney-client privilege than the *bengoshi.*

In a similar vein, if the Japanese in-house legal personnel are not experts on U.S. law, they will be acting as an agent of the attorney for providing information to the corporation. U.S. courts must apply the privilege to the agents of U.S. attorneys acting in Japan as they would to agents in the United States.[306]

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300. *See supra* notes 75-76 and accompanying text (discussing Japanese corporate hiring policies' effects on bar membership numbers).

301. *See supra* note 94-95 and accompanying text (discussing education of Japanese *bengoshi* and quasi-lawyers regarding U.S. law).

302. *See supra* note 261 and accompanying text (explaining Japanese quasi-lawyer connections to U.S. law).

303. *See supra* notes 78-81 and accompanying text (discussing LTRI training and *bengoshi* functions).

304. *See supra* notes 68-69 and accompanying text (discussing Japanese undergraduate law courses).

305. *See supra* note 94 and accompanying text (discussing quasi-lawyer supplimentary education regarding U.S. law).

306. *See supra* notes 258-60 and accompanying text (discussing application of attorney-client privilege to subordinates of U.S. lawyers).

If the courts do not apply the attorney-client privilege this way, U.S. courts will be unable to provide equitable judgments in cases involving Japanese corporations, because the U.S. party will be receiving an unfair advantage. If courts apply the privilege to the Japanese in-house legal personnel as subordinates or agents of U.S. attorneys, the strict privilege arguments no longer apply. The language of the attorney-client privilege states that the communication in question must be between a client and a lawyer or his subordinate.[307] While the attorney-client privilege may not apply to the legal personnel in their capacity as lawyers, it definitely applies to them as subordinates of U.S. lawyers.[308]

The arguments proposing that the lack of an expectation of confidentiality[309] is due to a lack of Japanese privileges become less realistic under the provisions of the new CCP. The "primarily for the use of the holder" exceptions to document production give the in-house legal personnel a form of privilege.[310] This will add a new expectation of confidentiality to the list qualifications for the privilege. Even the old CCP, however, does not require document production except under limited circumstances.[311] This limited discovery creates the reasonable assumption by Japanese corporations that all of their internal documents will be inherently confidential, especially those produced by in-house, legal personnel.

The issue of independence[312] is not relevant because the argument applies equally to all in-house counsel, regardless of whether they are members of a bar.[313] Because the U.S. Supreme Court has determined that the attorney-client privilege

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307. *See supra* notes 25-48 and accompanying text (explaining application of attorney-client privilege).

308. *See supra* note 261 and accompanying text (discussing how Japanese in-house legal personnel act as subordinates of U.S. lawyers).

309. *See supra* notes 275-82 and accompanying text (discussing arguments relating to absence of Japanese discovery privileges and lack of expectation of confidentiality).

310. *See supra* notes 61-62 and accompanying text (explaining Japanese holder exceptions to document production).

311. *See supra* notes 150-58 and accompanying text (discussing limited circumstances requiring document production in Japanese courts under old CCP).

312. *See supra* notes 291-95 and accompanying text (discussing arguments of Japanese in-house personnel's lack of independence)

313. *See supra* notes 293-94 and accompanying text (discussing application of lack of independence argument to U.S. in-house lawyers).

applies to all U.S. in-house lawyers,[314] the independence issue has been resolved. If U.S. in-house lawyers are not denied the privilege because they are interested in the financial success of the corporation, neither should Japanese legal personnel.

CONCLUSION

While the arguments on both sides of this issue are strong, those favoring the application of the attorney-client privilege to Japanese in-house legal personnel are stronger. These arguments are rooted in the purposes behind the attorney-client privilege and the very nature of the U.S. judicial system. If Japanese corporations are to comply with U.S. law, and U.S. courts are to render fair judgments, the in-house legal personnel must be allowed to invoke the attorney-client privilege.

314. *See supra* note 42 and accompanying text (discussing U.S. Supreme Court application of attorney-client privilege to U.S. in-house lawyers).