Baker McKenzie.

Global Attorney-Client Privilege Guide

FOURTH EDITION

Global Attorney-Client Privilege Guide

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Introduction

Welcome to the fourth edition of our Global Attorney-Client Privilege Guide – the most comprehensive guide of its kind, and an invaluable resource for our multinational clients who regularly need to navigate the complexities of the law of privilege in a global setting.

In this new edition, we draw on the expertise of colleagues around the world to outline the current law on privilege in 34 jurisdictions, covering many recent developments in national laws and professional rules worldwide. This year, we welcome a new chapter from our colleagues in Luxembourg.

Most jurisdictions recognize that communications between a client and a lawyer should be given some form of protection from disclosure, although there may be differences in how privilege operates in each jurisdiction depending on whether the situation is civil, criminal, regulatory or investigatory in nature. In the common law world, privilege is usually a right of the client and typically attaches to communications between a lawyer and their client, and/or documents prepared in anticipation of litigation. In civil law jurisdictions, privilege is more often expressed in terms of "professional secrecy", being the obligation, and in some cases, the right to keep a client's information confidential. Professional secrecy can often be invoked to protect information held by a lawyer, and in some cases material held by other professionals such as tax advisers, from disclosure.

In recent times it has become increasingly difficult for companies to claim privilege successfully over their documents. The digital age has resulted in more material than ever being produced, and more copies being held by more people. Email chains involving lawyers often include multiple other parties, making it more difficult to discern who is communicating with whom, and who is merely observing. Communications can be easily forwarded on, potentially losing their confidentiality in the process. The global nature of companies and their activities mean that more documents cross borders, and there is an increasing amount of regulatory activity, with more information sharing taking place between national agencies. With all of this in mind, our guide highlights some of the highest risk situations in which caution must be exercised, and offers practical guidance to our clients on maximizing the protections available.

Whilst the general trend over the past years has been for courts and legislatures to restrict the expansion of privilege or even reduce its scope, there are some recent notable exceptions. In France, new provisions have been introduced that sanctify privilege as a rule of evidence and reinforce the protection of privileged material from search and seizure. In Japan, a new privilege-like mechanism has been introduced within the antitrust investigation regime, so that where certain conditions are satisfied, lawyer-client communications shall be treated as inaccessible to investigators.

One of the key areas that we cover in this guide is whether documents produced during internal investigations are protected from seizure, according to the laws of each jurisdiction. The question of whether such materials should be protected is subject to an ongoing political debate. In Germany, a draft law was recently put forward which proposed that the results of an internal investigation would not enjoy privilege from seizure. This was highly criticized on the basis that it may prevent companies from conducting an investigation, and as a result the law was not adopted.

We also address the evolving matter of whether privilege extends to all lawyers, including in house-counsel. Common law jurisdictions are more likely to extend privilege to advice from in-house lawyers, so long as the advice is provided in the performance of their legal, as opposed to an executive or business role, and the other requirements for privilege are met. Civil law jurisdictions may take a similar approach to the EU in competition investigations, and restrict privilege to outside counsel only, on the grounds that in-house lawyers are presumed to be insufficiently independent from their employers. In some civil law jurisdictions, however, there has been a recent trend in favour of extending protections to in-house lawyers. For example, Spain has introduced a statutory amendment

requiring that in-house lawyers are treated as external lawyers, and a recent ruling in the Netherlands confirmed that, subject to certain conditions, Dutch in-house lawyers have the right to invoke legal professional privilege.

There will always be limits to the right to invoke privilege, and a balance must often be struck between the right to protection from privilege and the rights of the authorities to access information. In recent years, many jurisdictions have passed legislation requiring lawyers to report information obtained in the exercise of their profession to the authorities. The general trend has been towards prioritizing the prevention of serious crimes, such as money laundering and terrorist financing, over the right to privilege. However, such laws are often viewed as incompatible with the right to a defense and the very nature of attorneyship, and are increasingly being challenged through the courts. In Belgium, the Constitutional Court has partially annulled anti-money laundering legislation on the basis that lawyers' reporting obligations conflicted with their duties of professional secrecy. In Turkey, an action for nullity was recently filed in response to the passing of a law requiring lawyers to report suspicious transactions.

Finding the exact scope of protection for an individual jurisdiction often requires careful analysis. But national rules do not provide complete protection on a global scale, and for clients with complex global corporate structures and contentious matters crossing many national boundaries, it can be extremely difficult to predict what might be protected.

Issues around cross-border privilege are some of the most complex problems we work on with our clients. They require not only knowledge of the law, and of conflict of law principles, but experience of how the rules are applied in practice. This is especially true when dealing with regulators and in arbitration (where the parties and arbitrators may come from different jurisdictions and traditions, and there may be no agreed point of reference in national or international law). This guide alone cannot provide all the answers, but we provide a range of services to assist our clients in dealing with these issues. We deliver training, and design protocols, that protect privileged communications in high-risk circumstances. Please contact us if you require more specific assistance.

Asia Pacific

Australia

01 - Discovery

What disclosure/discovery is required in litigation?

Parties to litigation will normally be required to give either general discovery or discovery by categories, the purpose in each case being to enable a proper examination of the matters in dispute. In some courts in Australia, there has been a recent change toward discovery being provided after rather than before the service of evidence, and to courts requiring the parties to explain why discovery is necessary in a particular case rather than it being assumed that discovery will occur.

If an order for general discovery is made, each party will be required to produce a list of the documents relevant to the issues in dispute, which will include the following:

- Documents on which a party relies
- Documents that adversely affect the party's own case
- Documents that adversely affect another party's case
- Documents that support another party's case

Parties will frequently be ordered to give discovery by reference to categories of documents identified as relevant to a matter in dispute. In such cases, if a document falls within the description of the category, it must be discovered.

"Document" is very broadly defined and includes virtually any record of information (e.g., letters, notes, computer files, emails and minutes of meetings). Within the parameters of either general discovery or discovery by categories, parties will be required to produce all documents within their possession, custody or power. This may include documents held by third parties, such as a party's agents, solicitors and accountants.

Parties are not generally required to discover privileged documents. However, privileged documents must be separately identified as privileged. It is not uncommon for a party to request a list of another party's privileged documents for the purposes of assessing whether privilege has been properly claimed and whether it can be challenged.

That a document is confidential or commercially sensitive is not in itself a ground for withholding it from production. All discovered documents are protected by an implied undertaking that they may only be used for the purposes of the proceedings in which they have been discovered and must not be used for any collateral purpose. Additional protective measures may be agreed for confidential documents, such as a regime to restrict access only to certain people involved in the litigation.

Parties must not withhold or destroy discoverable documents, and severe penalties apply if this occurs, including, in some jurisdictions, the possibility of criminal penalties. Parties must disclose in their list of documents any documents that are no longer in their power, custody or control and explain what has become of those documents.

Parties to proceedings may also use other compulsory court processes to obtain documents from third parties, for example, by issuing a subpoena. Production of documents pursuant to a subpoena may be challenged where production would be oppressive or when the classes of documents sought by the subpoena are not sufficiently defined. All documents answering the terms of the subpoena, including privileged documents, must be produced to the court. Privileged documents must be produced in a separate sealed envelope marked "privileged."

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Legal professional privilege (sometimes referred to as "client legal privilege") is a common law doctrine recognized in Australia that permits the holder of the privilege to prevent the disclosure of documents or communications to which the privilege attaches. The Evidence Act 1995 (Cth) and equivalent legislation in certain Australian states and territories protects privileged documents or communications from being adduced as evidence in court.

There are two types of legal professional privilege recognized in Australia.

Advice privilege protects: (i) confidential communications passing between a client and a lawyer, or two or more lawyers acting for the client; or (ii) the contents of a confidential document prepared by the client, lawyer or another person, where the communication was made or the document was prepared for the dominant purpose of the lawyer or lawyers providing legal advice to the client.

Litigation privilege protects: (i) confidential communications passing between a client and another person, or a lawyer acting for the client and another person; or (ii) the contents of a confidential document, where the communication was made or the document was prepared for the dominant purpose of providing the client with professional legal services in relation to an actual or anticipated Australian or overseas proceeding in which the client is, may be, was or might have been a party.

Both types of privilege can protect a confidential document prepared by a client or another person even if it was not in fact delivered to the lawyer, as long as the document was prepared for the dominant purpose of obtaining legal advice or services.

The "dominant purpose" must be the clear paramount purpose, but need not be the only purpose for which the document was prepared. The onus of establishing the dominant purpose is on the party who asserts the privilege. A heading such as "Privileged & Confidential" can be helpful, but will not be determinative. In the case of a corporation, the dominant purpose is that of the company and not that of the employee who instructed the preparation of the communication. Board minutes are the best record of corporate intention.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Under Australian law, privilege is a right of the client rather than an obligation or right of the lawyer. As a result, the privilege applies equally to copies of privileged communications held by the client and those held by the lawyer.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In-house lawyers are entitled to claim privilege on behalf of their employer; however, a claim for privilege in these circumstances will be subject to particular scrutiny. Demonstrating independence and the dominant purpose of the communication or document will be crucial. Factors that will be relevant in determining whether an in-house lawyer is sufficiently independent to claim privilege on behalf of his or her employer are as follows:

- Whether the in-house lawyer holds a current practicing certificate with consequential professional obligations to the court

- While there is authority that it is not essential for an in-house lawyer to hold a current practicing certificate in order to claim privilege, it has been held that a failure to have a practicing certificate would carry substantial weight on the question of lack of independence. In New South Wales, section 38 of the Legal Profession Uniform Law 2015 (NSW) clarifies that professional privileges (including client legal privilege) are not excluded or otherwise affected because an Australian legal practitioner (defined as an Australian lawyer holding a current practicing certificate) was acting in the capacity of a corporate legal practitioner.

- To whom the in-house lawyer reports in the organization and with whom the in-house lawyer shares draft advice in the organization (in particular, whether draft advice is shared with someone from the business only to ensure that the facts are correct, or to seek the approval of the business as to the conclusion of the advice)
    - The advice of in-house lawyers should not be subject to direction or alteration by nonlawyers, or lawyers acting in a nonlegal capacity.
- Whether the in-house lawyer holds other nonlegal roles within the business
    - If an in-house lawyer holds other roles, such as being a director, the risk is increased that they will be found not to be sufficiently independent for privilege to be claimed in relation to their documents and/or that it may not be possible to determine whether the dominant purpose of a particular communication was to provide legal advice rather than to provide business advice.
- Whether the in-house lawyer participates in remuneration schemes, whether in the form of cash bonuses or share or option entitlements, that are related to the financial success of the business

Does privilege extend to internal communications between in-house lawyers?

Privilege can extend to confidential internal communications between two or more in-house lawyers acting for the same client, or clients with a common interest privilege claim, provided the client(s) can meet the usual requirements for making a claim for privilege. As in-house counsel, any claim for privilege will face greater scrutiny as discussed above.

Are foreign lawyers recognized for the purposes of privilege?

Under the uniform Evidence Acts in New South Wales, the Australian Capital Territory, Victoria, Tasmania and at the Commonwealth level, an Australian-registered foreign lawyer, an overseas-registered foreign lawyer, or a natural person who, under the law of the foreign country, is permitted to engage in legal practice, will be recognized in Australia for the purposes of legal professional privilege.

For the remainder of the jurisdictions (Northern Territory, Western Australia, Queensland and South Australia), the common law applies, and it is likely that privilege also attaches to legal advice given by solicitors duly qualified and authorized to practice within that foreign jurisdiction. This has been confirmed in a decision of the Queensland Supreme Court, whereby the Court found that privilege may attach to communications involving a qualified lawyer who, though not admitted in Australia, is admitted elsewhere.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege will generally not extend to nonlegal professionals who advise on legal issues. There is an exception in those jurisdictions using the uniform evidence law, where employees or agents of those falling within the definition of "lawyer" will be recognized as lawyers for the purposes of assessing privilege claims.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Conduct inconsistent with the continued confidentiality of the communication will result in a waiver of the privilege. This will arise, in particular, when the client knowingly and voluntarily discloses the substance of the evidence publicly or to another person, or the substance of the evidence is disclosed with the express or implied consent of a client. The test is concerned with the behavior of the holder of the privilege, not their intention.

Where a reference is made in a communication to the gist, conclusion or substance of legal advice, this can potentially result in a waiver in respect of the whole advice and other documents reasonably necessary to understand that advice. Particular caution should be exercised when referring to advice in correspondence with another party, or in publicly available documents such as financial reports, ASX announcements and takeover documents.

There are a number of exceptions to the doctrine of waiver, including the following:

Compulsion of law: Disclosure in accordance with a legal obligation to disclose is not a waiver. This will include situations where a regulator has the power to compel the production of privileged documents. However, a regulator will not ordinarily have the power to compel the production of privileged documents, and if in those cases otherwise-privileged documents are provided voluntarily to a regulator, then privilege is likely to be waived.

Common interest: A document may be disclosed to another without waiving privilege where the parties' interests are aligned. Individual interests must not be selfish or potentially adverse. Companies in the same corporate group will not automatically share a common interest. It will be a question of fact in each case.

Limited purpose waiver: Where a document has been confidentially disclosed for a limited and specific purpose (for example, to conduct due diligence), then privilege will not be waived if the circumstances are not inconsistent with maintaining the privilege. The original holder of the document must retain control of the document and take steps to limit its disclosure and otherwise maintain confidentiality.

Inadvertent waiver: Where a privileged document is disclosed by mistake, it is possible to assert that there has been no waiver of privilege. However, it is important to take steps to recover the document as soon as the inadvertent waiver is discovered.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Australia, the ultimate question to determine whether privilege applies is the dominant purpose test, which is whether the confidential communication was created for the dominant purpose of giving legal advice to a client, or to provide legal services for actual or anticipated litigation.

Privilege is not available if a client seeks legal advice in order to facilitate the commission of a crime, fraud or civil offense, regardless of whether the adviser knows of the unlawful purpose. Privilege is available where legal advice is sought for a past crime, fraud or civil offense.

Generally, there is no difference in how privilege operates in Australia. Privilege can be claimed in civil or criminal proceedings, during the course of a trial and in non-judicial proceedings. Privilege may also be claimed in relation to production of documents under a subpoena, a police search warrant, a search by taxation authorities, or an inquiry by a statutory body such as ASIC. There is jurisprudence which provides that a section 155 notice issued by the Australian Competition and Consumer Commission (ACCC) does not abrogate legal professional privilege which is recognized as an important common law right that can only be abrogated expressly or by necessary implication.

There are only a few instances when privilege is not a protection for persons to avoid providing information or documents (for example, sections 3ZZGE, 3ZQR and 15HV of the Crimes Act 1914 (Cth), section 9(4) of the Ombudsman Act 1976 (Cth), section 96(5) of the Law Enforcement Integrity Commissioner Act 2006 (Cth), section 18 of the Inspector-General of Intelligence and Security Act 1986 (Cth) or section 202 of the Proceeds of Crime Act 2002 (Cth)). The purpose is to compel individuals to produce evidence or information to government oversight bodies to allow for open government and accountability in decision making. However, the laws that abrogate privilege generally provide that the privileged material disclosed is not admissible in proceedings against that person.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Privilege protects the contents of confidential documents prepared by a client or lawyer for the dominant purpose of the lawyer providing legal advice to the client. Confidential notes, memoranda, minutes, copies and other documents made by the client and lawyer relating to communications, which if disclosed would reveal privileged communications, are also privileged. Such material is protected as the existence of the confidential material is directly attributable to the making of the privileged communication.

Section 118 of the Evidence Act 1995 (Cth) extends privilege to include documents prepared by a client or lawyer in their own right regardless of whether they are client-lawyer communications. Section 118 also extends to documents prepared by another person (i.e., not the client or lawyer). Oral communications from third parties made for the purposes of a lawyer giving advice fall outside the scope of privilege under section 118.

The Australian courts have not yet followed the UK's approach in *The RBS Rights Issue Litigation* on determining the "client" for the purpose of privilege. Rather, section 117 of the Evidence Act 1995 (Cth) defines a client to include an employee or agent of a client, and the Australian position remains based on the "dominant purpose" test and therefore the purpose for which the document was created will remain the key consideration.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Generally, a regulator does not have the power to compel the production of privileged documents; however, it depends on the particular statute from which the regulator obtains its powers. For example, in New South Wales, privilege has been abrogated by statute in relation to certain matters concerning the investigation into the James Hardie Group. A number of statutes expressly abrogate the entitlement to claim privilege against self-incrimination.

It should be noted that there are additional considerations which parties may have to weigh up when it comes to deciding whether or not to disclose privileged materials to a regulator. For example, in situations where a party has obtained conditional immunity from prosecution from a regulator, although the regulator may not have the power to compel the production of privileged documents, there is a risk that the party will lose their conditional immunity should a condition of their immunity be a requirement to provide full, frank and truthful disclosure and cooperation with the regulator (including by withholding nothing of relevance).

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Privilege has been an issue in many recent investigations being carried out by regulators, particularly those investigations being conducted by the Australian Taxation Office and the ACCC. Two examples of this are *Commissioner of Taxation v. PricewaterhouseCoopers & ors* [2022] FCA 278 and *Commonwealth Director of Public Prosecutions v. Citigroup Global Markets Australia Pty Ltd* [2021] FCA 511. In both cases, the regulator contested claims of privilege over documents to which the regulator was seeking access as part of their investigation, and the court, in both cases, found that privilege could not be upheld for all documents over which it was claimed.

The regulators have also made clear that they will particularly scrutinize claims for privilege from multidisciplinary firms such as the large accountancy firms where particularly documents relating to tax advice can raise issues as to whether they are covered by legal privilege.

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Hong Kong

01 - Discovery

What disclosure/discovery is required in litigation?

Discovery is a process by which the parties to a civil proceeding or matter are permitted to obtain, within certain defined limits, full information as to the existence and the contents of all relevant documents relating to the matters in question between them.

In any action begun by writ in the High Court and District Court, each party must (unless otherwise agreed or ordered), within 14 days after close of pleadings, disclose to each other all relevant documents (including those that are privileged or otherwise protected from inspection) that are or have been in their possession, custody or power by setting them out in a list of documents, which includes a brief description of the document. Once the lists of documents have been exchanged, the parties are entitled to inspect the documents referred to in the list, other than those privileged or protected from inspection, and to take copies of them.

This early exchange of information is intended to prevent trial by ambush, facilitate thorough trial preparation and an early assessment of the strengths and weaknesses of the parties' respective cases, and encourage settlement.

Only documents relating to matters in question are required to be disclosed. This includes documents that would tend to prove or disprove a matter in issue as well as documents which it is reasonable to suppose might enable the other party either to advance its own case or to damage the case of its adversary, or which might fairly lead to a train of inquiry that might have either of those two consequences.

Relevance is generally tested by reference to the pleadings and further particulars provided, but may extend to matters which, in the ordinary way, may be expected to be raised in the course of the proceedings. However, discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action, nor in respect of an allegation not made in the pleadings or particulars. Discovery will also not be allowed to enable a party to "fish" for witnesses or for grounds upon which to found their case. Nor will discovery be ordered in respect of documents leading an applicant to a train of inquiry that would only lead to matters not admissible in evidence.

Each case must be considered according to the issues raised. Where there are numerous documents of slight relevance, and it would be oppressive to produce all of them, some limitation may be imposed by the courts. Courts are empowered to, and will, by way of case management, limit the scope of automatic discovery that the parties would otherwise be required to make.

Where a party fails to make discovery or makes inadequate discovery, another party can apply to the court for an order for "general discovery." Where a party is dissatisfied with the list of documents from their opponent, further disclosure may also be obtained by applying for a further and better list (either in general terms or limited to certain classes of documents), or applying for an order of specific discovery of documents.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Legal professional privilege is a substantive legal right recognized in both statute and common law. It is applied in Hong Kong to protect the confidentiality of certain types of communications made

between clients and their lawyers and, in some circumstances, their communications with third parties.

Privilege over such communications is to protect clients and not their lawyers. The protection afforded is not confined to what lawyers and clients say or write to each other, but naturally extends to information gathered or generated in certain circumstances and under certain conditions.

There are two types of legal professional privilege in Hong Kong.

Legal advice privilege protects confidential communications between clients and their lawyers that are made for the dominant purpose of seeking or giving any legal advice or related legal assistance. It is not necessary that litigation was pending or contemplated, and the protection is not restricted to specific requests for advice and to documents containing advice – it extends to communications aimed at advising a client during the continuum of communication between the lawyer and client.

As a result of the Hong Kong Court of Appeal decision in *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, legal advice privilege in Hong Kong applies more widely to communications between employees of corporate clients and external lawyers, and its application is subject to the dominant purpose test of obtaining or seeking legal advice.

Litigation privilege protects confidential communications between clients and their lawyers, as well as between clients or their lawyers and third parties (such as a factual or expert witness), where such communications came into existence for the dominant purpose of use in connection with actual, pending or contemplated litigation.

The Hong Kong Court of Final Appeal in *Akai Holdings Ltd (In Compulsory Liquidation) v. Ernst & Young (A Hong Kong Firm)* (24/02/2009, FACV28/2008) confirmed that such protection turns on the issue of dominant purpose and will apply if the documents were brought into existence in order to obtain legal advice in connection with litigation that was in active contemplation and in real prospect at the time. Where there is no actual or pending litigation, the Hong Kong Court of First Instance in *Citic Pacific Limited v. Secretary for Justice & Anor* (19/12/2011, HCMP767/2010) considered that litigation must be a real likelihood rather than a mere possibility.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Lawyer-client communications that satisfy the requirements set out above, whether originals or copies, are protected by privilege. This protection applies regardless of whether the originals and/or copies are in the lawyer's or the client's possession. The protection can, however, be lost if the communications are sent to an external third party, including for consideration and/or comment beyond the scope of litigation and legal advice privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Legal professional privilege extends to protect communications between in-house lawyers and corporate clients (i.e., their employer). However, the claim for privilege will be subject to particular scrutiny. Communications with in-house lawyers must be made to or by in-house lawyers in their capacity as lawyers, as opposed to another capacity (for example, of an executive nature). Moreover, the communications must relate to legal matters, as distinct from administrative or business matters. There is no single test that will enable all situations to be classified as falling on one side of the line or the other. However, there are two helpful benchmarks:

- Whether the in-house lawyer's communications involve the use of skills for which an external lawyer could claim privilege
- Whether an external lawyer could be engaged on the matter on which the in-house lawyer was instructed by their client employer

If the answer is yes in either case, the communications are likely to be privileged. If not, they are unlikely to be privileged.

Does privilege extend to internal communications between in-house lawyers?

Legal advice privilege extends to all communications created for the dominant purpose of advising a client, and during the continuum of communication between the lawyer and client. Privilege will extend to internal communications between in-house lawyers so long as the internal communications are for the dominant purpose of advising their corporate client (i.e., their employer) and are between in-house lawyers acting in their capacity as lawyers as opposed to any other capacity (such as those that are administrative or executive in nature).

In *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, it was held that legal advice privilege is subject to the dominant purpose test of obtaining legal advice. Despite the wider scope of legal advice privilege, it remains good practice to identify who needs to be part of the communication group so as to avoid any waiver of privilege.

Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers practicing in Hong Kong are recognized as lawyers for the purposes of legal professional privilege, but the protection afforded by the privilege only applies in proceedings brought in Hong Kong.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The Hong Kong Court of Appeal in *Super Worth Int'l Ltd & Others v. Commissioner of the ICAC & Another* [2016] 1 HKLRD 281 followed the UK Supreme Court decision in *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1 and held that legal professional privilege does not extend to advice given by professionals other than lawyers, even where that advice was legal advice that the professional was qualified to give.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

The loss of privilege can occur where (i) there is loss of confidentiality; (ii) privilege is waived intentionally; (iii) the clients or their lawyers attempt to make some limited use of privileged documents without reserving privilege; or (iv) when a partial disclosure of privileged documents occurs. It can also occur when a third party is able, by whatever means, to produce secondary evidence of the contents of a privileged communication.

There are limited exceptions where sharing a document may not result in the waiver of privilege.

Partial waiver

The Hong Kong Court of Appeal in *Citic Pacific Limited v. Secretary for Justice and Commissioner of Police* [2012] 2 HKLRD 701 held that Hong Kong law recognizes the concept of partial waiver of privilege. A privileged document may be disclosed to one party for a limited purpose, thus waiving the

privilege to that document as against that party alone only for the specified purpose. However, the privilege to the document is retained as against all other third parties. In order to maintain the privilege, it is important to specify in writing at the time the privileged document is disclosed that it is provided confidentially and the purpose for which the privileged document is disclosed. The scope of the disclosure should be sufficiently limited so that a wider blanket waiver is not implied.

In this case, the Court of Appeal rejected the Hong Kong Secretary for Justice's contention that when prosecuting authorities come into possession of privileged documents, privilege will be lost, and the information would be available for use by the authorities regardless of how the authorities came about the information. The Court of Appeal made clear that privilege is recognized in the Basic Law of Hong Kong as a substantive legal right of particular importance to the due and just administration of justice. Privilege is not lost unless there is evidence that it has been intentionally waived by the holder of that privilege, and a waiver will not be lightly inferred.

Common interest privilege

Common interest privilege arises where one party confidentially and voluntarily discloses the privileged document to another party, who has a common interest in the subject matter of the communication at the time of disclosure. The document will remain privileged, with privilege belonging to the original party, despite the fact it has been shared. The privilege can only be waived by the original party.

Joint privilege

Joint privilege can arise in two circumstances: (i) through a joint retainer; or (ii) by sharing a joint interest in the subject matter of the communication at the time that it comes into existence. The effect of joint privilege is that each party is entitled to benefit from all privileged communications and neither party retains any confidence against the other. Both parties need to agree to waive privilege, and disclosure of privileged communications by one party will not automatically result in the waiver of privilege over the document.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Hong Kong, legal professional privilege is a constitutional right and can be applied to protect the confidentiality of relevant communications in civil, criminal, regulatory and investigatory situations.

If protection is sought for documents which came into existence in connection with civil, criminal or regulatory proceedings, or investigations, the application of legal advice privilege or litigation privilege will depend upon the nature of the document and the relevant circumstances.

In Hong Kong, litigation privilege protects communications which came into existence for the dominant purpose of use in connection with actual, pending or contemplated litigation. In *Akai Holdings Ltd (In Compulsory Liquidation) v. Ernst & Young (A Hong Kong Firm)* (24/02/2009, FACV28/2008), transcripts and notes from the liquidators' private examinations and interviews were held to be protected by litigation privilege as they were found to be made in connection with litigation that was in active contemplation and in real prospect. In *Citic Pacific Limited v. Secretary for Justice & Anor* (19/12/2011, HCMP767/2010), the Court of First Instance considered that where there was no actual or pending litigation, litigation must be a real likelihood rather than a mere possibility. The court mentioned that the approach would cover both civil and criminal litigation as well as litigation involving appropriate regulators.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

As a result of the Hong Kong Court of Appeal decision in *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, communications between employees of corporate clients and external lawyers are given greater protection and are subject to the dominant purpose test of obtaining legal advice. This extends to the whole process of gathering information for the purpose of obtaining legal advice, which may include notes of interviews produced during investigations. Recently, in *Wong Wai Keung v Commissioner of Police* [2022] HKCFI 374, it was reiterated that privilege will not automatically attach to documents collated by the client from its own files, even if the intention is for those documents to be provided to lawyers for the purpose of obtaining legal advice. While the communication to the lawyer may be privileged, the underlying documents still exist separately within the client's files, and therefore the normal rules of discovery will apply.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

There are a number of statutes in Hong Kong that grant information-gathering powers to governmental and/or regulatory authorities. Some expressly abrogate or curtail the application of legal professional privilege, while others expressly confirm its application. The Hong Kong courts, while recognizing that the Hong Kong legislature can legislate to abrogate or curtail legal professional privilege, have made it clear that, as legal professional privilege is a fundamental right entrenched in the Hong Kong Basic Law, such abrogation or curtailment needs to be made by clear and compelling words in primary legislation or by necessary implication.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The most recent key issue was in the case of *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20. As a result of the Hong Kong Court of Appeal decision in this case, legal advice privilege in Hong Kong applies more widely to communications between employees of corporate clients and external lawyers, and its application is subject to the dominant purpose test of obtaining or seeking legal advice.

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India

01 - Discovery

What disclosure/discovery is required in litigation?

The Code of Civil Procedure 1908 stipulates that the court may, either of its own motion or on the application of any party, order the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence. Further, a party to a suit may serve a notice on the other party to produce documents referenced in the other party's pleadings or affidavits for inspection. Where such an order for inspection is made, and privilege is claimed in respect of the documents sought, the court will be entitled to inspect the documents to decide the validity of the claim of privilege.

Similarly, the Code of Criminal Procedure 1973 empowers the court or an officer in charge of a police station to issue a summons for the production of documents or any other thing in the power or possession of the person to whom the summons is issued. Privileged communications are not expressly exempted from the scope of this provision, and the dominant view is that privilege is a rule of evidence and becomes relevant only at trial. At trial, the court may be petitioned to exclude it from evidence.

The definition of "court" under the Indian Evidence Act 1872 includes all judges and magistrates, and all persons, except arbitrators, legally authorized to take evidence. As a result, in addition to the regular civil and criminal courts in India, certain tribunals and adjudicating bodies established under statute, such as the National Company Law Tribunal, the Debt Recovery Tribunal, the various fora established under the Consumer Protection Act 2019, etc., have the same power as civil courts under the Code of Civil Procedure 1908 to call for disclosure and discovery of documents or other material that may be produced as evidence.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, India recognizes the concept of attorney-client privilege, which protects professional communications as well as work product created in anticipation of litigation. Professional communications between a client and their advocate are protected under the Indian Evidence Act 1872, the Advocates Act 1961 and the Bar Council of India Rules. The Indian Evidence Act 1872 provides that an obligation of confidentiality rests upon certain categories of legal practitioners, i.e., barristers, attorneys, pleaders or vakils. Vakil is an Urdu word for an advocate, pleader, counsel or attorney. At the time of British rule in India, the term was used to describe a pleader of Indian origin. Subsequent to the enactment of the Advocates Act 1961, a single category of legal practitioners was created, i.e., advocates, and the use of the term vakil was done away with. However, the term still appears in earlier legislation.

Legal practitioners that are subject to an obligation of confidentiality are not permitted to:

- Disclose any communication made to them in the course of and for the purpose of their employment, by or on behalf of the client
- State the contents or condition of any document with which they have become acquainted in the course and for the purpose of their professional employment
- Disclose any advice given by them to their client in the course and for the purpose of such employment

However, privilege does not extend to circumstances where:

- The client has expressly consented to disclosure of the privileged information
- The communication has been made in furtherance of any illegal purpose
- The barrister, pleader, attorney or vakil, in the course of their employment, observes that any crime or fraud has been committed since the commencement of their employment

Under the Indian Evidence Act 1872, a person cannot be compelled to disclose any confidential communication between themselves and their legal professional adviser. The only exception is where a person offers themselves as a witness, and the court compels them to disclose communications necessary to explain the evidence they have given.

The protection of privilege extends to all the work products and communication exchanged between a client and attorney in anticipation of litigation. This includes communication to:

- Obtain advice for the litigation
- Obtain or collect evidence to be used in the litigation
- Obtain information that will lead to such evidence, drafts of notices, pleadings and so forth exchanged between the attorney and the client

Indian law follows the English position concerning work product. The work product must be prepared by counsel or the request of counsel in anticipation of litigation to confer protection.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The Indian Evidence Act 1872 treats the contents or condition of any document with which a barrister, attorney, pleader or vakil (now advocates) has become acquainted in the course of and for the purpose of their professional employment as privileged information. Thus, all communications made between clients and their attorneys confidentially with a view to obtaining professional advice are privileged, and privilege is applicable even to a copy held by a client. In *D Veerasekaran v. State of TN*, the court held that a letter written by an advocate to their client (who was accused of terrorist activities) could not be used as evidence against the advocate for establishing the charge of abetment as the said letter would be protected as a professional communication.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The issue regarding the position of an in-house counsel vis-à-vis an outside counsel in the realm of attorney-client privilege in India has been the subject matter of judicial interpretation. Under the Advocates Act 1961, an advocate is one who has been entered in the relevant state bar council rolls. The Bar Council of India Rules stipulate that an advocate must not be a full-time salaried employee of any person, government, firm, corporation or concern. An in-house lawyer (i.e., one who receives a salary) therefore cannot practice as an advocate while employed full-time.

There does not appear to be any decision by the Supreme Court of India as to whether communications with in-house counsel are on the same footing as those with an advocate (although there is case law on whether, in certain instances, advocates working as full-time employees, especially of government corporations/departments, would be considered as advocates). In *Sushma Suri v. Govt. of NCT of Delhi and Anr.*, the Supreme Court, while interpreting Rule 49 of the Bar Council of India Rules, held that the test is not whether an advocate employed by a government or

body corporate is engaged on terms of salary or by payment of remuneration, but whether such person is engaged to act or plead on its behalf in a court of law as an advocate. If such person is not acting or pleading on behalf of their employer, but does other kinds of work, then they become a mere employee of the government or the body corporate. Further, in the case of *Satish Kumar Sharma v. Bar Council of Himachal Pradesh*, the Supreme Court held that a full-time salaried employee of a government department could not continue to practice as an advocate, as the relevant state bar council did not frame any rules to provide any exemption to law officers of central/state government from the general rule that bars an advocate from being a full time salaried employee of any person, government, firm, corporation or concern so long as they continue to practice.

The Bombay High Court, in *Municipal Corporation of Greater Bombay v. Vijay Metal Works*, held that privilege should apply to in-house legal advisers so long as the communication relates to advice on questions of law. In *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd*, the Bombay High Court observed that where in-house counsel would, save for their employment with the concerned litigant, otherwise be qualified to give legal advice, communication between the in-house counsel and the litigant would be privileged. However, decisions of the Bombay High Court have only persuasive value before the high courts of other states.

Does privilege extend to internal communications between in-house lawyers?

There is no reported decision on this issue by an Indian court yet.

Are foreign lawyers recognized for the purposes of privilege?

Under the Indian Evidence Act 1872, the obligation of confidentiality rests only upon barristers, attorneys, pleaders or vakils (now advocates) and their clerks or interpreters; and under the Advocates Act 1961, on advocates. Foreign lawyers do not fall within the category of advocates.

In 2018, the Supreme Court of India in *Bar Council of India v. A.K. Balaji* clarified that while foreign lawyers are not entitled to practice the profession of law in India, they may "fly in and fly out" on "casual" visits to give legal advice on foreign law to their clients. They may also conduct/participate in international commercial arbitrations, in which case they will be governed by the code of conduct applicable to Indian lawyers. This could arguably include both the Advocates Act 1961 as well as the Bar Council of India Rules pertaining to attorney-client privilege. Since the Union of India and the Bar Council of India have been granted liberty to frame additional rules in respect of the practice of law by foreign lawyers in India, it remains to be seen if these rules, when framed, would specifically extend privilege to foreign lawyers.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The doctrine of privilege under the Indian Evidence Act 1872 does not extend to nonlegal professionals.

The Bombay High Court in *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd* observed that in order for advice to be protected as a privileged communication under the Indian Evidence Act 1872, it must be given by a person who is qualified to give legal advice. However, due to a lack of pleadings, the court did not make a formal finding on this issue.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

The privilege accorded under sections 126 to 129 of the Indian Evidence Act 1872 can only be waived by the client. Under section 126, a client is required to expressly consent to the waiver of privilege. This need not be in writing necessarily and could be inferred from the facts and circumstances of the case. Further, under section 128, if a client calls their attorney as a witness and, in the course of an examination, asks questions that specifically require disclosure of attorney-client privileged information, then such client is understood to have waived privilege.

Sections 126 to 129 do not contemplate limited waiver or sharing of attorney-client communications or work product among persons with a common interest without waiving protections. As per the language of section 126, a client may waive privilege entirely or not at all. However, where the disclosure is forced by a government authority (e.g., as a part of documents seized), such disclosure may be attempted to be made without waiving protections.

If a document has not passed directly between the legal adviser and the client, but is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the court may not compel the production of such document (*Vishnu Yeshawant Wagh v. New York Life Insurance Co.*).

However, courts have held that for privilege to be claimed, the document or information should be confidential. Therefore, once a document has been obtained, it is imperative that it is kept confidential and not disclosed for any purposes except in the course of litigation or preparation for litigation. In *Diljeet Titus and Ors. v. Alfred A Adebare and Ors.*, the court held that if an associate or advocate works for another advocate and their clients, they owe an obligation not only to maintain the confidentiality between the client and their advocate, but also not to surreptitiously take away what is the final product of the effort put in, to which they may also be a party.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Although the provisions relating to attorney-client privilege contained in the Indian Evidence Act 1872 apply in the course of both civil and criminal judicial proceedings, their applicability to investigatory or regulatory situations is not free from doubt. There is no clear pronouncement of the Indian courts that prevents investigative agencies from seizing material solely on the ground that it is marked as privileged.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

While there is no direct judicial precedent on this question yet, notes of interviews (i) conducted by legal counsel or in the presence of legal counsel; and (ii) required by legal counsel in order to provide advice or to prepare for litigation may be covered by privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Yes, government regulators may require a privileged document to be provided to them. The term "government regulator" has a very broad definition and includes within its ambit courts, tribunals and

other adjudicating bodies established under statute, which usually are accorded powers identical to a civil court regarding discovery and disclosure as provided under the Code of Civil Procedure 1908 and the Indian Evidence Act 1872. In *Re: Matter of Great Public Importance Touching Upon The Independence of Judiciary*, the Supreme Court reaffirmed that without production of the information, the court cannot be prevented from inspecting a document even though such document is claimed to be privileged.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The Right to Information Act 2005 ("**RTI Act**") was enacted to secure access to information in the possession of public authorities. Under the RTI Act, citizens may require certain information in the possession of public authorities to be furnished to them. However, the RTI Act sets out certain exceptional circumstances wherein such information need not be disclosed. One such exception is where information is held by a public authority by virtue of a fiduciary relationship between the authority and the person providing the information, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

In *The Superintendent, High Court v. The Registrar, Tamil Nadu Information Commission and M. Sivaraj*, the issuance of a summons by the Tamil Nadu Information Commission to the Public Prosecutor's office to disclose certain records under the RTI Act was challenged. It was contended on behalf of the Tamil Nadu Information Commission that a public authority may be required to disclose documents in its possession, even where such documents were exempted from disclosure under the RTI Act, where the public interest in disclosure outweighed the harm to the protected interests. However, the court ruled that the documents sought to be disclosed were protected under the provisions of the Indian Evidence Act 1872, and thus disclosure was not required, especially since it was prohibited under statute and disclosure would have resulted in consequences for counsel.

Further, in *Mukesh Agrawal v. Public Information Officer, RBI*, the public information officer of the Reserve Bank of India contended that advice provided by a lawyer is held by the client in a fiduciary relationship and hence is exempt under Section 8(1)(e) of the RTI Act. The Central Information Commission, while rejecting this contention, held that although communications of a client with a lawyer are held in a fiduciary capacity by the lawyer, a client does not hold communications from a lawyer in a fiduciary capacity.

In *Alok Srivastava v. CPIO, English and Foreign Language University*, the Central Information Commission evaluated the issue of whether the advice given by standing counsel to the client university would be considered to be given in a fiduciary relationship. It concluded that in the circumstances of that case, public interest outweighed the protected interest, and ordered disclosure of the legal opinion.

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Indonesia

01 - Discovery

What disclosure/discovery is required in litigation?

Indonesia does not have an elaborate discovery/disclosure process as known and practiced in many common law jurisdictions. After pleadings have been filed, there is an evidentiary hearing in which parties are required to submit any evidence on which they have relied in their arguments. There is no procedural provision for either the court or another party to require a party to disclose any evidence which it has not chosen to submit as part of this process. This is in line with the general principles in Indonesian civil procedure that judges should only examine matters that are submitted by the parties and that parties have the burden of proving any assertions made as part of their case.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The concept of attorney-client privilege is recognized in Indonesia. The basic rule is that advocates are obliged to keep confidential anything known to them or obtained from the client because of their professional relationship, unless stipulated otherwise by law.

Further, advocates are entitled to a right of confidentiality in respect of any information that they obtain from their clients. Authorities cannot seize or inspect advocates' client-related documents and files. Wiretapping of advocates' electronic communications with clients is also prohibited.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The privilege only applies to the advocate and does not extend to other parties, including the client. Therefore, attorney-client communications held by the client are not protected.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Attorney-client privilege only applies to information and documents known to advocates or obtained by them from their clients or obtained in the course of the representation of their clients because of the professional relationship between them. The Advocate Law defines an advocate as a registered Indonesian advocate who is an independent professional serving their clients for certain payments agreed with the clients (or without payments in the case of pro bono matters) and defines a client as a party who receives services from the advocate.

Accordingly, an in-house counsel (regardless of whether or not they hold an advocate license) would not enjoy the attorney-client privilege protection provided by the Advocate Law.

Does privilege extend to internal communications between in-house lawyers?

As in-house counsel (regardless of whether or not they hold an advocate license) are not considered to have an attorney-client relationship with the company by whom they are employed, the attorney-client privilege does not extend to their internal communications.

Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers who are: (i) registered as lawyers in their original countries; (ii) registered at the office of the Ministry of Law and Human Rights; and (iii) working at a registered Indonesian law firm, must comply with the terms of the Advocate Code of Ethics and generally, Indonesian law (which includes the Advocate Law).

As a result, attorney-client privilege rules are also applicable to foreign lawyers who operate in Indonesia and meet the above requirements.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege is applicable to advocates only. There is no law which provides for privilege in respect of other professions (e.g., accountants or tax consultants).

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

The rights and obligations to preserve confidentiality of information are applicable to advocates only. Once the documents are transferred to a third party who is not an advocate, the third party does not have the same privilege.

The Advocate Code of Ethics provides that written communication between advocates with the note "sans prejudice" cannot be shown to a judge as evidence. However, as this is stipulated in the Advocate Code of Ethics, it may be argued that if the document is provided to a third party who is not an advocate, that party will not be bound under this rule.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The Advocate Law, which is the general basis of privilege under Indonesian law, does not differentiate between privilege in civil, criminal, regulatory or investigatory situations. Note that in civil procedural law, there is no concept of discovery. The Criminal Procedural Law stipulates that in the event that suspects are under detention, they may directly communicate through letters with their counsel without the correspondence being scrutinized by the investigator, prosecutor, judge, or officer of the detention house, unless there is a suspicion that the correspondence is being abused. This is in line with the general client-attorney privilege given by the Advocate Law.

As discussed, there are limits to this privilege as stipulated under the Anti-Corruption Law, Anti-Money Laundering Law and Tax Law.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

As under the Advocate Law privilege follows the advocate, whether the notes are covered by privilege would depend on who possesses the notes. If the notes are possessed by the advocate, then it can be argued that the notes are pieces of information or documents that were obtained from the client, which are covered by privilege. If the notes are possessed by any other person that is not an advocate, then they are not covered by privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Attorney-client privilege may not be applicable in corruption, money laundering and tax cases. The Anti-Corruption Law, the Anti-Money Laundering Law and the Tax Law provide exceptions to attorney-client privilege and require those who by their profession or position are obliged to keep secrets to testify as witnesses. These exceptions, however, do not extend to the provision of client-related documents and files in the possession of attorneys.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There has been ongoing debate as to the appropriate balance between advocates' obligations to preserve the confidentiality of their clients' information and the authorities' rights under the Anti-Corruption Law. This debate has not been resolved, and there is no authoritative rule or court decision that provides any guidance.

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Japan

01 - Discovery

What disclosure/discovery is required in litigation?

There is no discovery process under the Japanese Code of Civil Procedure similar to that found in common law jurisdictions. It is usually quite difficult for a plaintiff to obtain evidence from a defendant or from third parties.

Whilst a procedure to obtain disclosure of specific documents exists, the document to be disclosed must be very precisely identified by the requesting party. The Code of Civil Procedure allows any party to demand that either the other party to the proceeding or a third party produce a document. The demand must clearly identify the requested document, its contents, the facts to be proven by the document and the legal basis for its production. Accordingly, disclosure of a wide number of unknown documents is not possible. Further, under the Code of Civil Procedure, a document that was created only for internal use may not be subject to discovery.

The demand is filed with the court, and, if accepted, the court will issue a corresponding order. The order may be appealed. If a party to the proceeding fails to produce a document in accordance with a court order, the court may deem the allegations made by the requesting party in respect of the requested document to have been proven. A third party who fails to comply with a court order requiring disclosure of a document may be sanctioned by way of a non-criminal fine not exceeding JPY 200,000. A party may also ask the court to subpoena a witness. Limited sanctions exist if the witness does not obey the court order.

Two other procedures may be used to obtain evidence prior to the commencement of proceedings. Firstly, the procedure of preservation of evidence allows a judge to confirm on-site the existence and contents of certain evidence. However, the judge may validly be refused entry to the premises where the evidence is held.

Secondly, lawyers are not allowed to directly demand the production of evidence prior to the commencement of proceedings but can do so through the bar association. However, the party being asked to produce the evidence may refuse to do so without risk of being sanctioned.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

It does, but protection is limited to documents and communications kept by registered attorneys-at-law. Japanese lawyers (bengoshi) and foreign lawyers registered as foreign attorneys in Japan (gaikokuhojimubengoshi) are subject to a statutory obligation of confidentiality. Under the Civil and Criminal Procedure Codes, they may refuse to testify as witnesses in relation to knowledge acquired in the course of their professional duties as lawyers. There is no attorney-client communication privilege as such.

Aside from privilege in the litigation context, the Antimonopoly Act was amended on 19 June 2019 and came into force on 25 December 2020, with the key revisions introducing a new privilege-like mechanism within the antitrust investigation regime of the Japan Fair Trade Commission (JFTC). By way of this new mechanism, digital and documentary materials containing confidential communication between a subject party of an investigation and its legal counsel, if certain conditions are satisfied, shall be treated as inaccessible by JFTC investigators and will be returned to a party, even if wrongfully confiscated in the process of a JFTC investigation.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The obligations and rights of confidentiality are limited to documents and information in the possession of lawyers. To the extent that the same information or documents are in the possession of the client or any party other than a lawyer, the information or documents will not be subject to any specific protection from disclosure.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The statutory obligations of confidentiality only apply to bengoshi and gaikokuhojimubengoshi. In-house lawyers are not usually bengoshi or gaikokuhojimubengoshi and are not subject to any statutory obligation of confidentiality.

In-house lawyers will be treated in the same way as external lawyers if they are registered attorneys-at-law (bengoshi or gaikokuhojimubengoshi).

Does privilege extend to internal communications between in-house lawyers?

Yes, provided that they are registered attorneys-at-law.

Are foreign lawyers recognized for the purposes of privilege?

Yes, the statutory obligations of confidentiality will apply to foreign lawyers, provided that they are registered foreign lawyers (gaikokuhojimubengoshi). Whether or not a communication or work product of a foreign lawyer is privileged in their home jurisdiction is irrelevant.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

No.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

None. If disclosure to a third party results in the documents or information ceasing to be confidential, then the lawyer's statutory obligations of confidentiality will not apply.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In all civil, criminal, and administrative court procedures, lawyers (i.e., bengoshi or gaikokuhojimubengoshi) may refuse to (i) testify against their client at court; and (ii) produce evidence in their possession, in order to comply with the duty of confidentiality. Further, in criminal cases, lawyers may refuse confiscation of evidence in their possession during investigations by police or prosecutors. On the other hand, in administrative cases such as alleged violations of antitrust, tax, or securities laws, the law does not explicitly prohibit the authorities from confiscating evidence in the possession of lawyers. However, it is quite rare that the authorities exercise such rights against lawyers.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Yes, as long as they are in the possession of lawyers. If such documents are held by the client, the client may, in a civil case, refuse to produce such documents as internal documents under the Code of Civil Procedure. On the other hand, the client may not do so if it is a criminal case.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Regulators cannot require a lawyer to provide a document that is protected by confidentiality.

However, to the extent that the same information or documents are held by the client or any party other than a lawyer, that information or those documents will not be subject to any specific protection from disclosure.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no recent issues in relation to privilege in Japan. In December 2013, Japan passed a controversial new law on the protection of specific secrets designed to reinforce sanctions against leaks of state secrets. For the time being, this law does not affect or concern privilege, although it should be noted that decrees to be made under this law have not yet been published.

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Malaysia

01 - Discovery

What disclosure/discovery is required in litigation?

Parties to civil litigation in Malaysia are, in practice, expected only to disclose documents on which they intend to rely in the proceedings, subject to the right of the opposing party to seek an order for wider discovery of documents.

Pursuant to the Rules of Court 2012, the court will give pre-trial directions during case management. Pre-trial directions will typically provide for a period within which the parties must file a bundle of the documents that any party intends to rely on or refer to. However, a party can seek an order for the discovery of documents beyond those that have been voluntarily disclosed. The documents that a party may be ordered to discover are:

- The documents on which the party relies or will rely
- The documents that could:
    - Adversely affect the party's own case
    - Adversely affect another party's case
    - Support another party's case

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

There are two types of legal professional privilege recognized in Malaysia.

Legal advice privilege protects any communication made in the course of the professional employment of a lawyer by a client seeking legal advice.

Litigation privilege protects any communication between a client and legal professional advisers or a third party, created at the behest of the party to a litigation or their solicitor, if the dominant purpose of the communication was to obtain legal advice for use in litigation.

The Evidence Act confers protection upon such communications, documents and advice by rendering them inadmissible in any court or judicial proceedings. As such, whatever the circumstances in which disclosure of privileged communications is sought of a solicitor in the litigation process, they are bound to assert the privilege and resist such disclosure unless the client expressly waives that privilege. Furthermore, a document cannot be admitted as evidence if it is privileged, even if it is in the hands of the opposite party or if it has been wrongly released to the opposite side in discovery proceedings.

The only exceptions where disclosure or discovery of otherwise privileged communications is required in litigation are set out in the Evidence Act. These exceptions apply to the following:

- Any communication made in furtherance of any illegal purpose
- Any fact observed by any advocate in the course of their employment showing that crime or fraud has been committed since the commencement of their employment

It is also worth noting that the Evidence Act provides that where clients have offered to give witness evidence, they may be compelled to disclose any privileged communications as may appear necessary to the court to be known in order to explain any evidence that they have given.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Copies of attorney-client communication held by the client are also protected by legal professional privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The position in Malaysia is still unclear as to whether legal professional privilege extends to in-house lawyers, as there have been no Malaysian cases on this point.

The term "advocate" used in the Evidence Act is defined as "a person entitled to practice as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia." A strict reading of this definition suggests legal professional privilege does not extend to in-house lawyers or legal advisers who are salaried employees of the client. On this interpretation, privilege would only apply to advocates and solicitors entitled to practice in Malaysia by virtue of being called to the Malaysian bar and holding a practicing certificate or by obtaining an exemption allowing them to practice in Malaysia on an ad hoc basis. An in-house lawyer cannot hold a practicing certificate and cannot appear in court.

The term "legal professional adviser" used in the Evidence Act is not defined, and until there is clear judicial interpretation as to the legislative intent behind the use of the term, there is no basis to limit the application of the provision to confidential communications between a person and their advocate. Arguably, the test of whether in-house lawyers are sufficiently independent to be treated in the same way as external lawyers may be applied, as it has been in some Commonwealth jurisdictions.

As a matter of prudence, it should however be assumed that the concept of legal professional privilege extends only to communications with externally appointed advocates and solicitors.

Does privilege extend to internal communications between in-house lawyers?

As the position regarding whether the concept of legal professional privilege extends to in-house lawyers is unclear, the prudent approach would be to assume that it does not extend to internal communications between in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

Legal professional privilege extends only to Malaysian advocates and solicitors. Foreign lawyers will generally (unless, for example, they have leave of a Malaysian court to practice) not be afforded the protection of privilege.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

As nonlegal professionals are not "advocates" for the purposes of the Evidence Act, legal professional privilege will not be afforded to nonlegal professionals who advise on legal issues relating to their field.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

"Privilege" is not treated as co-extensive with "confidentiality." Insofar as the concept of legal professional privilege is concerned, a privileged document can be given to a third party without waiving privilege in all circumstances, except where the holder of the privilege has waived that privilege for court proceedings. In Malaysia, the maxim applies: "once privileged, always privileged."

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The Evidence Act confers protection upon privileged communications only by rendering them inadmissible in any court or judicial proceedings.

A governmental regulator may legitimately require a privileged document to be provided to them, subject to its powers of seizure. Otherwise, there are no differences in how privilege operates in civil and criminal situations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and documents produced or obtained during investigations in order to obtain information on a matter of expected litigation, for the purpose of submission to advocates and solicitors for advice or the conduct of litigation, are covered by privilege. However, documents which are not produced for submission to the advocates and solicitors, although obtained for the purposes of litigation, will not be covered by privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

A governmental regulator may legitimately require a privileged document to be provided to them, subject to its powers of seizure.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Has common law litigation privilege been displaced by the Evidence Act?

In the 2017 case of *Wang Han Lin & Ors v. HSBC Bank Malaysia Berhad* [2017] MLJU 1075, the Court of Appeal reversed the position in *Tenaga Nasional Berhad v. Bukit Lenang Development Sdn Bhd* [2016] 5 MLJ 127 where the High Court held that litigation privilege at common law had been displaced by section 126 of the Evidence Act as the existence of a statute codifying the law of evidence had removed the basis on which to rely upon the common law. The court in *Wang Han Lin* held that section 126 of the Evidence Act did not fall within the purview of common law litigation privilege and that there are no inconsistencies between the two. Litigation privilege existed before the passing of the Evidence Act and continues to apply in Malaysia.

Breach of legal professional privilege

In the 2018 case of *Tan Chong Kean v. Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669, the Federal Court considered the remedies available to a client against their solicitors in an action for breach of legal professional privilege. The client's solicitors had failed to destroy trust deeds prepared by them on the client's behalf, against the client's express instructions. Instead, the solicitors used the trust deeds to support their application for a third-party notice to be issued against the client. The client had sought to claim damages against the solicitors, but the solicitors contended that the client's only recourse was to lodge a complaint against them to the relevant disciplinary body. The court found in favor of the client and made an order for damages to be assessed by the High Court. The solicitors were also prohibited from disclosure, use or retention of the trust deeds.

Is a document in the form of a "draft" intended to be disclosed protected by privilege?

Yes, so long as it has not been disclosed to the counterparty. In the 2020 case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421 at the Court of Appeal, it was held that as long as the "draft" is a solicitor work product produced on the client's instructions, it shall remain within the protective umbrella of legal professional privilege until the client is satisfied that the "draft" is ready for disclosure and is so disclosed.

Is privilege lost or waived in the absence of confidentiality?

No. In the same case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421, the Court of Appeal held that privilege is still intact notwithstanding the fact that most or all of the contents of a document have been made known to and/or are in the knowledge of the counterparty, so long as the document itself, in its entirety and as a whole, remains undisclosed to the counterparty. Privilege is waived only upon the conscious or deliberate act on the part of the client in disclosing the document directly to the counterparty or through intermediaries such as their solicitors.

Can a solicitor's client account attract privilege under the Evidence Act?

Yes. In the 2021 case of *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 2 MLJ 428, the Court of Appeal was of the view that any or all financial information or data exchanged between an advocate and their client, and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of section 126 of the Evidence Act. Such privilege extends to documents rendered or kept in the client's account as well as all information relating thereto.

Extension of scope under section 126 (1)(b) of the Evidence Act

Section 126 (1)(b) of the Evidence Act does not protect from disclosure any fact observed by an advocate and solicitor which shows commission of any crime or fraud since the commencement of their employment. It follows in section 126 (2) that it is immaterial whether or not the fact (which shows a crime or fraud has been committed) was brought to the attention of the advocate and solicitor. In the 2020 case of *Celcom (M) Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors* and another suit [2020] 11 MLJ 44, the High Court, based on section 126 (2), extended the scope of section 126 (1)(b) to apply in the following three circumstances:

- Willful blindness – when an advocate and solicitor intentionally closes their eyes to any fact which shows the commission of a crime or fraud after commencement of their employment. In other words, Nelsonian knowledge, willful ignorance and/or contrived ignorance on the part of the advocate and solicitor

- Recklessness – when an advocate and solicitor is reckless and fails to make such inquiries as an honest and reasonably competent advocate and solicitor would have made regarding the commission of a crime or fraud after commencement of their employment
- Knowledge of circumstances – when an advocate and solicitor has knowledge of circumstances which to an honest and reasonably competent advocate and solicitor would indicate commission of a crime or fraud after commencement of their employment

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People's Republic of China

01 - Discovery

What disclosure/discovery is required in litigation?

In the context of civil litigation conducted in the courts of the People's Republic of China (PRC),[1] there is not yet a consistent, established concept of formal adverse party discovery. There is, however, a process known as evidence exchange (zhengju jiaohuan). Generally speaking, parties are required to conduct their own investigations and to produce evidence in their possession to meet their respective evidentiary burdens. No document requests are issued to the opposing party, and no interrogatories are conducted.

Nonetheless, the process in PRC civil litigation is evolving, and parties sometimes can find means to work around the absence of a formal discovery process and requirements. For example, a party may petition the relevant PRC court to collect evidence from their opponent or third parties if the petitioning party can establish that the evidence exists, is relevant, and is objectively difficult to obtain or at risk of destruction. Sometimes, PRC courts will grant such a petition and permit a limited evidence collection or even an evidence preservation exercise. However, it is worth noting that even when a PRC court does grant such a petition, the opponent or third party from which the evidence is sought is able to avoid complying with the court's request for evidence collection and preservation. Therefore, enforcing the order could be difficult. Although sanctions exist, they do not extend to a dismissal of the claim or a strike-out of the defense.

In addition to the difficulties of collecting evidence in the PRC, the authenticity or admissibility burdens for party-introduced evidence can be significant. PRC courts tend to hold parties to a very high standard regarding the authenticity of their evidence. In most cases, parties should be prepared to prove even the most basic of information (e.g., that the signature on a contract is authentic or that the email retrieved from a company computer was not manufactured).

The lack of a formal adverse party discovery process in the PRC often makes it difficult to pursue a civil case before a PRC court, particularly when the case is brought by a foreign party or foreign investor against a Chinese party and involves claims concerning concealed activities by the defendant (e.g., trade secret infringement, fraud and civil conspiracy). The absence of such a process is often viewed favorably by a party defending a claim in a PRC court. The defending party will likely be faced with discovery burdens significantly smaller than might arise if that party were defending a claim in courts of other jurisdictions, such as those of the United States.

That being said, the amended Civil Procedure Law of the People's Republic of China and the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings have provided certain help for the party that does not possess the evidence. For example, if a party in control of written evidence refuses to submit it without justifiable reasons, the people's court may determine that the content of the written evidence is truly as claimed by the other party. Also, a party who neither admits nor denies facts unfavorable to them as claimed by the other party, but fails to explicitly admit or deny such facts after the judge has delivered an explanation and made inquiries, shall be deemed to have admitted such facts.

[1] Please note that references to PRC exclude Taiwan and the Special Administrative Regions of Hong Kong and Macau

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The concept of what is understood in common law jurisdictions as attorney-client privilege and the related work product protections are not found as intact analogous concepts in the PRC.

PRC laws and regulations do specifically provide for the confidentiality of documents and communications arising and occurring between a qualified lawyer (i.e., lawyers who meet specific qualification criteria prescribed under applicable PRC laws and regulations) and their client, in the course of the law-practice activities of that qualified lawyer.

However, PRC laws and regulations explicitly exclude facts and information pertaining to a criminal offense that the client or someone else is preparing to commit or is currently committing, and which jeopardizes state security or public safety or seriously jeopardizes the safety of others or others' property, from the scope of a lawyer's confidentiality obligation.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

To the extent privilege applies in the PRC, it can be argued that both situations are protected.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In-house lawyers who are not admitted to the local bar or are not registered with PRC's Ministry of Justice do not appear to fall within the scope of lawyers in the PRC who have a confidentiality obligation. They are not regarded as qualified lawyers and cannot engage in private practice.

Current PRC laws and regulations indicate that in-house lawyers in the PRC are different from outside counsel and, therefore, lesser confidentiality obligations apply to the documents and communications which they undertake with their clients.

Does privilege extend to internal communications between in-house lawyers?

This is unlikely to be the case.

Are foreign lawyers recognized for the purposes of privilege?

It is believed that foreign lawyers duly registered in the PRC under their law firms are subject to the same conditions and the same level of protection as qualified PRC lawyers in terms of confidentiality obligations.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

This is unlikely to be the case.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Waiver of a lawyer's confidentiality obligation is not explicitly addressed in the applicable PRC laws and regulations. Conduct inconsistent with the continued confidentiality of the communication is likely to result in a waiver of the confidentiality protections.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There are some differences in how privilege operates in civil, criminal and regulatory situations.

The Criminal Procedure Law of the People's Republic of China provides that a defense lawyer in criminal proceedings has the right not to disclose client-related information obtained in the course of representing their client unless the information indicates that the client or other persons are to commit or are committing crimes endangering national security, public security or seriously endangering the personal safety of others. This nondisclosure right also applies to government authorities, including the police, the prosecutor and the court.

For civil and regulatory proceedings, however, Chinese lawyers have a legal obligation to disclose client information if required to do so by judicial authorities and government agencies.

- The Civil Procedure Law of the People's Republic of China requires all individuals possessing knowledge of the circumstances of a case to give testimony in court. Lawyers are not excluded from this general obligation, although, in practice, it is extremely rare that lawyers are required to testify or give evidence against their own clients. Nonetheless, the existence of such a broad legal obligation renders the confidentiality of communications between lawyers and clients vulnerable.
- Chinese lawyers may be required to cooperate with regulatory authorities when their clients are under administrative investigations for violation of Chinese laws such as the Anti-Monopoly Law, the Anti-Unfair Competition Law and the Anti-Money Laundering Law. For example, the Anti-Monopoly Law provides specifically that:
    - The anti-monopoly law enforcement authorities may conduct interrogations of the business entity, interested parties and other relevant entities and individuals, and require such parties to provide explanations
    - Business entities under investigation, interested parties, and other relevant entities or individuals shall cooperate with the anti-monopoly law enforcement authorities as they perform their duties, and shall not refuse or impede the investigation

Lawyers are not excluded from the above cooperation obligations, although in practice it is extremely rare that lawyers are forced by the authorities to cooperate or disclose client-related confidential information.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Whether the notes of interviews with employees and other documents produced during investigations are protected under the lawyers' confidentiality obligation depends on the content of such documents. The confidentiality obligation under PRC law applies only to state secrets, commercial secrets, the

privacy of their clients, and any other information that their clients or other interested parties are unwilling to disclose publicly. Second, lawyers have a mandatory obligation to disclose information relating to activities that may endanger state security or public security, or which may gravely threaten the personal safety of others. Third, when faced with a request by regulatory authorities, lawyers may be required to produce such documents to the regulators.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

It is likely that a PRC governmental regulator can require the production of a document that falls within the scope of confidential communications between a qualified lawyer and their client. However, this will depend on the specific circumstances and issues involved.

There are certain variations among the PRC government bureaus as to the interpretation and enforcement of PRC laws and regulations. In most cases, government bureaus, in particular regulatory authorities, will not respect a confidentiality obligation claimed by a lawyer in relation to their client.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Issues concerning lawyer-client confidentiality obligations are, to date, largely untested in the PRC.

However, there is an inherent and unresolved tension in PRC laws and regulations between a lawyer's confidentiality obligation and an individual's affirmative obligations (under certain circumstances and pursuant to certain provisions in PRC laws concerning civil procedure and criminal procedure) to disclose information of which they are aware.

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Philippines

01 - Discovery

What disclosure/discovery is required in litigation?

Under the Philippine Rules of Civil Procedure, where a party has not been served with interrogatories, they generally cannot be compelled by the other party to give testimony in court or a deposition pending appeal. The exception to this is where a court allows the testimony or deposition for good cause and to prevent a failure of justice.

The Philippine Supreme Court has issued guidelines requiring litigants to make use of interrogatories to parties, requests for admission by adverse parties, and depositions. In civil cases, within one day from receipt of the complaint, the court should issue an order requiring the parties to avail themselves of: (i) interrogatories to parties; and (ii) requests for admission by the adverse party of the genuineness of any material and relevant document and the truth of any material and relevant matter of fact; or (iii) at their discretion, make use of depositions or other measures. Such other measures may include the production or inspection of documents or things upon the motion of any party showing good cause, or the examination of the physical or mental condition of a party where this is an issue in controversy.

In practice, however, these rules are not strictly enforced by Philippine courts.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Attorney-client privilege is embodied in the Philippine Rules of Court ("**Rules**") and the Code of Professional Responsibility for lawyers ("**Code**").

Under the Rules, attorneys or persons reasonably believed by the client to be licensed to engage in the practice of law cannot, without clients' consent, testify or be examined as to any communication made by the client to them or as to their advice given on such a communication in the course of, or with a view to, professional employment; nor can an attorney's secretary, stenographer or clerk or other persons assisting the attorney testify or be examined, without the consent of the client and the attorney, concerning any fact the knowledge of which has been acquired in such capacity. The Code requires a lawyer to preserve the confidence and secrets of their client even after the attorney-client relationship is terminated. It further provides that a lawyer shall not reveal a client's confidences or secrets except:

- If the services or advice of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud
- As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate or by inter vivos transaction
- As to a communication relevant to an issue of breach of duty by the lawyer to their client or by the client to their lawyer
- As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness

- As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients, unless they have expressly agreed otherwise

In order for a communication or information to fall under the coverage of attorney-client privilege, the following requisites must be present:

There must be an attorney-client relationship

The relationship of attorney and client must exist at the time the communication is made. This relationship exists when a client employs an attorney for the purpose of obtaining legal services, advice or opinion concerning the client's rights or obligations relative to the subject matter of the communication. The test is whether the communications are made to an attorney with a view to obtaining professional assistance or advice.

There must be communication between the client and the attorney

The privilege is not confined to verbal or written communications made by the client to the attorney. It also includes information communicated by the attorney to the client by actions, signs, or other means.

The communication must be made in confidence for the purposes of the attorney-client relationship. Confidentiality must be contemplated. Thus, communications made by the client to the lawyer in the presence of third parties who are not agents of either the client or the attorney are not covered by the privilege.

The work product of a lawyer, including effort, research and thought, contained in the lawyer's files, is privileged.

Communication must have been made in the course of or with a view to professional employment

A communication to an attorney is said to be in the attorney's professional capacity when the client makes the communication with the purpose of obtaining legal services, advice or opinion concerning the client's legal rights, obligations or duties relative to the subject matter of the communication. The communication must be connected with the matter for which the attorney has been employed. It is not necessary that the communication be made in connection with pending or current litigation.

In the absence of any of the requisites detailed above, the communication or information ceases to be covered by the attorney-client privilege rule.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The law protects clients from the effect of disclosures made by them to their attorneys in the confidence of the legal relationship.

However, a distinction should be made between a copy held by a client and a copy that lands in the possession of third parties. There is jurisprudence in the Philippines to the effect that a copy of such communication that falls into the hands of third parties, whether legally or illegally obtained, is not covered by privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Philippine law does not distinguish between external or internal counsel in the application of privilege.

However, with respect to internal counsel, since they frequently perform both a business and a legal function for their employer, only internal counsel's communications in their legal role may be subject to the protection of attorney-client privilege. In one case, the Philippine Supreme Court held that attorney-client privilege cannot be extended to communications made to a corporate secretary and general counsel in the absence of evidence as to which "hat" they are wearing at the time the communications are received. The privilege also does not apply where legal services are so intertwined with business activities that a clearer distinction between the two is impossible to discern.

Does privilege extend to internal communications between in-house lawyers?

Philippine law does not distinguish between external or internal counsel in the application of the privilege. Thus, privilege would also extend to internal communications between in-house lawyers, provided each lawyer has an attorney-client relationship with the employer client and the communication is made for the purpose of providing legal advice to that client or clients. There is no difference between in-house lawyers and external lawyers in this regard.

Are foreign lawyers recognized for the purposes of privilege?

The client may invoke the attorney-client privilege rule when their foreign lawyer is asked to testify on matters covered by privilege. This is consistent with the purpose of the rule of encouraging clients to make full disclosure to their attorneys, and to place unrestricted confidence in them in matters affecting their rights and obligations.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The Philippine Rules of Court are specific as to who may be covered by privilege, making particular reference to attorneys. As such, nonlawyers such as accountants and tax consultants providing legal advice are not covered. Indeed, in the case of accountants, there is legislation to the effect that accountants may be compelled to disclose confidential information when legally required to do so.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

A document may be given by an attorney to a third party without waiving privilege or losing confidentiality when such is either:

- Required by law
- Necessary to collect legal fees or to defend the lawyer, the lawyer's employees or associates, or by judicial action

Attorney-client privilege may be waived either expressly or impliedly. Implied waiver may result from either:

- The client's failure to object to the attorney's testimony regarding a privileged matter
- The client giving evidence on the privileged communication

- The privileged communication falling into the hands of the adverse party
- The client cross-examining the attorney in relation to the privileged communication

When privilege has been waived, the attorney may give evidence in relation to matters confidentially communicated by the client, or the attorney may be compelled to testify as to the statements and admissions of their client.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Generally, none. Attorney-client privilege is set out in the Philippine Rules of Court, which apply to civil and criminal cases. The privilege extends to regulatory inspections or administrative investigations, as it is common for government agencies to adopt these Rules as a supplement to their own procedural regulations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and other documents produced during investigations should be covered by privilege if the employees act in their capacity as such and on behalf of the client.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

A regulator generally does not have the power to require privileged documents to be provided.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no recent issues concerning privilege in the Philippines.

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Singapore

01 - Discovery

What disclosure/discovery is required in litigation?

The new Rules of Court 2021 (ROC 2021) came into effect on 1 April 2022. All civil proceedings, including appeals, commenced on or after 1 April 2022 will be governed by the ROC 2021. However, civil proceedings commenced before 1 April 2022 remain governed by the predecessor version of the Rules of Court, i.e., the Rules of Court 2014 (ROC 2014). Accordingly, this section will cover:

- Discovery for proceedings commenced on or after 1 April 2022 to which the ROC 2021 apply
- Discovery for proceedings commenced before 1 April 2022 to which the ROC 2014 apply

Production of documents under the Rules of Court 2021

The ROC 2021 introduces a number of key changes to terminology. In the context of discovery/disclosure, the ROC 2021 refers to the "production of documents."

The rules on production of documents under the ROC 2021 seek to narrow the scope of production of documents and reduce the time and costs expended in the production of documents process. The court may, at a case conference, order that the parties in an action must, within 14 days after the case conference, exchange a list of and a copy of all documents in their possession or control which fall into the following categories:

- All documents that the party will be relying on
- All known adverse documents, which include documents that a party ought reasonably to know are adverse to its case

In other words, the obligation to produce documents is not limited to the production of adverse documents that a party is actually aware of and includes the production of adverse documents that the party could have knowledge about through reasonable checks and searches.

"Control" has a wide meaning and the obligation to produce documents would include, for example, documents in the party's custody or power which were terms previously used under the ROC 2014.

Further, a requesting party may apply to court for the production of a specific document or class of documents in a party's possession or control. However, the court will not order the production of:

- Documents that merely lead a party on a train of inquiry to other documents, except in a special case
- A party's private or internal correspondence unless such correspondence are known adverse documents or in a special case
- Subject to any written law, documents subject to any privilege or where production would be contrary to the public interest

Discovery under the Rules of Court 2014

Pursuant to the ROC 2014, the court may at any time order a party or parties to give discovery by drawing up and serving on any other party a list of the documents relating to any matter in question between them in the action that are or have been in that party's possession, custody or power. The documents that must be disclosed include documents falling within the following categories:

- Documents on which that party relies or will rely

- Documents which could either
    - Adversely affect the party's own case
    - Adversely affect another party's case
    - Support another party's case

A party that has served a list of documents on any other party must allow the other party to inspect the documents referred to in the list and to make copies of them.

Further and/or specific discovery may also be sought by application to court. In particular, an application for the discovery of specific documents or a specific class of documents may include, in addition to the documents in the categories above, any document that may lead the party seeking discovery of it to a train of inquiry resulting in that party obtaining information that may either:

- Adversely affect its own case
- Adversely affect another party's case
- Support another party's case

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The concept of legal professional privilege in Singapore can be broadly divided into legal advice privilege and litigation privilege.

Legal advice privilege covers all confidential communications between a party and their advocate and solicitor. Legal advice privilege prevents an advocate or solicitor employed by a party from:

- Disclosing any communication made to them in the course and for the purpose of their employment by or on behalf of their client
- Stating the contents or condition of any document with which they have been acquainted in the course and for the purpose of their employment
- Disclosing any advice given by them to their client in the course and for the purpose of their employment

This privilege applies whether or not litigation is contemplated in respect of communications by the client and by third-party agents of the client who communicate merely as conduits. Where the third party does not communicate as a mere agent or conduit of the client, there are dicta from the Singapore Court of Appeal that such communications may nonetheless be privileged if the communication is made for the dominant purpose of seeking legal advice.

Litigation privilege covers all communications between a party and its lawyer, as well as communications with other third parties that were made for the predominant purpose of litigation. Litigation privilege protects from disclosure all information and materials created and collected for the sole or dominant purpose of litigation, including communications between the client and the client's legal professional adviser or between third parties and the client's legal professional adviser, whether or not they were made as an agent of the client and whether confidential or otherwise. In order for litigation privilege to apply, there must be a reasonable prospect of litigation.

Although both legal advice privilege and litigation privilege are embodied in the Evidence Act, reference to English law principles is permitted unless those principles are inconsistent with the Evidence Act.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Privilege is a right of the client rather than an obligation or right of the lawyer. As a result, the privilege applies equally to copies held by the client and those held by the lawyer.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The Evidence Act was amended in February 2012 to extend legal advice privilege to communications with in-house lawyers in their legal capacity. Specifically, legal advice privilege now extends to communications and advice between an entity and its "legal counsel" made or given in the course of and for the purpose of their employment as legal counsel. Legal counsel is broadly defined as a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes. It should be noted that only communications with in-house counsel made for the purpose of seeking their legal advice are privileged. This is an important distinction where the in-house counsel is entrusted with multiple roles in the entity in addition to being a legal adviser.

As regards confidential communications with in-house legal counsel before the amendments to the Evidence Act in February 2012, the Singapore Court of Appeal has held that such communications would be protected by the common law rule protecting such communications. Such privilege at common law would apply where the following three requirements are satisfied:

- The advice must have been rendered by a legal professional
- The legal professional must have been acting in their capacity as legal adviser when they provided the advice
- The communications must have been made in confidence

In respect of litigation privilege, the relevant statutory provision and case law developments appear to extend litigation privilege to cover communications or advice rendered by an in-house lawyer to the company (i.e., the client). The requirements described above in relation to the applicability of litigation privilege (that there must be a reasonable prospect of litigation and the communications must be for the dominant purpose of litigation) would therefore apply likewise to an in-house lawyer.

Does privilege extend to internal communications between in-house lawyers?

Confidential internal communications between two or more in-house lawyers are protected by legal advice privilege provided that the communication is made for the purpose of providing legal advice to that client or clients.

Are foreign lawyers recognized for the purposes of privilege?

The Legal Profession Act extends the solicitor-client privilege contained in the Evidence Act to professional communications between a client and a law corporation or limited liability law partnership. The sections further provide that the privilege shall apply to all the partners, officers and employees of such law corporation or limited liability law partnership. Since foreign lawyers may register to practice Singapore law in a Singapore law practice, their communications will be accorded

privilege as employees of the law corporation or limited liability law partnership (subject to any conditions that may be prescribed by the attorney-general under the registration of the foreign lawyer).

In respect of a joint-law venture between a foreign law practice and a Singapore law practice, or a formal law alliance between one or more foreign law practices and one or more Singapore law practices, solicitor-client privilege over communications between the joint law venture or formal law alliance and their clients exists by virtue of the Legal Profession Act. However, the Legal Profession Act is silent on whether employees of the joint-law venture or formal law alliance are accorded privilege in their communications.

In respect of a "foreign law practice", which is defined as a law practice – except a Singapore law practice – providing legal services in any foreign law in Singapore or elsewhere, there is no provision of law or regulation that expressly confers attorney-client privilege on such a firm.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Strictly, legal advice privilege does not extend to nonlegal professionals who, from time to time, may advise on legal issues relating to their field.

However, the Singapore Court of Appeal had, upon consideration of an Australian authority, suggested that legal advice privilege can attach to communications from third parties depending on the nature of the function the third party performed and the purpose and content of the communications (i.e., instead of considering simply the third party's legal relationship with the party that engaged it). In particular, if that function was to enable the client to make the communication necessary to obtain legal advice it required, and the communication is so intertwined with the communication made by the client to its legal adviser, the communication with the third party (and work product) may be brought within legal advice privilege. In other words, legal advice privilege may potentially be applied to communications from third parties obtained with the dominant purpose of obtaining legal advice.

As a matter of prudence, in any event, it would be advisable to have the legal adviser manage such communications with the third party as part of its legal advice.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Privilege may be waived by an express waiver, or an implied waiver when privileged information is disclosed to third parties. The circumstances of the dissemination determine whether there is a waiver. In 2008, the Singapore High Court approved of the following proposition for determining when a document loses privilege:

Where a document is disclosed to one or more third parties with no express or implied requirement that the third party should treat the document as confidential, there will not be any legal bar on the third party disclosing the document. However, the privilege in a document is not waived where information is imparted in the course of a relationship or venture that a reasonable person would regard as involving a duty of confidentiality and where a reasonable person in the recipient's position would regard the information as confidential.

Further, the Singapore Court of Appeal has clarified that given the importance of legal professional privilege, waiver is not to be easily implied. A court tasked to determine whether there has been an implied waiver of privilege by reason of a reference made to privileged material should approach the

matter by examining all the circumstances of the case. In this regard, the Court of Appeal identified the following non-exhaustive list of factors which were relevant, namely:

- What has been disclosed (the materiality of the information in the context of the pending proceedings)
- The circumstances under which the disclosure took place (in particular, the position in the authorities appears to be that disclosures of privileged material during trial almost invariably results in a waiver)
- Whether the party had "relied" or "deployed" the advice to advance their case
- Whether there is a risk that an incomplete and misleading impression had been given

Ultimately, the court should consider whether, in all the circumstances of the case, fairness and consistency required disclosure. This is an objective inquiry, as it is the objective role played by the legal advice which is relevant and not the subjective intention of the party who is asserting privilege.

Where disclosure of privileged documents was made inadvertently to opposing parties, and unless it is too late to restore the status quo, courts will generally not allow parties to take advantage of the mistakes of their opponent; the courts may order the parties receiving the privileged documents to return the documents, and those parties will be restrained from using the information contained in those documents.

Although the courts of Singapore have not considered the precise point of whether the doctrine of limited waiver applies in Singapore, it is possible to argue that the doctrine will apply based on the above dictum.

The courts of Singapore have recognized that common interest privilege (i.e., a privilege in aid of anticipated litigation in which several persons have a shared interest) applies in Singapore. This allows sharing of privileged materials with others who have a common interest in the subject matter to which the privileged materials relate without any loss of legal privilege.

Inadvertent disclosure of part of a memorandum may also result in a waiver of privilege in respect of the other parts of the memorandum where there can be no informed argument without the disclosure.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There is no difference in how privilege operates in civil or criminal proceedings, although there are nuances relating to who determines whether a document is privileged when privilege is claimed.

In civil proceedings, it is generally the case that the courts are the ultimate arbiter over whether a document is privileged when a party has refused production of a document by asserting privilege.

In criminal proceedings, however, there is recent dicta by the Singapore High Court that where documents have been lawfully seized by the police and a claim of privilege is asserted over the seized documents, the Attorney-General's Chambers rather than the court should conduct an initial review of seized materials for legal professional privilege. The Attorney-General's Chambers should conduct this initial review if the lawyer and/or their clients' claim to legal professional privilege was not accepted by the Attorney-General's Chambers at face value, or if there was a reasonable basis to think that legally privileged material would be encountered in a review of seized material, even if there was no specific claim of legal privilege. The High Court further observed that the review should be conducted by a team of Attorney-General's Chambers officers who are not, and will not be, involved in the underlying investigation. Once the Attorney-General's Chambers has conducted its initial review of

any claims of privilege, this will ensure that only narrowly defined disputes as to privilege are brought to court for the court's determination.

In the same High Court decision, the court observed that the Evidence Act and the Criminal Procedure Code did not contain provisions prohibiting the seizure and review of legally privileged material, in contrast to the UK's position, where the police are prohibited by law from seizing material which they reasonably suspect to be legally privileged.

It is presently unclear whether there are any differences in how legal professional privilege operates in regulatory situations. The Evidence Act is silent on this issue.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The issue of whether notes of interviews with employees and other documents produced during investigations are covered by privilege remains unclear in Singapore. However, the Singapore Court of Appeal has endorsed an Australian decision recognizing that certain communications from third parties were protected by legal advice privilege, depending on the function of the third party rather than the nature of the relationship between the third party and the party that engaged it.

However, it should be noted that the Singapore courts have not conclusively decided on this issue. The contrary English position, where the English courts have suggested that an employee is only considered the "client" for the purposes of legal advice privilege where they can be considered the "directing mind and will of the corporation", may still prove to be persuasive.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Aside from the observations of the Singapore High Court regarding documents lawfully seized by the police, the issue of whether governmental regulators can require a privileged document to be provided to them is unclear in Singapore. The Evidence Act is silent on the applicability of legal professional privilege outside the context of judicial proceedings, especially in the context of search and seizure by police and other regulatory authorities in the course of their investigations.

In July 2017, the Ministry of Law issued a public consultation on several proposed amendments to the Evidence Act and the Criminal Procedure Code, including amendments to clarify whether legal professional privilege can be asserted in the context of search and seizure by police and other regulatory authorities in the course of their investigations, and in cases where orders for production are issued under any written law. However, these amendments were not implemented in the final bill passed in March 2018. The Ministry of Law had announced that this issue would be dealt with by a Code of Practice agreed upon among the Attorney-General's Chambers, law enforcement agencies, and the Criminal Bar to deal with legal professional privilege issues in criminal investigations. However, pending that, it appears that this may have been superseded in the light of the recent observations of the Singapore High Court as to how potentially privileged materials seized by the police should be dealt with. It remains to be seen whether the Ministry of Law would consider it necessary to issue a further Code of Practice which may further clarify the Court's observations.

The specific legislation relevant to the investigations may, however, expressly deal with privilege. There are examples of legislation in Singapore which, while conferring coercive information-gathering powers on the relevant regulatory authorities, expressly provide that persons under statutory obligations to observe secrecy (such as advocates and solicitors) are not obliged to disclose such communications.

For instance, under the Singapore Competition Act, legal privilege is recognized, and the investigative powers of the regulatory body are curtailed such that communications between a professional legal adviser and their client and communications made in connection with or in contemplation of legal proceedings or for the purpose of such proceedings are regarded as privileged documents, cannot be seized and need not be produced. Communications with in-house lawyers, in addition to lawyers in private practice, including foreign lawyers, can benefit from the privilege. However, the Competition Commission is still given the power to require the details of the relevant persons to whom or by whom the communications were made to be given to the Commission to ascertain if the communications are indeed privileged.

Similarly, under the Singapore Companies Act, where the Minister directs that a company be investigated, an advocate and solicitor cannot be compelled to disclose any privileged communication.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The issue of how potentially privileged materials seized by the police should be dealt with was recently given some consideration by the Singapore High Court. Having reviewed the positions in foreign jurisdictions, the court ultimately observed that the Attorney-General's Chambers, rather than the court, should conduct an initial review of seized materials for legal professional privilege. Upon the conclusion of the initial review, narrowly defined disputes as to privilege may then be referred to the court for a determination.

Although the Singapore High Court's observations on this issue were strictly obiter and therefore not binding, the Court made these observations after extensive submissions by the parties (including Attorney-General's Chambers) on the appropriate procedure for such review. Therefore, the Singapore High Court's suggested approach is likely to be highly persuasive for future cases where potentially privileged materials have been seized by investigative authorities.

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Taiwan

01 - Discovery

What disclosure/discovery is required in litigation?

The common law pre-trial disclosure/discovery procedures, such as interrogatories, depositions and document production, are generally not available under the Taiwan Code of Criminal Procedures and the Code of Civil Procedures. Certain provisions of the Code of Criminal Procedures and the Code of Civil Procedures establish a process known as "evidences." However, no document requests can be issued by a party to the opposing party, no interrogatories are allowed, and no depositions of the opposing party's witnesses are permitted.

Criminal procedure

Criminal procedure comprises the investigation procedure and the trial procedure. During the investigation procedure, the prosecutor has no obligation to disclose the evidence they have to the defendant, since, under the Code of Criminal Procedures, the investigation procedure is not public. The defendant also has no obligation to disclose the evidence they have. However, the prosecutor may file a motion with the court for a search warrant to search and seize the evidence in the defendant's possession, if there is probable cause to believe that the evidence will be destroyed or concealed.

If it is apprehended that the evidence may be destroyed, forged, altered, concealed, or hard to use, then the complainant, suspect, accused or defense attorney may, during the investigation stage, apply to the prosecutor to conduct a search, seizure, expert examination, inspection, examination of a witness, or other necessary conservatory measures. If the prosecutor refuses to approve the application, the applicant may apply directly to the court for preservation of the evidence.

During the trial procedure, the court may schedule a preparatory proceeding before it substantially reviews the case on the trial date. During the preparatory proceeding, the court may ask the parties to file a motion for investigation of evidence. The court can also consider the scope, order and methods of investigation of evidence in the preparatory proceeding and can order the parties to present exhibits or evidential documents.

If the court does not schedule a preparatory proceeding, it can issue a subpoena and obtain or order the production of an exhibit before the trial date. A party, including the defendant or the prosecutor, may also present evidence and ask the court to order the production of exhibits or evidential documents before the trial date.

In addition, all of the records and exhibits which are in the possession of the prosecutor's office during the investigation process are required to be submitted to the court when a prosecution is initiated. Therefore, the defendant will be able to review the prosecutor's files in court after indictment.

Civil procedure

The civil procedure regarding the disclosure of documents is detailed in the articles relating to evidence in the Code of Civil Procedures. Common law pre-trial discovery procedures, e.g., requests for answers to interrogatories, requests for depositions, or document production, are generally unavailable in Taiwan. Each party merely presents, on an ad hoc basis, the evidence that it needs in order to support its factual allegations.

Pursuant to the Code of Civil Procedures, a party bears the burden of proof with regard to the facts which it alleges in its favor, except where the law provides otherwise or where the circumstances render it manifestly unfair.

However, if it is likely that evidence may be destroyed or difficult to use in court, or with the consent of the opposing party, the party may ask for a court ruling for the preservation of such evidence. Where necessary, the party that has a legal interest in ascertaining the status of a matter or object may move for expert testimony, inspection or preservation of documentary evidence.

A preparatory proceeding may also play a similar role to discovery. Where the court considers necessary, a preparatory proceeding can be convened, and the court may order the parties to provide explanations on matters indicated in the preparatory pleadings. The court may also order the parties: (i) to make statements with regard to the facts, documents, or articles; and (ii) to formulate and simplify the issues and other necessary matters.

Documentary evidence must be produced and submitted to the courts. Parties have a duty to produce documents that have been referred to in the preliminary pleadings or in the course of oral debate proceedings. If a party proposes to use a document that is in the possession of the other party as evidence, a court order requiring the other party to produce the document will be required. If the courts consider that the fact to be proved is material, they may order the other party to produce the document. As such, parties have an obligation to produce the following documents:

- Documents to which they have made reference in the course of the litigation
- Documents of which the opposing party may require delivery or an inspection pursuant to applicable laws
- Documents that are created in the interests of the opposing party
- Commercial accounting books
- Documents that are created with respect to matters relating to the action

If a party does not comply with an order for the production of a document in their possession without justifiable grounds, the court may, in its discretion, deem proven the opposing party's allegation with regard to such document or fact to be established by such document.

Notwithstanding the above, if there is no preparatory proceeding, the court may order the parties to produce documents or articles, to notify witnesses or expert witnesses to produce documents or articles, to conduct inspections or order expert testimony, or to request an agency or organization to conduct an investigation, amongst other things.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

No equivalent of the common law concepts of legal advice privilege/attorney-client privilege and litigation privilege/attorney work product doctrine exists in Taiwan.

In Taiwan, both legislation and case law are silent as to whether a client has the right to refuse to disclose, or prevent any other person from disclosing, confidential communications between the client and their lawyers. However, relevant laws and regulations impose obligations upon and grant certain rights to lawyers with respect to client confidentiality. There are three key sources of obligations upon lawyers:

- Under the Lawyer Ethics Rules, lawyers must keep confidential the content of the matter for which they are engaged, and must not disclose such content to any third party unless the client's intention or plan is of a criminal nature or the criminal behavior of the client may

endanger the life of any third party. A lawyer who violates the code of ethics will be disciplined in accordance with the Attorney Regulation Act as amended on 15 January 2020.

- Under the Criminal Code, lawyers who disclose confidential information without a legitimate reason may be imprisoned for up to one year. Alternatively, they may be detained, or a fine of up to TWD 50,000 may be imposed.
- Under the Code of Criminal Procedures, lawyers may refuse to testify as a witness in a criminal proceeding if their testimony would disclose their client's confidential information, unless the lawyer is permitted to disclose such information by the client. This right is only granted to lawyers. Clients have no legal basis for requiring their lawyers to refuse to testify if their lawyers wish to do so.

In relation to criminal cases, an opinion issued by the Department of Justice provides that the work product of a lawyer and relevant correspondence between a lawyer and their client cannot be seized by prosecutors. However, the relevant laws and court judgments are silent on whether documents that include confessions made by a defendant to their lawyer can be used as evidence in court. In practice, there have been cases where prosecutors not only seized correspondence between the lawyers and the client when conducting a search, but also used these documents in court proceedings. Although the courts have not explicitly referred to such materials as evidence in these cases, the fact that the court did not exclude seized client-attorney correspondence suggests that it may be possible to use client-attorney correspondence as evidence against a defendant.

In civil cases, lawyers may refuse to testify or provide documentation in their possession if the content of such testimony or documentation is confidential to their professional duties or business, and the lawyer cannot testify without divulging their technical or professional secrets. As under Taiwan law, there is no discovery procedure in the common law sense, the production of documents that in other jurisdictions would normally be considered privileged will not generally be an issue in Taiwan.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The laws in Taiwan are silent on whether a written communication between a lawyer and their client may be kept in strict confidence and free from criminal investigation or evidence investigation in a civil lawsuit. To date, the courts have not given any clear indication as to whether the lawyer's written communication will attract the protection of privilege.

As the law is silent and the courts have not expressed a view on the issue of whether communications between a lawyer and client, including a confession made by a defendant to an attorney, can be used as evidence in court, it is possible that such communications could be seized by a prosecutor irrespective of where they are located.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

According to the Attorney Regulation Act, attorneys who are employed exclusively to practice law by legal persons or foundations under an employment or retainer relationship are defined as in-house attorneys. In-house attorneys shall join the local bar association of the place where they are employed. Therefore, they must act in accordance with the Lawyer Ethics Rules and the Attorney Regulation Act. While in-house counsel who are licensed lawyers in Taiwan and are admitted to a bar association may refuse to testify, such protection does not extend to in-house counsel who are not licensed in Taiwan.

In practice, however, there have been cases in which in-house lawyers have been interrogated in criminal investigations because prosecutors considered them to be employees of the defendant company rather than independent lawyers. In order to prevent themselves from being considered as co-defendants or accessories, in-house lawyers who have been interrogated by prosecutors have tended to be cooperative and have seldom claimed their right to refuse to testify.

Does privilege extend to internal communications between in-house lawyers?

The laws in Taiwan are silent on whether written communication between licensed in-house lawyers may be kept in strict confidence and free from criminal investigation or evidence investigation in a civil lawsuit.

Are foreign lawyers recognized for the purposes of privilege?

Under the Attorney Regulation Act, foreign lawyers holding foreign practicing certificates cannot conduct cases in Taiwan unless they are permitted to do so by the Ministry of Justice, become members of a local bar association and meet the qualification requirements for doing so. Lawyers admitted to practice in a foreign jurisdiction can practice the law of their original jurisdiction. Foreign lawyers permitted to practice in Taiwan must abide by all laws of Taiwan and the rules and articles of incorporation of the bar association of which they are a member. As such, foreign lawyers who are permitted to practice by the Ministry of Justice and become members of a local bar association are subject to the rights and obligations provided for in the Lawyer Ethics Rules and the Attorney Regulation Act.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Under the Attorney Regulation Act, only licensed legal counsel admitted to a bar association are allowed to advise on legal issues. Nonlegal professionals are not allowed to advise on legal issues. However, certified public accountants in Taiwan (CPAs) can provide advice and consultation on tax matters.

Under the Norm of Professional Ethics for Certified Public Accountant of Taiwan, CPAs must maintain the confidentiality of the cases in which they are engaged. Unless it is with the consent of the client or in accordance with the provision of professional standards or laws or regulations, CPAs must not disclose details of their matters.

Under the Criminal Code, a CPA who discloses confidential information without a legitimate reason may be imprisoned for up to one year. Alternatively, he or she may be detained, or a fine of up to TWD 50,000 may be imposed.

Under the Code of Criminal Procedures, CPAs may refuse to testify in a criminal proceeding if their testimony would disclose their client's confidential information, unless they are permitted to disclose such information by the client. This right is only granted to CPAs. Clients have no legal ground to require their CPAs to refuse to testify if their CPAs decide to do so.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Waiver of a lawyer's confidentiality obligation is not explicitly addressed in the applicable Taiwan laws and regulations. Taiwanese laws and court decisions are silent as to whether lawyers remain under an obligation to prevent further disclosure or are entitled to refuse to testify where they have

previously disclosed (with their client's consent) documents or the substance of communications that would otherwise be confidential.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Taiwan, both legislation and case law are silent as to whether a client has the right to refuse to disclose, or to prevent any other person from disclosing, confidential communications between the client and their lawyers. However, relevant laws and regulations impose obligations upon and grant certain rights to lawyers with respect to client confidentiality, with certain differences.

In criminal and investigatory situations, lawyers may refuse to testify as a witness if their testimony would disclose their client's confidential information, unless the lawyer is permitted to disclose such information by the client. Although an opinion issued by the Department of Justice provides that the work product of a lawyer and relevant correspondence between a lawyer and their client cannot be seized by prosecutors, the relevant laws and court judgments are silent on whether documents which include confessions made by a defendant to their lawyer can be used as evidence in court.

In civil and regulatory situations, lawyers may refuse to testify or provide documentation in their possession if the content of such testimony or documentation is confidential to their professional duties or business, and the lawyer cannot testify without divulging their technical or professional secrets.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The laws in Taiwan are silent on whether the notes of interviews with employees and other documents produced during investigations may be kept in strict confidence and free from criminal investigation or evidence investigation in a civil lawsuit. To date, the courts have not given any clear indication as to whether such documents will receive the protection of privilege.

As the law is silent and the courts have not expressed a view on the issue of whether such documents, including a confession made by a defendant to an attorney, can be used as evidence in court, it is possible that such documents could be seized by the prosecutor.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Taiwan's laws and court decisions are silent on the question of whether communications between a lawyer and a client are privileged, and in practice, such material is seized and/or required to be produced. Law firms and lawyers are not exempt from search and seizure by prosecutors.

Lawyers may be unable to prevent materials in their possession from being taken away, and may be forced to submit materials in their possession when a court issues a search warrant or orders that those materials be secured as evidence.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The amendment to the Money Laundering Control Act in June 2017 (the latest amendment was 7 November 2018) requires a lawyer to report to the Investigation Bureau of the Ministry of Justice

when their client has suspicious transactions or abnormal cash flow. A lawyer who complies with this reporting obligation will be exempted from the said confidentiality obligations.

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Thailand

01 - Discovery

What disclosure/discovery is required in litigation?

There is only limited provision for discovery under Thai law. There is no discovery procedure under the Civil Procedure Code that is similar to that found in common law jurisdictions, and, in general terms, it can be quite difficult for a plaintiff to obtain evidence from the defendant or from third parties.

Each party is required to disclose documents and witnesses that might be introduced during the course of the trial by submitting a list of evidence and witnesses to the court and providing a copy of documentary evidence in its possession that it intends to produce during the trial to the other party. This must be done at least seven days before the taking of the relevant evidence.

Under the Civil Procedure Code, a party may file a motion requesting the court to subpoena evidence from the opposing party or a third party. If the court is of the opinion that the document is important evidence and the application is well-grounded, the court will issue a subpoena directing the provision of the evidence.

Where the opposing party refuses to produce the evidence subpoenaed or where such party has damaged, destroyed, concealed, or otherwise rendered useless the document in order to prevent the requesting party from relying on it as evidence, the allegations of the requesting party as to the facts to be proved by the document will be deemed to have been admitted by the opposing party. In practice, however, it can be quite difficult for the requesting party to establish with sufficient detail the facts to be proved by the document requested, as, in most instances, the requesting party will not be aware of the details contained in the document requested. A party may also ask the court to subpoena a witness.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

A similar concept to legal professional privilege or attorney-client privilege exists in the Thai legal system. It can be found in various legislative instruments, and in particular, those concerning court proceedings or litigation in the Thai courts. Additionally, it is a criminal offense for lawyers to divulge confidential information concerning attorney-client communications without the client's consent. The four main relevant legislative instruments are the following:

Penal Code

The Penal Code imposes an obligation on licensed lawyers, legal advocates, and other professionals (e.g., doctors and nurses) not to disclose any confidential information they know or receive as a result of carrying on their profession if such disclosure could or would result in damage to another person. The Penal Code protects not only the client but also other persons who would be injured by such disclosure.

Lawyer Act and the regulations on professional ethics of lawyers

The relevant provision in relation to attorney-client privilege provides that a licensed lawyer must not disclose or divulge any confidential information of the client that they obtain in their capacity as a lawyer unless consent from the client is obtained. The provision only applies to a lawyer who is licensed under the Lawyer Act.

Civil Procedure Code

The Civil Procedure Code provides that a licensed lawyer is entitled to refuse to give testimony or provide evidence that they are entrusted with or receive from the client unless consent from the client or a relevant person has been granted.

The Civil Procedure Code also provides that in the capacity of a witness in court proceedings, a lawyer cannot be required to testify if such testimony could incriminate the lawyer unless such questions are essential to the settlement of a dispute. Therefore, given that the attorney is under an obligation not to disclose any of the client's confidential information pursuant to the Penal Code, the attorney has an automatic privilege not to disclose any attorney-client communication.

The application of these sections is limited to proceedings in the civil court. Privilege under the Civil Procedure Code is not recognized and cannot be used outside the civil court.

Criminal Procedure Code

A party in a criminal proceeding cannot be required to testify or submit evidence that is confidential and that they obtain or know as a result of their profession or duty. The disclosure of confidential information, however, must be made upon the direction of the court pursuant to the Criminal Procedure Code. An exemption may also apply if such disclosure is made with the consent of the party concerned (i.e., the client). In addition, a witness in a criminal proceeding cannot be required to testify if it would result in the incrimination of that person. These provisions only apply to proceedings in the criminal court.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

In Thailand, the concept of attorney-client privilege is an obligation and right of the licensed lawyer not to disclose the client's confidential information. There are no legal concepts that grant such obligations and rights to the client itself. Thus, copies of attorney-client communications which are held by the client may not be protected (although there may also be an argument that copies that are held by the client should remain protected by privilege, there is no clear legal precedent to support this position).

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In-house lawyers should be treated in the same way as external lawyers. Their communications and work product should therefore be protected by attorney-client privilege in respect of the legal work provided to the in-house client. However, in-house lawyers must have a lawyer license under the Lawyer Act, or their communications and work product will not be protected by attorney-client privilege pursuant to the Lawyer Act or the Civil Procedure Code.

Notwithstanding the above, in the absence of clear precedent, there may also be an argument as to whether attorney-client privilege should extend to in-house lawyers. However, this may also be dependent on the role in which the in-house lawyer undertakes (i.e., whether the communication or work product relates to genuine legal advice). Ultimately, this may therefore be a question of fact on a case-by-case basis.

Does privilege extend to internal communications between in-house lawyers?

It may be possible for the principle of attorney-client privilege to extend to internal communications between in-house lawyers. The foregoing may be especially true where the in-house lawyers possess

lawyer licenses and where such communications relate to the legal work provided to their in-house clients.

Are foreign lawyers recognized for the purposes of privilege?

As attorney-client privilege only applies to licensed lawyers under the Lawyer Act, communications between clients and foreign lawyers will not be protected by attorney-client privilege pursuant to the Lawyer Act or the Civil Procedure Code unless the foreign lawyer is licensed under the Lawyer Act. However, this is not normally the case.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Whether or not a nonlegal professional is able to claim privilege will depend on their status. This is because the law clearly outlines which types of person are under the obligation and/or have the right to protect the client or customer's information.

For example, the Lawyer Act and the Civil Procedure Code restrict the obligation and right to lawyers; the Criminal Procedure Code provides the obligation and right to persons who have obtained the information in connection with their profession or duties; and the Penal Code specifically states, amongst other matters, that an offense relating to the disclosure of information may be committed by those who are physicians, pharmacists, drug dispensers, midwives, nurses, priests, advocates, lawyers or accountants, or those who assist or are receiving training in such professions.

Additionally, the obligation not to divulge confidential information may be imposed on other professions under other specific laws, such as the obligations of accountants under the regulations of the Federation of Accounting Professions.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Given the absence of legal precedent, once attorney-client privilege is established, privilege may be waived by the client's consent or by court order. Disclosure to a third party will not, in general, result in the loss of privilege.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The concept of privilege in Thailand may operate differently in civil, criminal, regulatory, and investigatory situations. This may be summarized as follows:

- In civil proceedings which are undertaken in the civil courts, it may be deemed that the lawyer has an automatic privilege not to disclose any attorney-client communication.
- However, under the Criminal Procedure Code, the criminal courts may still order the disclosure of confidential information, notwithstanding the existence of the privilege under the attorney-client communication.
- Moreover, in regulatory and investigatory situations, regulators and investigatory bodies in Thailand (such as the Department of Special Investigation) may have the authority to compel the production of privileged documents depending on the particular statute from which they obtain their powers. In such case, a lawyer may refuse to provide privileged documents (as

this may be an offense under the Penal Code), and such regulators or investigatory bodies may therefore have to obtain a court order (though there do not appear to be any court precedents on this issue).

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and other documents produced during investigations may be covered by privilege if the notes and documents are created by lawyers who possess lawyer licenses under the Lawyer Act. Otherwise, such notes and documents may not be protected by attorney-client privilege pursuant to the Lawyer Act and the Civil Procedure Code.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Some regulators have the discretion to compel the production of privileged documents. This will depend on the particular statute from which the regulator obtains its powers. In cases where the regulator is legally authorized to request privileged documents, a lawyer may be required to produce them.

However, since the disclosure of confidential information will result in a violation of the Penal Code, in theory, the lawyer could refuse to provide the privileged documents. In that case, the regulator would need to apply for a court order requiring disclosure by the lawyer of the privileged documents. We are not aware of this issue having been raised before the courts, and therefore there is no legal precedent or authoritative ruling on this matter that could be used as guidance.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

No significant issues have recently arisen in Thailand in relation to privilege.

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Vietnam

01 - Discovery

What disclosure/discovery is required in litigation?

Unlike those found in common law jurisdictions, there are no similar discovery procedures under Vietnam's Civil Procedure Code. However, the Civil Procedure Code 2015 does require related parties to take the necessary measures to gather evidence from third parties on their own initiative. Further, the court's involvement in the collection of evidence is available upon the parties' request, should they have given their best effort to collect evidence but failed to do so. This request must clearly identify the issues that need to be proven by the evidence, the relevant evidence to be gathered, and the reasons why the requesting party cannot gather the evidence in question. The court will then decide whether to formally require the individuals or organizations with possession of or control over the evidence in question to provide it to the court.

Regarding the disclosure of evidence between the involved parties, they are obliged to provide all documentation and evidence within a certain period of time upon request of the court. If the parties fail to provide or inadequately provide the evidence requested by the court within the deadline, the court shall resolve the case based on the evidence already provided by the parties. Any documents/materials provided after the deadline set by the court shall not be admitted into evidence, with a few exceptions prescribed by the law.

On 3 May 2020, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters entered into force for Vietnam. Accordingly, Vietnam may provide evidence in Vietnam to foreign courts upon the request of other contracting states to the convention, or request other contracting states to assist in collecting evidence. However, on accession to this convention, Vietnam also made an express reservation that it would not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents, as known in common law jurisdictions, unless all of the following conditions are met:

- The judicial proceeding before a competent court has been commenced
- The documents to be collected are specified in the Letters of Request as to date, subject and relevant information and facts to prove the direct relationship between the information sought and the pending proceeding
- The documents are related to the requested person or under the person's possession or control

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Vietnamese law does not recognize the common law doctrine of attorney-client legal privilege in relation to legal communications and documents prepared by or for lawyers. Under the current regulations, lawyers are obligated to keep the documents and information provided to them by their clients as well as their work product confidential. Specifically, the Law on Lawyers stipulates that a lawyer is prohibited from disclosing information about a case, matter or client that the lawyer obtained during the course of their practice, except where the client agrees to the disclosure in writing or the law stipulates otherwise. Nevertheless, courts and other relevant authorities can compel lawyers to produce work product provided by the client if an action is commenced.

The provisions of the Criminal Procedure Code and the Civil Procedure Code on evidence give judges (in civil cases) and investigating bodies and courts (in criminal cases) broad powers to collect evidence by, among other means, compelling individuals, agencies, or organizations to provide documents and other evidence related to the matter in controversy in order to clarify the issues in the case.

While there are no reported cases in which a lawyer has been required to produce a document received from their client, it must be noted that neither the Criminal Procedure Code nor the Civil Procedure Code exempt lawyers from the exercise of the powers afforded to investigating agencies and courts. Simply put, Vietnamese law does not recognize any concept of privilege that would apply to attorney work product or any documents or evidence provided by clients to their lawyers.

On a related note, the new Penal Code that fully came into effect on 1 January 2018 stipulates an obligation for advocates (including attorneys) to make denouncements upon detection of crimes against national security or other extremely serious crimes. The advocates shall bear criminal responsibility upon failure to adhere to this stipulation. This provision somewhat narrows down the scope of protection of clients' confidential information and is contrary to the provisions of the Law on Lawyers.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Vietnamese law does not recognize the common law doctrine of attorney-client privilege. Lawyers are prohibited from disclosing information that they obtain in the performance of their professional responsibilities, except where the client agrees in writing to such disclosure or as stipulated by law. This means that lawyers owe obligations of confidentiality to their clients with regard to all information that remains in the lawyers' possession. Documents or other evidence in the client's possession are not subject to this obligation of confidentiality. Furthermore, the client may be compelled by the courts or competent authorities to produce relevant documents or information if an action is commenced.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

As Vietnamese law does not recognize the common law doctrine of attorney-client legal privilege, there is no separate regime for in-house lawyers. In-house lawyers have the same obligation to maintain the confidentiality of documents and information provided to them by their clients, as well as that of their work product. In-house lawyers may also be subject to contractual obligations arising out of their employment contracts to maintain the confidence of documents and evidence provided to them by their employer. Naturally, in-house lawyers will be required to produce documents upon a valid request from competent Vietnamese authorities in the same circumstances as external lawyers.

Does privilege extend to internal communications between in-house lawyers?

There are generally no provisions on privilege for internal communications between two or more in-house lawyers under Vietnamese law. It much depends on the Policy/Code of Conduct of the entities that the in-house lawyers are currently working at to determine what kind of internal communications can be made in public or private. But generally in practice, any correspondence internally made, even with a disclaimer as privileged or highly confidential, can still be collected upon request from the courts and other relevant authorities. Entities may reserve the right to request courts or other relevant authorities to keep the materials confidential if such materials are related to trade secrets or personal information.

Are foreign lawyers recognized for the purposes of privilege?

Vietnamese law does not distinguish between foreign and local lawyers for purposes of privilege.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The disclosure of information that is shared by a client with nonlegal professionals, such as accountants or tax advisers, is subject to the service agreements between the client and the nonlegal professionals. Even if a service agreement requires a nonlegal professional to keep all communications with their client confidential, the courts or competent authorities may, in circumstances provided by law, compel relevant persons or organizations to supply documents or other evidence to clarify the facts of a case.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

There is no doctrine of attorney-client privilege in Vietnam. Information about a case, matter, or client obtained by a lawyer in the performance of their professional responsibilities can be provided to a third party with the client's written consent or as required by law.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Vietnamese law does not recognize the doctrine of privilege. In any case, the protection and disclosure of documents must be in accordance with the provisions of the Criminal Procedure Code and the Civil Procedure Code on evidence, and legally speaking, there are no differences between these procedures.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Since there is no doctrine of attorney-client privilege in Vietnam, interview notes with employees are not outside the scope of the Criminal Procedure Code and the Civil Procedure Code on evidence. Thus, it is very much possible that the courts and/or relevant competent agencies may request such notes be produced during investigations.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

While lawyers owe obligations of confidence to their clients, government regulators may compel the disclosure of information about a case, matter, or client obtained by a lawyer in the performance of their professional responsibilities. Practically speaking, lawyers may request the competent authorities to keep the document confidential if such document contains trade secrets or any personal information of the relevant party.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

In the past few years, the Supreme People's Court announced a number of judgments that could be a good point of reference, authority, and even precedents. A number of local courts' judgments and decisions are also published and available for public search on the website of the Supreme People's Court. However, we are not aware of any decisions concerning privilege in Vietnam.

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Europe, Middle East & Africa

European Union

Privilege is a subject of European Union (EU) law in addition to the laws of individual Member States. Rather than repeating this information in each jurisdictional chapter, we have prepared this separate chapter covering relevant EU laws. As the EU is not a single jurisdiction, we have followed a different format in this chapter than in the jurisdictional chapters.

Introduction

In September 2010, the European Court of Justice (ECJ), the highest court of the EU, ruled that under EU competition law, legal professional privilege does not extend to communications with in-house lawyers (case of *Akzo Nobel Chemicals and Akcros Chemicals*). This decision is still the leading case and applies to any proceeding that is governed by EU competition law rather than the domestic law of a Member State. At present, this means EU Commission investigations into competition matters (including investigations carried out by national regulators as agents for the Commission) and competition law proceedings before the ECJ.

As a result, regardless of any privilege rules that may apply in domestic proceedings within EU Member States, communications with in-house lawyers are not protected in EU Competition Commission investigations involving those states or ECJ proceedings relating to such investigations.

The Commission summarized the case law relating to EU legal professional privilege (LPP) in its Commission notice on best practices for the conduct of proceedings concerning articles 101 and 102 of the Treaty on the Functioning of the European Union (Official Journal of the European Union, C 308/6, dated 20 October 2011, paragraph 51 et seqq.).

General principles

EU law respects LPP between external EU-qualified lawyers and their clients (regardless of the jurisdiction in which the client lives). LPP does not extend to other professional advisers such as patent attorneys, accountants, etc. This means that correspondence prepared for the purpose of the defense (or related thereto) in EU Competition Commission investigations is protected. Whether this includes notes of interviews with employees and other documents produced during investigations is doubtful. Depending on the specific circumstances of the case, it may be argued that those documents are prepared for the defense in the Commission investigation and are part of the correspondence between the client and its external EU-qualified lawyer. Then, the notes would be privileged. However, it may also be held that such interview notes are not primarily directed to the defense but that the company on its own looks into suspicious circumstances. There is thus a significant risk that interview notes are not regarded as privileged.

Privilege also applies to the internal documents of a company if these documents (i) set out the content of the communication with external lawyers or (ii) are created exclusively for the purpose of obtaining legal advice from an external EU lawyer. It should, however, be noted that if those documents are provided to third parties, privilege will most likely be lost.

As mentioned above, LPP does not extend to in-house communications, as the EU's highest court, the European Court of Justice ruled on 14 September 2010 in the highly publicized case of *Akzo Nobel Chemicals and Akcros Chemicals*. The judgment came as no surprise, as it simply confirmed the views previously expressed by the Attorney-General of the EU in their advisory opinion to the court.

The key factor the ECJ cited in the long-awaited judgment was an alleged lack of independence due to the economic reliance of an employee on their employer. The ECJ downplayed the counterbalancing effect of strict ethical rules applying to lawyers admitted to a local bar or law society. According to the ECJ:

"[…] an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."

In-house lawyer communications thus do not benefit from LPP under EU competition rules. As a consequence, the European Commission can inspect these potentially sensitive documents when it is conducting an investigation.

Main arguments of the ECJ in *Akzo/Akcros*

In a previous case, the ECJ had ruled that LPP only applies when (i) communications between lawyer and client relate to a client's right of defense; and (ii) they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment. The ECJ confirmed this understanding in *Akzo/Akcros*, holding that the requirement of independence means the "absence of an employment relationship." According to the ECJ, being an employee always entails an inherent conflict between the lawyer's own professional obligations and the commercial strategies pursued by their employer. The ECJ added that the professional rules applying to Akzo's in-house lawyer would not ensure a degree of independence comparable to that of an external lawyer.

The ECJ also brushed aside Akzo's claim that refusing to apply LPP to communications with an in-house lawyer violates the principle of equal treatment. Even if an in-house lawyer is subject to certain professional ethical obligations, they do not enjoy a level of professional independence equal to external lawyers. In-house lawyers thus are, in the ECJ's view, in a fundamentally different position from external lawyers and may thus be treated differently.

Further, the ECJ did not accept the argument that the personal scope of LPP should be widened on the ground that national laws are not unanimous and unequivocal in recognizing LPP for communications with in-house lawyers. The ECJ found that it was not possible to identify a uniform tendency in the Member States toward protecting communications with in-house lawyers.

According to Akzo, the modernization of EU competition rules in 2004 increased the need for in-house advice, which should justify a change in the EU rules on LPP. The ECJ rejected this on the grounds that procedural reforms designed to bolster the Commission's power of inspection could not justify a change in the case law on LPP.

In addition, the ECJ reasoned that failure to recognize LPP for in-house communications would not effectively damage a company's right of defense. The ECJ held that a company seeking advice from an in-house lawyer must accept the restrictions applying to the exercise of that profession.

The ECJ was not persuaded that the differing approach of the Commission as compared with that of certain national competition authorities breached the principle of legal certainty. The stated reason for this approach is the clear division of competencies between EU and national authorities.

Finally, the ECJ rejected Akzo's claim that the EU approach to LPP violated national procedural autonomy. The ECJ pointed out that the question of which documents and business records the Commission may examine as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.

When does *Akzo/Akcros* apply?

The judgment is significant for companies undergoing a Commission investigation under EU competition law or engaged in proceedings before the ECJ relating to such an investigation. Whenever advice is needed on a contentious matter of EU competition law, procedures should be implemented in order to ensure that sensitive legal advice is, as far as possible, not susceptible to disclosure to the European Commission (for practical tips, see below). Indeed, it may be prudent to

take precautionary measures even if, at first glance, there is no EU competition law issue. At the "fact-finding" stage, a company will rarely know whether a competition issue will be genuinely domestic or end up being prosecuted by the Commission. Further, it is possible that the *Akzo/Akcros* approach will be extended to other areas that are regulated by the EU. Special care therefore has to be applied in any case where advice is needed on an issue relating to a highly regulated issue (e.g., competition or tax).

To sum up, companies will need to consult with external EU-qualified lawyers at an early stage to protect privilege whenever potentially contentious matters involving EU competition law may be at stake.

Practical tips to protect sensitive legal advice

- In-house advice relating to EU competition law should be drafted carefully or given orally.
- External EU-qualified lawyers should be involved at the outset.
- Privileged communications should be clearly marked as such (e.g., "Lawyer-Client Privileged Communication from External Counsel"). This suggestion is particularly relevant if advice from external counsel is forwarded within a company or summarized for internal purposes (those documents could, for instance, be marked as "Privileged Report on Advice Received from External Counsel").
- Documents prepared exclusively for the purpose of obtaining legal advice from an external EU lawyer should be marked as well. Further, it needs to be made clear that the document is prepared for this sole purpose (e.g., by including a statement as to the purpose and possibly also by naming the external EU lawyer for whom the document is being prepared).
- Privileged communications should be filed separately.
- In particular transactions, it may be considered advisable to store sensitive documents, such as documents relating to the analysis of the relevant markets, in an extranet provided by external EU-qualified lawyers.
- If non-EU lawyers are consulted, an external EU lawyer should coordinate the obtaining of advice. This is because advice from non-EU lawyers will not benefit from LPP.

Austria

01 - Discovery

What disclosure/discovery is required in litigation?

There is no formal process of disclosure/discovery under Austrian procedural law, and the duty to produce documents is very restricted. According to the Austrian Civil Procedure Code (Zivilprozessordnung), the court may order a party to disclose documents which are in their possession and have been referred to by that party. A party seeking disclosure from the other party must provide the court with evidence that the document exists, e.g., a copy of the document if available (for instance, where the party already has the copy, but wishes to examine the original) or as precise as possible a description of the document and its contents. The facts that are to be evidenced by the document in question must be in dispute and relevant to the outcome of the case, and the party carrying the burden of proof is obliged to adequately substantiate the facts of its case independently of the document.

This limited duty to disclose documents emanates from the principle that under Austrian procedural law, it is up to the parties to produce the evidence for their own case. "Fishing expeditions" are to be prevented. As a result, the duty of disclosure does not play a significant role in Austrian civil litigation. Third parties cannot be obliged to disclose documents if it is unreasonable for them or if they have a right to refuse testimony.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The so-called attorney's privilege (Anwaltsprivileg) is also referred to as "protection of confidentiality with regard to communication between attorney and client." However, under Austrian law this concept is not explicitly regulated. Rather, it is derived from the attorney's duty of confidentiality and the corresponding provisions of procedural law providing for an attorney's right to refuse to give evidence.

Generally, attorneys in Austria are subject to the Austrian Attorneys' Code ("**Code**"). The Code contains several provisions that regulate the relationship between attorneys and their clients.

Under the Code, an attorney is subject to a particular duty of confidentiality and must treat as strictly confidential all information which relates to: (i) facts the attorney has been entrusted with in a professional capacity (including documents provided to the attorney by a client); and (ii) facts that the client has an interest in keeping confidential that have otherwise become known to the attorney. The confidentiality obligation also extends to the employees and assistants of the attorney. Further, the Code provides that an attorney has a right to keep such information confidential in legal and administrative proceedings. The right of the attorney to refuse to divulge such information in civil and in criminal proceedings is also reflected in the Austrian Code of Civil Procedure and the Austrian Code of Criminal Procedure (Strafgesetzbuch). The right to refuse to give evidence also applies in other types of proceedings, such as in administrative proceedings and in legal proceedings for fiscal offenses. However, there are exceptions to these rules concerning cases of money laundering or financing terrorism.

Under the Code, the attorney's duty of confidentiality must not be circumvented by judicial or other measures. Consequently, the duty of confidentiality must not be circumvented by ordering the disclosure of documents, video or audio files or data carriers or by seizing them. This holds equally true for the attorney's right to refuse to give evidence as laid down in the Austrian Code of Civil Procedure and the Austrian Code of Criminal Procedure. However, it is important to bear in mind that

the consequences of using evidence obtained in violation of these rules differ, depending on the circumstances of each case (e.g., whether civil or criminal procedural rules apply and whether the evidence seized was in the attorney's or in the client's possession).

A violation by an attorney of these duties can constitute a breach of the attorney's professional obligations and may, for instance, lead to exclusion from the bar. However, the client can always choose to waive the attorney's duty of confidentiality. Nevertheless, even where there has been a waiver by the client, the attorney must consider whether the client would have to face detrimental effects due to the disclosure of the information. If this is the case, the attorney is obliged to refuse to provide evidence relating to these facts, even if the client is prepared to allow disclosure of the information.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Attorney-client communication is not privileged per se. Consequently, under Austrian law, there is no universally applicable answer to this question, which is disputed in Austrian legal literature. However, it seems to be the predominant view that only documents in the exclusive possession of an attorney are privileged, not those in possession of the client.

Furthermore, the level of protection may depend on the applicable law and on whether the proceeding in question is a criminal or a civil proceeding. With regard to criminal proceedings, for example, it has been claimed in literature that an attorney-client communication can be seized and used in court as soon as it has passed into the client's possession. However, the new doctrine acknowledges that in criminal proceedings attorney-client communications, even if they are in the client´s possession, are protected from seizure. Nevertheless, there are exceptions, for example, already existing documents that the client sends or hands over to the attorney, i.e., previously existing evidence, and other written communications that are not addressed to the attorney, are not covered by the privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

An in-house lawyer is not an attorney (Rechtsanwalt) within the meaning of the Austrian Attorneys' Code. Attorneys must fulfill certain requirements for practicing as an attorney and are listed in a register of Austrian attorneys established by the Austrian Bar Association according to the provisions of the Code.

Unlike registered attorneys, in-house lawyers do not have the right to refuse to provide evidence in civil or criminal proceedings. However, they may still invoke other forms of confidentiality obligations to which they may be subject, such as banking secrecy or official secrecy – the so-called Amtsverschwiegenheit.

Does privilege extend to internal communications between in-house lawyers?

In-house lawyers in general do not have the right to refuse to provide evidence in court proceedings. Thus, internal communications are not privileged.

Are foreign lawyers recognized for the purposes of privilege?

Under the Federal Law on the Free Movement of Services and Establishment of European Attorneys in Austria, European attorneys with an office in Austria have restricted rights in comparison to Austrian attorneys and are obliged to involve an Austrian attorney when representing or defending a client in legal proceedings. The question of privilege may therefore be less likely to arise in such cases. However, the services of a European attorney who has an office in Austria or provides legal advice in

Austria on a temporary basis are in this context treated as equivalent to the services rendered by an Austrian attorney. Such an attorney may therefore invoke the confidentiality obligation in accordance with the Austrian Attorneys' Code. Therefore, the attorney's privilege is applicable to such foreign attorneys as well.

The question of whether a foreign lawyer in general has a right to make use of the attorney's privilege is disputed. One opinion is that a foreign lawyer may not invoke a more extensive confidentiality obligation than the lawyer would be subject to under the provisions applicable in their home country, but otherwise may invoke the duty of confidentiality under the Austrian Attorneys' Code, in accordance with the principle of lex fori. The court must then decide whether the attorney is to be considered as an attorney within the meaning of the procedural rules and may invoke the right to refuse to provide evidence.

Another view is that the trust between an attorney and their client is to be protected and must, therefore, be evaluated in accordance with the law applicable to the legal relationship between the attorney and the clients themselves in accordance with the provisions of private international law. The law applicable to a contract between lawyers and their clients is the law of the jurisdiction in which the lawyers' office is located, unless otherwise agreed by the parties. Accordingly, this view looks to the law of the lawyers' home jurisdiction to determine privilege. The Austrian courts have yet to determine which of these competing views is correct.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Whether communications with nonlegal professionals are privileged primarily depends on the applicable vocational and professional law (Berufs- und Standesrecht). The Austrian Code of Civil Procedure provides for a general right to refuse to give evidence on facts which are protected by a statutory duty of confidentiality.

Tax consultants, as well as certified public accountants, are subject to the Austrian Accountants and Tax Advisors Act (Wirtschaftstreuhandberufsgesetz), which provides for a specific duty of confidentiality. Consequently, these professionals enjoy the right to refuse to give evidence.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

This is not applicable under Austrian law. If documents are sent by the attorney to a third person (e.g., an in-house lawyer or another employee of the client), privilege is no longer applicable, and the documents can be seized. Thus, essentially only documents in the exclusive possession of an attorney are privileged, not those in the possession of the client.

It is not possible to protect a document or its contents from disclosure to the court by signing a confidentiality clause or a similar clause. This is due to the fact that the judge is legally bound to weigh the interest in establishing the truth against the interests of the parties with regard to the confidentiality of such document or its contents when considering whether to require the document to be produced.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There are no particular differences in how privilege operates in these legal fields.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Generally speaking, yes.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

The concept of attorney's privilege is not explicitly regulated under Austrian law. Attorneys in Austria are subject to the Austrian Attorneys' Code. Therefore, there are no differences in the level of protection.

If a governmental regulator holds a search warrant (Hausdurchsuchungsbefehl), the regulator is entitled to perform a search and seizure of documents. If the regulator does not hold a search warrant, the client may refuse to surrender the documents without any sanction. Without a search warrant, there is therefore no way to force the client to surrender the documents.

A search warrant may be issued by the prosecutor with the approval of a judge if the judge is of the opinion that a search may yield evidence for the legal proceeding at hand.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The perceived importance of privilege has recently increased in Austria due to the decisions of the European Court of Justice in cases such as *Akzo Nobel Chemicals v. Commission*, which is discussed in more detail in the European Union chapter.

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Belgium

01 - Discovery

What disclosure/discovery is required in litigation?

There is no formal process of mandatory disclosure in Belgium. Parties are only required to produce documents on which they rely, which will be served on the opposing party and filed with the court. Consequently, the obligation to provide disclosure is a mere duty to produce the documents that support a party's case and upon which that party wishes to rely. Parties are bound to an obligation to cooperate in good faith with respect to the production of documents.

It should be noted, however, that in certain cases the court may order the parties, or even third parties, to make specific disclosure of certain documents, either on request of the parties or of its own motion provided that indications exist that such document constitutes evidence of a relevant fact. Belgian law does not allow unspecified disclosure requests or "fishing expeditions".

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Belgian law recognizes the concept of professional secrecy, which is a principle of legal ethics belonging to the essence of the lawyer's profession. Its protection also constitutes an essential element in the safeguarding of individual liberty in a free society and is likewise intended to ensure the proper administration of justice. Accordingly, the duty of professional secrecy is considered a matter of public order.

The duty of professional secrecy prohibits members of the bar, who are authorized to pursue their professional activities under the professional title of avocat/advocaat/Rechtsanwalt – for the purposes of this chapter referred to as "lawyers," from disclosing oral or written information related to the representation of a client.

This principle of professional secrecy is not only a lawyer's right, but also a duty. A breach of such duty is subject to sanctions under the Criminal Code, except in limited circumstances where the law requires or permits the lawyer to disclose the information. Even in cases where the law exceptionally authorizes release of the information, the lawyer may still be sanctioned by the bar authorities.

In complying with their obligation of professional secrecy, lawyers have the right and the duty to refuse to hand over documents in their possession to regulating or seizing authorities and to refuse to testify before the court both in criminal and civil cases.

Whereas in common law systems the attorney-client privilege usually attaches to confidential communications between client and lawyer that are created for the purpose of giving or receiving legal advice, the duty of professional secrecy applies to all information related to the representation of a client, whatever its source. In other words, it is not so much that the communication itself is privileged, but that the lawyer is under a duty to not disclose the information in it. This means that as a general rule, the duty of secrecy forbids lawyers from testifying to any fact that was revealed to them during the course of the exercise of their profession, unless the testimony is necessary for the representation of the client or for the lawyer's own defense in a criminal or civil case.

As a consequence, whereas the attorney-client privilege in common law systems is usually a right that belongs to the client and can be waived by the client, in Belgium professional secrecy as a general rule cannot be waived by the client, subject to certain exceptions to allow more fundamental values to

be protected (e.g., the right to defend oneself or to prevent a risk to life or health). The protection cannot be invoked in order to help a client commit a crime.

It merits emphasis that professional secrecy is limited to those cases where the lawyer is acting in the capacity of a lawyer and not, for example, as a board member of a company, or as the trustee of a bankruptcy.

Finally, professional conduct rules of the Belgian bar prescribe that correspondence between Belgian lawyers is, as a general rule, also confidential and cannot be used as evidence in court proceedings. However, this confidentiality is restricted to relations between lawyers and is not related to professional secrecy, except when the information exchanged between lawyers is in itself privileged.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

It should be assumed as a general rule that all documents prepared by a lawyer (acting as a lawyer) or any correspondence from or to such lawyer, are protected, regardless of where they are held, even if possessed by the client. This is because professional secrecy is also based on a fundamental right protecting privacy, and because certain information may be linked to the rights of defense of the client. However, each situation must be judged on its own facts.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The Act of 1 March 2000, which established the Institute of In-house Legal Counsel ("**Institute**"), grants confidentiality in respect of legal advice and opinions provided by members of the Institute for the benefit of their employer and acting in their capacity as legal counsel. However, the scope and effect of that confidentiality have been controversial and uncertain. It has been argued that this confidentiality is not the equivalent of professional secrecy, and consequently, that a member of the Institute would not be entitled to invoke this confidentiality in order to refuse to hand over documents in their possession or to refuse to testify before the courts.

In a landmark decision of 5 March 2013, the Brussels Court of Appeal (CoA) ruled that in-house counsel's legal advice (including the request for such advice, related correspondence and preparatory materials) are covered by a protection equivalent to professional secrecy in investigations under the Belgian Competition Act.

This decision is notable because it disregards the *Akzo* decision of the European Court of Justice, which denied in-house counsel professional privilege in EU antitrust proceedings (please see the European Union chapter).

The CoA based this protection on a fundamental right derived from article 8 of the European Convention of Human Rights (ECHR) and article 7 of the EU Charter of Fundamental Rights, which protect the right to privacy and private correspondence. By judgment dated 22 January 2015, the Supreme Court dismissed the appeal filed by the Belgian Competition Authority against the said decision. As a result, it is now settled that legal advice provided by in-house counsel (who are members of the Institute) to their employers and in their capacity as legal counsel, is protected by legal professional privilege, except in antitrust investigations, carried out by the EU Commission (*Akzo* ruling).

Does privilege extend to internal communications between in-house lawyers?

While the concept of in-house counsel privilege has been recognized by the Belgian Supreme Court, not all communications of all in-house counsel are protected.

The confidentiality protection was derived from the Act of 1 March 2000 regulating the Institute, and consequently only applies to in-house lawyers who are members of that Institute. In addition, the privilege only applies to opinions which the in-house counsel has addressed to their employer (as opposed to third parties), and confidentiality is lost in the event that the documents are sent to or shared with a person outside the company. Furthermore, confidentiality is only granted in respect of legal opinions rendered in the capacity as legal counsel, and not with respect to advice given in a management or operational capacity.

Finally, whilst the CoA has only dealt with national competition proceedings, it has applied the legal privilege protection on the basis of article 8 of the ECHR, and it seems that the protection can therefore probably apply to any other enforcement measures, whether civil, administrative or criminal. However, the protection does not apply to competition investigations by the European Commission pursuant to the EU competition law provisions, where the actual *Akzo* ruling will remain fully applicable.

Are foreign lawyers recognized for the purposes of privilege?

Professional secrecy applies to all lawyers governed by professional bar rules and entitled to practice their profession in any of the EU member states. The Code of Conduct for Lawyers in the European Union (adopted by the Council of the Bars and Law Societies of the European Union) stipulates that confidentiality is a primary and fundamental right and a duty of the lawyer that serves the interest of the administration of justice as well as the interest of the client. An additional basis for professional secrecy is also found in article 8 of the ECHR. In accordance with these principles, foreign lawyers entitled to practice in the EU are protected by professional secrecy in Belgium. This applies to all lawyers registered with a bar association of an EU member state. If an EU lawyer is registered with the bar in his home country, and also on the list of European lawyers ("**E-list**") with a Belgian bar, then Belgian professional secrecy will fully apply, pursuant to the principle of "double deontology." If an EU or non-EU foreign lawyer is not registered with the Belgian bar, the exact scope and effect of professional secrecy is not completely clear, and yet untested.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Various laws have extended professional privilege to statutory auditors and external tax and accountancy professionals affiliated with recognized professional organizations. While the primary description of this confidentiality privilege equates to a lawyer's professional secrecy, it is in reality also recognized that lawyers and nonlegal professionals have quite different roles in society. As a practical result, there is not an identical confidentiality protection between lawyers and nonlegal professionals. The privilege applicable to those professionals is thus commanded by the nature of their profession and membership to a professional organization, rather than the connection to any legal matter.

Legal assistants are considered representatives of the law firm. The information shared with legal assistants is covered by legal privilege.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

This can only be safely done when the third party itself is bound by the principle of professional secrecy. Any conduct inconsistent with the continued confidentiality of the communication will always entail a risk of losing the protection of confidentiality. This will in particular be the case if information is

shared with a party other than the client or their lawyer, or if the information is used in court proceedings.

However, depending on the circumstances, if a document protected by the concept of confidentiality or professional secrecy has been disclosed, it may be possible to take steps with the bar authorities or the courts to recover the document and to prevent it from being used in court. If the information is accessed by third parties outside the will of the client, the duty of professional secrecy will generally continue to apply and the information cannot be used in court proceedings.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The duty of professional secrecy, and the contents thereof are the same.

However, the circumstances under which the professional secrecy can be set aside may differ in civil and criminal proceedings in cases where a lawyer is called to testify in court as a witness. In civil proceedings, for instance, legal privilege constitutes a valid ground for refusing to respond to a question (article 929 Civil Code). The court cannot compel the lawyer to testify on issues which are protected by professional secrecy. In contrast, the Criminal Code states that a lawyer is not bound by professional secrecy when testifying in court. This means that a lawyer cannot be criminally prosecuted for the disclosure of privileged information in court (but they can still be held civilly liable for negligence and breach of confidence).

During investigatory procedures, the Belgian state security service must respect professional secrecy. Investigation methods that violate professional secrecy are only permitted if the state security has serious indications that the lawyer in question is participating in an activity that constitutes a potential threat to national security. Furthermore, if the computer system of a lawyer is legally seized in the context of a criminal investigation, the public prosecutor must consult the President of the Bar before reviewing any documents that may be covered by legal privilege.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Any information the lawyer receives when defending or representing a client before a court (including an administrative court or committee) and in the context of ascertaining the client's legal position (including when advising the client on preparation or performance of a transaction) is covered by professional secrecy. This legal privilege extends to any information that has a reasonable connection with the performance of the duties of a lawyer, to the extent that such information is intrinsically confidential or has been explicitly or implicitly entrusted to the lawyer as secret. This may include notes of meetings or documents not directly created or provided by the client.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

As a general rule, a governmental regulator does not have the power to require documents protected by professional secrecy to be provided, but regulators may be given such powers by law (for example in relation to money laundering and terrorism, or collective debt settlement proceedings).

However, it should be noted that in a recent decision the Constitutional Court partially annulled the Anti-Money Laundering Act of 18 September 2017 (AMLA) on the basis that lawyers' reporting obligations under the AMLA conflicted with their duty of professional secrecy.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

In March 2019, the Constitutional Court had to consider whether the obligation for lawyers to file an annual listing of clients who are taxable for VAT purposes with the tax authorities, is compatible with the duty of professional secrecy. Such listing discloses the identity of clients with whom the lawyer has carried out transactions for a total amount exceeding EUR 250 to the authorities. The Constitutional Court held that the duty of professional secrecy does not prevent such filing because the information filed does not concern the core activities of lawyers; it is not related to confidential information disclosed by a client that is potentially incriminating.

On 24 September 2020, the Constitutional Court partially annulled the Anti-Money Laundering Act of 18 September 2017 (AMLA) based on legal privilege. Under the AMLA, lawyers were obliged to report any suspicion of money laundering or terrorist activities by clients to the Financial Intelligence Processing Unit (CFI), even when the client had withdrawn the suspicious transaction, following the advice of the lawyer. The Constitutional Court held that in such case, the reporting obligation conflicts with the duty of professional secrecy of lawyers because the information received is covered by legal privilege and therefore annulled this aspect of the reporting obligation. This annulment was extended to reporting obligations of employees of lawyers, because no person external to the relationship between the lawyer and their client should ever be obliged to report legally privileged information to the CFI.

The Supreme Court clarified the scope of application of the duty of professional secrecy with respect to information not received directly by lawyers from a client, in its judgment of 19 October 2021. The Supreme Court held that an (oral) conversation between the lawyer of a defendant in criminal proceedings and another co-defendant, which revealed incriminating information regarding the lawyer's client, is covered by the duty of professional secrecy of that lawyer. The content of such a conversation may therefore not be intercepted during investigations or used in legal proceedings.

Finally, the Court of Appeal in Ghent confirmed on 3 February 2020 that the duty of professional secrecy applies regardless of the medium on which the information was communicated. If a communication technique is used which allows information to be consulted by third parties, legal privilege will only lapse if the information is also addressed to third parties. In particular, any communication sent to the professional email address of a client, which may from a technical point of view be accessed by its employer, still falls under the duty of professional secrecy. This is also the case if the accessing party is a counterparty in legal proceedings.

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England and Wales

01 - Discovery

What disclosure/discovery is required in litigation?

In civil proceedings before the courts in England and Wales, "disclosure" is the stage in the proceedings when the parties to an action are required to inform each other of the existence of all documents that are or have been in their control and which are relevant to matters in issue in the litigation. The Civil Procedure Rules (which apply to most civil proceedings in England and Wales) refer to this process as "disclosure" although historically it was known as "discovery."

Not all proceedings will involve disclosure, the rules differ depending on the type of case and what division of the court it is brought in. There is no provision under the Civil Procedure Rules for automatic disclosure and the duty to disclose only arises if and when and to the extent that the court orders disclosure.

At present there are two main sets of rules governing disclosure. The first commonly involves an order for "standard disclosure," and this is an order requiring parties to disclose the following:

- Documents on which they rely
- Documents which adversely affect their case
- Documents which adversely affect another party's case
- Documents which support another party's case

The second set of rules are part of a "living" disclosure pilot scheme that is in operation until 31 December 2022 in the Business and Property Courts. This pilot is intended to promote a culture change and a move away from standard disclosure, focusing instead of different "models" of disclosure, aligned to each issue in the case that requires disclosure. The models vary, ranging from very limited disclosure (of known adverse documents only) to search-based disclosure.

In any case, the Civil Procedure Rules are clear that disclosure should be restricted to what is necessary in the individual case. The court retains discretion to dispense with or limit disclosure. The courts may be minded to exercise their discretion where the disclosure sought would be unduly expensive, inconvenient or troublesome in comparison to the likely forensic benefits. An overall factor of importance is proportionality.

The fact that a document has been disclosed does not necessarily mean that it may be inspected. As noted above, disclosure simply means stating that a document exists or has existed. While parties have a right to inspect documents that have been disclosed, this is not an unfettered right and there are exceptions which permit parties to withhold documents from inspection. Legal professional privilege is one such exception. Under the pilot scheme, inspection of disclosed documents is presumed, however it is still possible to withhold production of certain documents, including on the grounds of privilege.

Although disclosure between parties to proceedings is discussed here, it should be noted that non-parties to proceedings can also be subject to disclosure orders by the courts. However, the Civil Procedure Rules note that ordering disclosure against non-parties is the exception rather than the rule and that the jurisdiction should be exercised with caution.

Finally, it is worth noting that even where a document has been disclosed as part of litigation proceedings and inspected by a party, the use of that document is strictly limited to those proceedings

only. The document cannot then be deployed in other proceedings without either the consent of the party whose document it is, or the permission of the court.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes. The concept of legal professional privilege is "a fundamental human right, long established in the common law,"[1] "fundamental to the administration of justice"[2] and "jealously guarded by the common law."[3] Legal professional privilege over documents can be waived by the person entitled to it and can be overridden by statute, but it is otherwise absolute unless the document concerned was prepared for, or in connection with, an iniquitous purpose (e.g., in the furtherance of fraud or a crime).

If a document is covered by legal professional privilege, it entitles the party claiming privilege to withhold production from those seeking to inspect it. That is so even where the party seeking inspection is a governmental or regulatory body. If the assertion of legal professional privilege is challenged, the onus is on the party claiming privilege to establish it.

When assessing whether a claim to legal professional privilege exists in respect of specific documents, it should be noted that an email and attachment are not treated as "one communication." Following the Court of Appeal in *Sports Direct International Plc v. The Financial Reporting Council* [2020] EWCA Civ 177, an email and its attachment need to be considered separately for the purposes of privilege. It is quite possible for a legally privileged email to attach a non-privileged attachment. Merely attaching a document to a legally privileged email does not automatically make the document privileged.

The different types of legal professional privilege

Legal advice privilege covers confidential communications between lawyers (acting in their professional capacity) and clients for the dominant purpose of giving or obtaining legal advice.[4] It does not matter whether the advice sought relates to contentious or non-contentious matters, though if the communication focuses on commercial (as opposed to legal) matters that is unlikely to satisfy the dominant purpose requirement. Legal advice privilege attaches to all material forming part of the continuum of lawyer/client communications even if those documents do not expressly seek or convey legal advice provided that they are part of a necessary exchange of information of which the object is the giving of legal advice as and when appropriate.

Litigation privilege covers confidential communications between clients and their lawyers, or between either of them and a third party for the purpose of obtaining information or advice in connection with existing or reasonably contemplated litigation, provided that the following conditions are satisfied:

- Litigation is in progress or reasonably in contemplation
- Such communications are made with the sole or dominant purpose of conducting that litigation

[1] Often quoted Lord Hoffman comments in *R (Morgan Grenfell Ltd.) v. Special Commissioner for Income Tax* [2003] 1 A.C. 563 (paragraph 7).
[2] Lady Justice Gloster at paragraph 39, *Dechert LLP v. Eurasian Natural Resources Corporation Limited* [2016] EWCA Civ 375.
[3] Mr Justice Burnett at paragraph 31, *R (on the application of Colin McKenzie) v. Director of the Serious Fraud Office* [2016] EWHC 102 (Admin).
[4] *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35

- The litigation must be adversarial, not investigative or inquisitorial

Reasonably in contemplation or prospect does not mean that the prospect of litigation has to be greater than 50% – but it must be more than a mere possibility. Where a litigation hold notice is sent, this is likely to be good, but not conclusive, evidence that litigation is in reasonable prospect

Litigation privilege can extend to documents that are concerned with settling litigation, however, purely commercial discussions regarding settlement will not be privileged. In *WH Holdings Ltd v. E20 Stadium LLP* [2018] EWCA Civ 2652, litigation privilege was claimed over emails passing between company board members (and between board members and stakeholders) on the ground that the emails were created for the dominant purpose of discussing a commercial settlement of a dispute when litigation was in contemplation. The Court of Appeal held that a claim in those terms does not fall within the scope of litigation privilege, on the basis that litigation privilege does not extend to purely commercial discussions.

The *Three Rivers* cases (*Nos. 5 and 6*) remain the principal authorities on legal advice privilege and litigation privilege respectively.[5]

In a judgment relating to *The RBS Rights Issue Litigation* and concerning privilege, Mr Justice Hildyard explained the different types of legal professional privilege as follows:

"Put shortly, litigation privilege protects the assembly and content of evidence for the purpose of the litigation and thus focuses on the purpose for which the documentation has been obtained or assembled; whereas legal advice privilege applies only to the confidential communications between a party and his legal advisers for the purposes of enabling that party to obtain informed and professional legal advice, and thus is confined to confidential communications within that relationship and for the purpose of its fulfilment."

Who is the client?

The *Three Rivers (No. 5)* case confirmed that legal advice privilege only applies to communications between a client and its legal advisers, to documents evidencing such communications and to documents that were intended to be such communications even if not in fact communicated. The court found that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice. The court further rejected the notion that communication from employees are different and stated that information gathered from an employee stands in the same position as information from an independent agent even if the information is collected by or in order to be shown to a solicitor to enable fully formed advice to be given to the client corporate entity. The judgment concluded that legal advice privilege attaches only to communications between the lawyer and those individuals who are authorized to obtain legal advice on that entity's behalf.

The decision in *Three Rivers (No. 5)* has been the subject of criticism and debate, principally concerning the fact that the decision provides a narrow view of legal advice privilege which means that communications between an employee of a corporation and the corporation's lawyers are not privileged unless that employee was authorized to seek and receive such advice on behalf of the corporation. This is likely in practice to be senior employees, and not necessarily those with the relevant factual knowledge relating to the issue in question upon which advice is to be sought. In *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, the Court of Appeal was clear that if the ambit of *Three Rivers (No. 5)* is to be decided differently, then that decision will need to come from the Supreme Court. Notwithstanding this, the court went on to express the view that there was much force in the arguments put before it that the decision in *Three Rivers (No. 5)* was wrong and that if it had been open to them to depart from that decision, they would have been in favor of doing so. One of the observations of the Court of Appeal

[5] *Three Rivers District Council and Ors v. Governor and Bank of England (No. 5)* [2003] QB 1556 and *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610.

was that the decision in *Three Rivers (No. 5)*, as interpreted by the English courts, puts English law at odds with the international common law on the question of communications with employees. For example, in Hong Kong, where the "client" is a corporation, the corporation is the "client" for the purpose of legal professional privilege and its general employees (including in-house counsel) can be regarded as being authorized to act for the corporation in the process of obtaining legal advice or in connection with actual, pending or contemplated litigation.

In a more recent judgment, the Court of Appeal again indicated that it would be disinclined to follow the *Three Rivers (No. 5)* judgment on this point, had it been in its power to do so.[6] However, until such time as the Supreme Court has an opportunity to reconsider legal advice privilege and the decision in *Three Rivers (No. 5)*, "the client," for the purposes of legal advice privilege, are those individuals who are authorized to communicate with their legal advisers for the purpose of seeking and obtaining legal advice. Merely being authorized to communicate facts to a lawyer does not mean that individual is part of the confidential client/lawyer relationship for the purposes of legal advice privilege.

As is clear from the discussion above, the question of "who is the client" for the purposes of legal advice privilege is very different to the question of "who is the client" in terms of the entity to which a law firm owes professional duties. It may be helpful in practice to define who falls within "the client" and establish clear lines of communications with those individuals at the outset, though the "client" team can change over time.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Lawyer-client communications that are covered by legal advice privilege remain so regardless of whether they are held by the lawyer or the client. Copies of privileged documents are also privileged.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Yes. Under English law, in-house lawyers are treated in the same way as external lawyers for determining privilege. Insofar as they are giving legal advice, their communications will be privileged. However, if their communications relate to purely business or administration (i.e., they are corresponding as a "man of business") and "do not contain advice as to what should prudently and sensibly done in a relevant legal context,"[7] they will not attract privilege. As a practical matter, it is wise for in-house lawyers to separate communications which concern business or administration from communications which are providing legal advice.

However, under EU law, privilege only covers written communications exchanged between a client and an independent lawyer (i.e., external counsel) who is entitled to practice in an EEA Member State.

Does privilege extend to internal communications between in-house lawyers?

Yes. Internal communications between in-house lawyers are privileged, provided the communications are for the dominant purpose of the provision of legal advice to the internal client. Communications with lawyers that relate to business or administration with no relevant legal context will not be privileged.

[6] *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35 at paragraph 57
[7] Paragraph 13, *Z v. Z & Ors* [2016] EWHC 3349 (Fam).

Are foreign lawyers recognized for the purposes of privilege?

Yes, as long as the lawyer is acting in their professional capacity or function as a lawyer, in connection with the provision of legal advice. The English court will not examine a foreign lawyer's qualification or regulated status by reference to their domestic laws. Accordingly, under English law, foreign in-house lawyers' communications can also attract privilege, so long as they are providing advice in their capacity or function as a lawyer and the other requirements of legal advice or litigation privilege are met (*PJSC Tatneft v. Bogolyubov and others* [2020] EWHC 2437 (Comm)).

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Legal advice privilege does not extend beyond qualified lawyers to advice given by nonlawyers. The Supreme Court decision of *R (on the application of Prudential Plc and another) v. Special Commissioner of Income Tax and Anor* confirmed this. The Supreme Court's judgment confirmed the historic common law position that legal advice privilege does not extend to advice given by accountants, tax advisers, economists, construction claims consultants or other professionals, even where this advice is necessary for a client to understand their legal rights and obligations. The Supreme Court's rationale for maintaining this rule was that to extend legal advice privilege to nonlawyers "would detract from the certainty and clarity which presently exist." Clients therefore continue to face difficulties when it comes to instructing nonlawyer third parties, as information shared with them may later be disclosable in a litigation or regulatory context, unless they are covered by litigation privilege. Litigation privilege may apply to other nonlegal professionals as it can cover communications with third parties, such as a client's communication with an expert.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Limited waiver of privilege

Confidentiality is an essential element of privilege. If a party chooses to share a document with another party, confidentiality – and therefore privilege – will be lost as against that party. However, confidentiality is not lost as against the rest of the world and so privilege in that document can be asserted as against the rest of the world.

In *Property Alliance Group v. Royal Bank of Scotland* [2015] EWHC 1557 (Ch), Mr Justice Birss (as he then was) confirmed that waiver of privilege can be made for a limited purpose and that this would prevent the person to whom the document was disclosed from using it in some circumstances if they were outside the limited purpose for which privilege was waived. In that particular case, the documents in question had been provided to various regulators on the basis that confidentiality and privilege would be preserved as against third parties. The agreements with the regulators contained "carve outs" which permitted the regulators to share the documents with other third parties (such as other governmental or regulatory agencies) and/or to make the material public or to disclose it further. Birss J found that those carve outs did not amount to a general waiver of privilege and stated that: "The fact that the carve outs recognize the regulator's rights and obligations to take a step, which might go so far as even publishing the information in the document, makes no difference if that has not happened. Until they do, I fail to see why the confidentiality and privilege would not be preserved."

The recent case of *State of Qatar v. Banque Havilland SA* [2021] EWHC 2172 (Comm) confirmed the English court's view that where a document has been provided to a limited number of people, it will generally take a good deal of persuading that privilege has been waived more broadly, as against the rest of the world.

In practice, if it is necessary to share a privileged document with a third party, it is advisable, before handing over the document, to: (i) state expressly in a communication to the third party that the document is being provided in confidence and without prejudice to legal professional privilege; (ii) specify the purpose for which the document is being provided; and (iii) ask the third party to acknowledge this in writing and to undertake not to disclose the documents to any other person.

Inadvertent disclosure

A party who is entitled to claim legal professional privilege is not obliged to do so: that party can, if it chooses, waive privilege and allow inspection. As such, it cannot be assumed that the production for inspection of a privileged document must have been inadvertent. Where a party has allowed another party to inspect a privileged document by mistake, privilege may be lost as against that party. However, the court has jurisdiction to intervene to prevent the use of the document. That said, where privileged material is leaked or inadvertently disclosed to a prosecuting authority, the public interest in investigating and prosecuting the crime may override the privilege holder's right to restrain the use of the privileged material (*ENRC v. Decherts LLP & ors* [2022] EWHC 1138 (Comm)).

While the court will ultimately decide each case on its own particular facts, the court is likely to grant an injunction if the making of the privileged document available for inspection was an obvious mistake and there are no other circumstances which would make it unjust or inequitable to grant relief. A mistake is likely to be held by the court to be obvious where the lawyer appreciates that a mistake has been made before making some use of the documents or that it would be obvious to a reasonable lawyer in their position that a mistake had been made. Furthermore, English solicitors' professional rules require them to be alive to mistaken disclosure and in circumstances where they are (or should be) on notice that the disclosure was a mistake, they must bring this to the attention of the other side for their confirmation.

Where inspection has been procured by fraud, it is very likely that the court will grant an injunction.

Common interest privilege

A party does not waive privilege where it discloses documents to a third party with whom it shares a common interest in the subject matter of the privileged document or the litigation to which the document relates. It is uncertain precisely which situations are covered by this form of privilege but the relationships in which a common interest has been found to exist to date include: companies in the same group; insured and insurer; reinsured and reinsurer; agent and principal; company and shareholder; co-defendants; and parties using the same solicitor. It is always best practice to use a common interest privilege agreement to record this relationship and its agreed terms.

Use of privileged materials in court

There are circumstances in which privilege will be held to have been waived as a result of a reference to privileged materials in pleadings or a witness statement, even if the reference in question is only to the effect, rather than the content, of the advice (see e.g., *PCP Capital Partners LLP and another v. Barclays Bank Plc* [2020] EWHC 1393). Depending on the context, even a reference to those materials, e.g., to demonstrate that a witness was acting with the benefit of unspecified legal advice, can lead to a waiver of privilege. Current case law has adopted a distinction between a "mere reference" to and "reliance" on the privileged item, this is very fact-specific. The latter will likely constitute waiver (*Kyla Shipping Ltd v. Freight Trading Ltd* [2022] EWHC 376 (Comm)). An earlier Court of Appeal case (*Raiffeisen Bank International v. Asia Coal & Ashurst* [2020] EWCA Civ 11) held that waiver would occur where the reference "puts in issue the content" of the privileged material. A statement simply referring to it will not automatically and without more give rise to a loss of confidentiality and therefore a loss of privilege.

So, while references to information in a document in open court will not necessarily expose the document itself to the public sufficiently that the confidentiality in it is lost (*SL v. Tesco* [2019] EWHC 3315 (Ch)), caution should be exercised when referring to legal advice or its effects in witness statements and other court communications.

Compulsion of law

Legal professional privilege is considered a fundamental right and can, generally speaking, be asserted in answer to any demand for documents by a public or other authority. However, as discussed above, parties can agree to provide privileged documents on a limited basis.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Legal professional privilege generally operates in the same way irrespective of whether the situation is civil, criminal, regulatory or investigatory. That said, it is important to note that litigation privilege is "essentially a creature of adversarial proceedings"[8] and does not extend to investigative or inquisitorial proceedings.

However, the fact that an investigation may be the precursor to any litigation does not necessarily mean that litigation privilege will not be available when the investigation is being carried out. In the context of investigations, the important points are: (a) identifying the point at which litigation is in reasonable contemplation of the parties – usually, criminal litigation in the form of prosecution; and (b) understanding that when an investigative report is commissioned for a range of reasons, a claim to litigation privilege can be difficult, given the requirement to demonstrate that the report is prepared for the dominant purpose of the litigation. Ultimately, many investigations will be inquisitorial in nature at the beginning. This may change during the course of the investigation or it may not and if it does not, litigation privilege will not apply.

In the Court of Appeal decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, the court found that litigation (in the form of criminal proceedings) was reasonably in contemplation at the time when ENRC had instigated its own investigation and certainly by the time the SFO had written a letter urging ENRC to consider carefully the Self-Reporting Guidelines even though it had confirmed that the SFO was not, at that stage, carrying out an investigation. Further, and very importantly, the Court of Appeal decision confirmed that, contrary to the decision of the first instance judge, there is no general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken.

In the recent case of *The State of Qatar v. Banque Havilland SA* [2021] EWHC 2172 (Comm), the court refused a claim to litigation privilege over an accountants' investigative report. Although the issue addressed in the report was a serious one (with the potential for serious legal and regulatory consequences), there was insufficient evidence on the facts that it had been commissioned for the sole or dominant purpose of adversarial litigation.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The starting point is that where interviews are themselves not privileged, verbatim notes or transcripts cannot be privileged.

[8] Paragraph 42, *Property Alliance Group v. Royal Bank of Scotland* [2015] EWHC 1557 (Ch) (quoting Lord Jauncey in *Re L (a minor) (Police Investigation: Privilege)* [1997] AC 16).

A good example of this can be found in *The RBS Rights Issue Litigation* case. RBS had notes of interviews with 124 individuals, some of whom were ex-employees, across a number of divisions, locations (including the US) and levels of seniority. The interview notes compromised information gathered from employees or former employees preparatory to and for the purpose of enabling RBS, through its directors or other persons authorized to do so on its behalf, to seek and receive legal advice. Hildyard J. considered that these interview notes did not meet the requirements for legal advice privilege: "The individuals interviewed were providers of information as employees and not clients: and the Interview Notes were not communications between client and legal adviser."

In *The RBS Rights Issue Litigation* case, RBS also argued, in the alternative, that the interview notes were privileged because they were "lawyers' working papers." Under English law, lawyers' working papers are privileged if they would betray the trend of advice which the lawyer is giving the client. RBS argued that the interview notes were not simply verbatim recitals of the interviews, but were notes that evidenced the impressions of the lawyer in the sense that they reflected the work undertaken in preparation for the interviews thus revealing the train of inquiry. Further, as these notes were not verbatim transcripts, they reflected a selection by the author of the points being recorded. Hildyard J did not consider this to be sufficient and said that there was a real difference between reflecting a train of inquiry and reflecting – or giving a clue to – the trend of legal advice. A claim for privilege on the basis that interview notes were "lawyers' working papers" was also rejected at first instance in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* as the judge concluded that there was insufficient evidence that the notes would give a clue as to the legal advice or any aspect of the legal advice being given to ENRC. The Court of Appeal declined to give a view on this and considered that it would be better for the question of the extent to which lawyers' working papers are covered by legal advice privilege to be considered by the Supreme Court. As such, the position on lawyers' working papers remains as outlined above.

If adversarial litigation is reasonably in contemplation and the other ingredients for litigation privilege are present, then interviews with employees and third parties may be covered by litigation privilege. For example, in *Bilta (UK) Ltd (in liquidation) & Ors v. Royal Bank of Scotland PLC & Ors* [2017] EWHC 3535 (Ch), interviews with former and current employees which were conducted by RBS as part of an investigation were found to be covered by litigation privilege. Also, in the Court of Appeal decision in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd*, the court held that (contrary to the decision at first instance), the notes of interviews with employees, former employees, officers of the company and subsidiary companies and other third parties were covered by litigation privilege. The Court of Appeal considered that the contemporaneous documents showed that ENRC was "aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility" (adopting the test in *United States of America v. Philip Morris* [2003] EWHC 3028 (Comm)).

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

No. Legal professional privilege is considered a fundamental right and can, generally speaking, be asserted in answer to any demand for documents by a public or other authority. Furthermore, statutory powers that confer compulsory information gathering powers are almost always coupled with privilege preserving provisions. Such statutory powers are very limited (for example, in relation to matters of national security).

The Court of Appeal in *Sports Direct International Plc v. The Financial Reporting Council* made it clear that it is very rare for statutory powers to override privilege. Unless a statute prevails over privilege, a regulator cannot go through the back door and require a client to produce privileged documents, where the client has a credible claim to assert privilege over those documents. The English Law

Society has emphasized that when solicitors are confronted with requests to produce privileged materials which would involve trespassing on privilege, they should recall that it is truly exceptional for an authority to have the power to obtain such material.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been plenty of cases featuring issues of privilege since the last edition of the Global Attorney-Client Privilege Guide. Certain key cases are highlighted below.

The case of *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35 confirmed that legal advice privilege is subject to a "dominant purpose" test, meaning that in order to benefit from legal advice privilege, there is a requirement to show that the dominant purpose of the relevant document or communication in question was to give or obtain legal advice (rather than for a commercial purpose for example). In the case of communications made for a dominant commercial purpose, privilege would still be lost (or not apply in the first place) even if the communication was contemporaneously sent to a lawyer for the purpose of giving legal advice. This case serves as a warning that merely copying a lawyer to a multi-party communication or having a lawyer attend a meeting is not enough to attract privilege.

In *State of Qatar v. Banque Havilland SA* [2021] EWHC 2172 (Comm), an accountant's report into the origin and circulation of a presentation prepared by an employee of the defendant bank, which had been leaked or hacked, was not protected from disclosure by litigation privilege. The court found that it had not been prepared when litigation was in contemplation or for the sole or dominant purpose of conducting that litigation. Following the leak, the bank initiated an investigation. The bank argued the report was subject to litigation privilege because it was being prepared at a time when adversarial proceedings were reasonably in contemplation. The judge concluded that this was too general an apprehension to support a claim for litigation privilege. Additionally, the judge wasn't convinced that the dominant purpose of the report was anticipated litigation, rather it was to find out the facts and satisfy the regulator that the bank was acting appropriately. This case shows the importance of the timings of expert instructions, ensuring a clear paper trial of the reasons for the instructions and of being cognizant of the dominant purpose test for communications to attract privilege.

In *Loreley Financing (Jersey) No 30 Ltd v. Credit Suisse Securities (Europe) Ltd and ors* [2022] EWHC 1136 (Comm), the court held that litigation privilege could not be claimed in respect of the identities of the individuals giving instructions to their lawyers on their behalf in relation to the litigation. The court found that whether the identity of a person communicating with a lawyer is privileged depends on whether: (i) the communication itself is privileged; and (ii) that privilege will be undermined by the disclosure of the person's identity. That will depend on the facts of each case (but a positive finding in respect of (ii) will be rare). In this case the court found there was no evidence to show that the privilege would be undermined, and therefore the identity information was not protected by privilege.

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France

01 - Discovery

What disclosure/discovery is required in litigation?

There is generally no disclosure/discovery in France. Parties must provide the court with all documents supporting their claims, and all documents referred to in their submissions should be provided to the opposing parties.

A party may, before initiating an action, ask in summary proceedings or by filing a request to be provided with documents in the possession of another party, provided that there is no other way to obtain the documents.

When an action has been initiated, parties may also request the judge to order the production of documents in the possession of the opposing party or of a third party. The judge has a discretionary power to grant or deny the request. The request will be denied if the judge considers that the documents are not relevant to the case or that the request is overly broad. The request will also be denied if the party in possession of the document successfully claims that the document is privileged or, more generally, confidential. The scope for production of documents is thus relatively limited.

In the case of arbitration, under a decree issued on 13 January 2011 amending arbitration law, the arbitral tribunal's authority has been broadened to include the ability to order parties, under the threat of penalty if necessary, to produce evidence that they may have in their possession. The arbitral tribunal may also authorize a party to request from state courts (from the President of the Tribunal Judiciaire) an order against third parties to obtain evidence held by them.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Under French law, all communications on any medium between an external attorney and their client are covered by attorney-client privilege, pursuant to the National Regulation of the Lawyer's Profession, Law No. 71-1130 of 31 December 1971, the Privacy Decree of 20 October 2005, and the Preliminary Article of the French Code of Criminal Procedure as amended by Law No. 2021-2129 of 22 December 2021. Thus, French law protects, as being confidential, communications between lawyers and clients as well as communications between lawyers, together with any documents attached to the said communications.

With regard to communications between lawyers and clients, privileged documents include the following:

- Legal opinions drafted by the lawyer and transmitted or to be transmitted to the client
- Communications between the client and their lawyer(s)
- Meeting notes
- All documents included in the lawyer's file (e.g., notes taken by a lawyer to prepare the client's defense even if not yet transmitted to the client)

Law No. 2021-1729 dated 22 December 2021 introduced new provisions regarding legal privilege. For certain tax and criminal investigations, French law operates a distinction between legal advice privilege and litigation privilege. While litigation privilege is always protected, legal advice privilege is

not protected when (i) the investigation pertains to tax fraud, corruption, influence peddling, terrorism financing and money laundering offenses, and (ii) the legal opinions, correspondence or exhibits that are in possession of, or were communicated by, the lawyer or the client were used for committing or facilitating the commission of said offenses. This exception applies to materials that were not prepared in the context of a litigation proceedings and is strictly controlled; a judge makes the final determination as to which materials can be disclosed.

The other exclusion to the protection relates to the disclosure of privileged materials that is necessary for the proper defense of a lawyer who is personally suspected and/or prosecuted as perpetrator or accomplice of a criminal offense or within the context of a disciplinary procedure.

The privilege protecting communications between lawyers is even broader than the privilege protecting communications between a lawyer and a client. Pursuant to the National Regulation of the Lawyer's Profession, all communications between lawyers are by nature confidential and therefore cannot be produced in court.

Communications between lawyers are privileged unless stamped "official" or considered to be procedural acts. Even if stamped "official," a communication between lawyers should not be disclosed to a third party if it refers to discussions or documents that are privileged. Such a communication would itself be considered as privileged under French law.

Communications between a French lawyer (i.e., a lawyer admitted to a French bar association) and a foreign lawyer are also deemed privileged, irrespective of the foreign rules on privilege applicable to the foreign lawyer, if they are included in the file of the French lawyer.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Attorney-client communications are also privileged when a copy is held by the client. However, the obligation to preserve the confidentiality of the communications is only imposed on the lawyer, who is subject to the duty of professional secrecy. Consequently, as stated by the French Cour de Cassation, a client can take the initiative to produce correspondence with the lawyer before a court. In such instances, the client is no longer entitled to invoke professional secrecy in respect of communications they voluntarily made public.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Under French law, there is a strict difference between the status of in-house counsel and external lawyers. In-house counsel are not admitted to the bar and therefore are not bound by the specific professional rules of ethics applicable to lawyers. External lawyers cannot act as in-house counsel, since they must remain independent from their clients.

In-house counsel, like other employees of companies, are only bound by professional secrecy regarding information considered as "business secrets" and received as a consequence of their position within the company.

As only external lawyers are subject to a strict code of professional conduct, legal privilege is not extended to communications between in-house counsel and employees, officers or directors of a company where such communications were created for the purpose of obtaining legal opinions on matters relating to the company's activities. Consequently, an in-house counsel can neither resist an investigation by public authorities (whether EU or national authorities) nor refuse an inspection of the business premises they use, nor oppose a seizure of their communications (except for

communications with an external lawyer). In addition, like any witness, in-house counsel can be called to testify or to provide evidence against the company they work for.

In practice, in-house counsel refrain from giving written advice, especially on competition law. Legal opinions of major importance are provided by external lawyers so that they are protected by legal privilege.

Does privilege extend to internal communications between in-house lawyers?

Legal privilege does not extend to communications issued by in-house lawyers, who are not subject to the National Regulation of the Lawyer's Profession. As such, in-house lawyers do not benefit from any legal privilege concerning their own internal communications, since they are not legally subject to strict professional secrecy. Even if in-house lawyers have internal obligations to keep business information secret, this obligation falls away when the authorities require internal information for a judicial procedure.

Are foreign lawyers recognized for the purposes of privilege?

The position of foreign lawyers with regard to privilege depends on whether the foreign lawyer is an EU lawyer and whether the issue of confidentiality arises with regard to acts performed in France or abroad.

EU lawyers

If the lawyer is admitted to a bar association within the EU, their communications with clients are privileged.

In relation to documents exchanged between lawyers from different European bar associations, the default rule is that these are not privileged unless stamped "confidential" or "without prejudice."

Within France, documents exchanged between lawyers are privileged unless stamped "official." If a French lawyer forwards a document received from an EU lawyer that is not stamped "confidential" (and is therefore not privileged) to another French lawyer, then French rules apply and the document will be considered confidential.

Non-EU lawyer working in France as in-house counsel

Privilege does not extend to communications (written or oral) between a company and its in-house counsel working in France, even where the in-house counsel is admitted to a foreign bar association in a jurisdiction where privilege is extended to in-house counsel.

Non-EU lawyer practicing as a Foreign Legal Consultant

Since April 2018, non-EU lawyers can register as Foreign Legal Consultants to practice law in France under the professional title they use in their state of origin if they are nationals of a jurisdiction that entered into an international trade agreement with the European Union, and said agreement includes provisions on legal services.

Foreign Legal Consultants are bound by both the professional rules of their state of origin and the professional rules applicable to lawyers admitted in France.

Therefore, written and oral communications between a Foreign Legal Consultant and a client are privileged.

Non-EU lawyer working abroad

French rules do not address the application of privilege to communications (written or oral) between a lawyer admitted to a bar association outside the EU and a client located in France. However, scholars

consider that French courts will take any relevant foreign privilege laws into consideration on the basis of comity.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Accountants are subject to a special code of ethics that incorporates the principle of professional secrecy. Privilege thus also extends to communications between accountants and their clients.

Professional secrecy is also applicable to nonlegal professionals such as accountants regarding communications between a lawyer and a client. When an accountant and a lawyer advise the same client on related matters, both are subject to professional secrecy, and therefore the accountant cannot produce in court a confidential document between the lawyer and the client, or a communication between the lawyer and the client in which the accountant took part. This is because the document or communication is deemed to be subject to legal privilege. However, communications passing directly between the lawyer and the accountant in principle fall outside the protection of legal privilege.

Lawyers' secretaries are also subject to professional secrecy, since their collective bargaining agreement imposes this duty, which if breached can lead to their dismissal for professional misconduct. Thus, in the event of an investigation by public authorities, those employees must object to testifying on the basis of their duty of professional secrecy, unless they are personally indicted.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

With the exception of disclosure required by law and to a specific public authority, confidentiality is generally lost whenever a privileged document or information is disclosed to a third party. The only way to protect confidentiality in such a case is to enter into a confidentiality agreement with the third party. Such confidentiality agreement does not prevent confidential documents from being seized by antitrust or criminal authorities.

It should be noted that the lawyer remains bound by confidentiality even when such confidentiality is lost by the client, i.e., if the document or information has already been disclosed to a third party. Clients may disclose privileged communications without prior authorization of their lawyers.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Legal privilege protects documents covered in all civil, criminal, regulatory and investigatory situations, meaning that the documents covered by privilege can be seized or disclosed only in limited circumstances, which are strictly controlled by a judge, as follows:

For tax fraud, corruption, influence peddling, terrorism financing and money laundering investigations, legal advice privilege is not protected if the legal opinions, correspondence or exhibits that are in possession of, or were communicated by, the lawyer or the client were used for committing or facilitating the commission of said offenses.

Facing criminal situations such as assistance to a person in danger or disappearance of a minor child, the lawyer has the right to breach their duty of professional secrecy and thus to provide a judge with

privileged documents when such disclosure is necessary to prevent criminal offenses from occurring. However, a lawyer has no obligation to do so.

Regarding the antitrust authority, agents regularly breach privilege, in particular when broadly copying hard drives. The Court of Justice of the European Union has set a procedure known as the *Akzo* procedure, allowing the agents of the European Commission to bring documents covered by privilege under seals before the Commission where the owner of the seized documents is able to provide evidence proving the privilege. If the Commission considers that the seized documents are not covered by privilege, the owner of the said documents can appeal this decision. The agents or the Commission itself are not aware of the contents of the seized documents until a final decision is taken on whether or not the documents are covered by privilege. However, the *Akzo* procedure has for the moment no equivalent under French law.

Moreover, under the money laundering legislation, lawyers have the obligation to report to the French financial information unit known as the Treatment of Information and Action Against Illicit Financial Circuits (TRACFIN), any suspicions of money laundering they may have about their clients, except in the course of litigation proceedings and when delivering legal opinions (except when such legal opinions are about money laundering or financing terrorism). In this regard, lawyers might provide TRACFIN with documents covered by privilege through the President of the Bar Association.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The relationship between the lawyer acting as investigator on behalf of a private company and the legal privilege of interviews and documents collected in this manner was subject to recommendations from the Paris Bar Association on 8 March 2016.

Following those recommendations, when interviews are carried out by a lawyer appointed by a private company, the results of such investigation are covered by attorney-client privilege. Therefore, the lawyer can neither communicate the results of its investigation nor provide any documents collected in the course of such investigation to third parties.

However, the oral or written discussions between the interviewed employees and the lawyer are not covered by privilege, meaning that the company is entitled to use the statements of its employees in view of settlement negotiations or judicial proceedings, e.g., in individual labor court litigation. In such instances, the lawyer acting as investigator is not permitted to represent the company against employees he or she has interviewed.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Searching a lawyer's office and the seizure of privileged documents located in their office are possible only if these measures are likely to prove that the lawyer committed a criminal offense or was an accomplice in such offense. The search must be (i) authorized by the Judge of Freedoms and Detention (Juge des libertés et de la détention), and (ii) conducted by an investigating judge or public prosecutor, in the presence of the President of the Bar Association (Bâtonnier) who will ensure the protection of legal privilege.

Searches and seizures of privileged documents may, in strictly limited circumstances and upon authorization by a judge, also be performed by tax and customs authorities if there are strong reasons to believe that a taxpayer is committing tax fraud. The same applies to antitrust authorities.

Disclosure of privileged documents or information remains exceptional, and any seizure of privileged documents and information must be limited to the documents strictly necessary to establish the truth.

Documents prepared specifically for the defense of the prosecuted person cannot be seized.

Documents protected by legal advice privilege, such as legal opinions, correspondence or exhibits that were not prepared in the context of a specific litigation proceedings cannot be seized, except in the following cases: tax fraud, corruption, influence peddling, terrorism financing and money laundering investigations. In those cases, authorities must prove that the legal opinions, correspondence or exhibits that are in possession of, or were communicated by, the lawyer or the client were used for committing or facilitating the commission of said offenses.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

New provisions regarding legal privilege were introduced by Law No. 2021-1729 dated 22 December 2021 and entered into force on 1 March 2022 in spite of the protests of the French legal profession. On one hand, this law sanctified legal privilege as a rule of evidence in the Code of Criminal Procedure and clearly states that documents protected by legal privilege cannot be seized. It also reinforced the procedure regarding search and seizure of privileged materials in a lawyer's office by requiring that this measure be authorized by the Judge of Freedoms and Detention beforehand. On the other hand, the law introduced an exception that operates a distinction between litigation privilege and legal advice privilege which could result in the disclosure of documents that would have been protected before this law, albeit in a limited set of circumstances.

Extending the benefit of legal professional privilege to in-house counsel is constantly discussed. The underlying reason justifying the absence of the protection of privilege for documents issued by in-house counsel lay in the presumed lack of independence of mind of in-house counsel towards their employer. This reasoning is heavily criticized nowadays, and many have highlighted the fact that external lawyers working for a limited number of clients might, in practice, have less independence of mind towards those clients than in-house counsel. French legislation may change in this respect, and serious thought is being given to the idea of allowing lawyers to be employed in companies. This would extend the protection of privilege to documents and communications passing between the lawyer and the company by which they are employed. While the legal privilege of in-house counsel was planned to be established by law in 2016 and the aforementioned Law dated 22 December 2021 was to introduce a five-year experiment where lawyers could be employed by companies in two bar associations located in the Paris area, both projects were abandoned in large part due to the opposition of the French bar associations.

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Germany

01 - Discovery

What disclosure/discovery is required in litigation?

There is no formal process of disclosure or discovery under German procedural law, and the duty to produce documents is very restricted. Since a change of the German Code of Civil Procedure ("**Civil Procedure Code**") in 2008, the court may order that a party or a third party disclose specific documents to which one of the parties has referred and that are in the other party's or the third party's possession (section 142 of the Civil Procedure Code). The facts that are to be evidenced by the documents must be in dispute and relevant to the outcome of the case, and the party that has the burden of proof must adequately substantiate the facts of its case independently of disclosed documents. The highest German civil court, the Bundesgerichtshof (BGH), has confirmed that a court must not order the production of documents solely for the purpose of extracting information. For this reason – and probably also because disclosure is at odds with the traditional approach in German civil litigation – disclosure orders are rare in practice. Therefore, case law on the application of section 142 of the Civil Procedure Code is sparse.

According to section 142 of the Civil Procedure Code, a court has discretion whether to order the production of a document or not. In exercising this discretion, the court, according to the BGH, may take into consideration the principle of proportionality and also legitimate interests in maintaining confidentiality. Thus, a court may find that the other party does not have to disclose documents, for example, if they contain business or trade secrets. Some scholars also argue that, in order to protect the attorney-client relationship, the other party would not have to disclose documents prepared within such relationship. At present, however, it cannot be assumed that this view would be shared by the courts. Third parties are not obliged to disclose documents if it would be unreasonable for them to do so or if they have a right to refuse testimony (section 142 paragraph 2 of the Civil Procedure Code). Thus, for example, a lawyer would not be obliged to disclose a document falling within the scope of their confidentiality obligations, as explored further in this chapter.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, both communications between lawyer and client and documents prepared by or for lawyers enjoy some kind of protection. However, because of the limited disclosure regime, privilege does not play a significant role in German civil litigation. Also, the rationale behind the "privilege" is different from the Anglo-American concept. As, generally speaking, there is no obligation to disclose documents, there is no corresponding privilege for not disclosing certain documents. Rather, in Germany, privilege (more accurately "Anwaltsgeheimnis," i.e., professional secrecy of lawyers) protects lawyers, who are considered as independent agents of the administration of justice, against state intervention. Also, it is accepted that lawyers can only properly fulfill their role if there is a relationship of trust between lawyers and their clients. Therefore, the relationship between lawyer and client is protected by professional confidentiality regulations set out in the Code of Professional Conduct and Regulations concerning the Legal Profession. Without the consent of the client, lawyers are prohibited from divulging any confidential information or documents obtained in the course of their professional activities. Breaches of this duty carry criminal penalties under the German Criminal Code.

The obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information in civil and criminal procedures as set out in the Civil Procedure Code and the

Criminal Procedure Code. Thus, under German law, the communication itself is not privileged, but the lawyer is under a duty not to disclose the information it contains and thus has a right to refuse testimony. Nevertheless, for the purposes of this chapter, the expression "privilege" will be used.

With regard to criminal procedures, under the Criminal Procedure Code (section 97), written correspondence between the accused and persons who may refuse testimony (such as lawyers) must not be seized. The same applies for notes etc. taken by the lawyer concerning matters covered by the right to refuse testimony.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

In Germany, attorney-client communication is not privileged as such. Rather, lawyers have the obligation and the right to not disclose confidential information. The Civil Procedure Code does not explicitly rule on the question of whether attorney-client communication held by the client is also protected. Given that disclosure does not play a significant role in civil litigation in Germany, there is no established case law relating to this issue. Based on a decision of the Regional Court of Karlsruhe and on scholarly writings, there is a basis for clients to argue that privilege should apply in this context. However, we consider that there is a considerable risk that privilege would not be extended to such communications. This is because even in criminal cases copies of attorney-client communications held by the client are, in principle, not protected (as the wording of the Criminal Procedure Code grants the right not to disclose confidential information only to lawyers). Nevertheless, by way of exception, documents that relate to a defense to alleged criminal or regulatory offenses must not be seized even if they are in the possession of the accused. This is to ensure that the confidentiality of communications with defense counsel is effectively guaranteed and follows from the right to an effective defense (as a part of the right to a fair trial), which is guaranteed by the German constitution and the European Convention on Human Rights. The limitations of this privilege from seizure are, however, unclear. For example, it is disputed whether or not documents relevant to a defense that are in a third party's (e.g., an expert's) possession also enjoy protection from seizure.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

No. A change in the Criminal Procedure Code in 2015 has clarified that in criminal proceedings in-house lawyers are not entitled to refuse testimony in relation to information that was entrusted to them or became known to them in their capacity as in-house lawyer. As a consequence, documents prepared by in-house lawyers do not enjoy protection from seizure in criminal cases. In civil litigation, however, an in-house counsel may refuse to give testimony regarding information obtained from their employer if the in-house counsel is admitted to the bar. If this is the case, in-house counsel are not obliged to disclose corresponding documents.

Does privilege extend to internal communications between in-house lawyers?

Yes in civil cases (but only if the in-house lawyers are admitted to the bar), but no in criminal cases. In 2015, the German legislature decided that in-house lawyers are not entitled to refuse testimony in relation to information that was entrusted to them or became known to them in their capacity as in-house lawyer (section 53 No. 3 of the Criminal Procedure Code). As a consequence, documents prepared by in-house lawyers may be seized in criminal or regulatory situations.

Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers who are admitted to the German bar are recognized for the purposes of privilege. Whether other foreign lawyers also enjoy privilege is disputed. A number of authors are of the view

that all lawyers who are admitted to the bar in a Member State of the EU may invoke privilege. Occasionally, it is argued that all foreign lawyers should benefit from privilege (at least in criminal cases).

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Yes. Certain nonlegal professionals like accountants and tax consultants are obliged to preserve confidentiality due to their rules of professional conduct. Again, this confidentiality obligation is mirrored by the right to refuse to divulge such information in civil and criminal procedures.

It should be noted, however, that due to regulations set out in the German Civil Procedure Code and the Legal Service Act, nonlegal professionals are not allowed to advise on legal issues without specific permission.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

As a general rule, there are no such circumstances. If documents compiled by a lawyer are sent to a third party (e.g., a foreign lawyer or even a client), the legal privilege is no longer applicable. Thus, only documents in the exclusive possession of a lawyer can be privileged. This is due to the fact that "privilege" actually results from professional confidentiality regulations. If a document is sent to a third party (which is only allowed with the client's consent), who in turn is obliged to maintain secrecy (e.g., another German lawyer), the document will fall under the confidentiality obligations of the third party.

As a consequence of the different legal background, there is no concept of waiver like in the Anglo-American system. Yet, the client may release the lawyer from the obligation of confidentiality. In this case, the lawyer is no longer entitled to refuse testimony and has to divulge the corresponding documents.

However, there are significant exceptions to that rule in relation to documents that relate to a defense to alleged criminal or regulatory offenses.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Yes. Privilege is almost a non-issue in German civil litigation. It does, however, have greater significance in the context of dawn raids, e.g., in cartel cases or other compliance-related matters.

In particular, the confidentiality of communications with defense counsel is effectively guaranteed and requires that privilege applies to such communication. The same applies to documents prepared for the purpose of defense.

So far, regional courts have been reluctant to grant privilege in cases of internal investigations (at least unless the company is already accused and the internal investigation is directed at preparing the defense). The Regional Court of Bonn held that documents prepared during an internal cartel compliance investigation may be seized at a subsidiary company's premises if the external lawyers who prepared the documents were retained by the parent company and not for the immediate purpose of preparing the defense of the subsidiary company. According to the court, only communications between an accused and the lawyer instructed to prepare the defense are protected.

The Regional Court of Hamburg reached a similar decision. According to its judgment, a lawyer's notes taken during an interview with an employee of the client in the course of an internal investigation could be seized, as there was no relationship of mutual trust between the employee and the lawyer. This was because the lawyer was engaged by the employer to assess its position vis-à-vis the employee in relation to potential damage claims.

Both decisions have been criticized, and there is scope to argue that they are based on too strict an interpretation of the law. Further, a change in the Criminal Procedure Code in 2011 may support the view that at least documents from internal investigations in the lawyer's possession must not be seized (Regional Court of Mannheim). Yet, the German Federal Constitutional Court in 2018 took a strict view. It held that documents prepared during an internal investigation (launched by the parent company with the intent to submit the results of the investigation to the US Department of Justice) can be seized at an international law firm's German office (as the documents were not prepared for the defense of an accused). The law firm had argued that the right to choose and practice a profession (in combination with general fundamental rights) includes protection of the relationship of mutual trust between an attorney and its client. As a consequence, documents prepared during an internal investigation should enjoy privilege, irrespective of whether the company who mandated the lawyers is accused in criminal or regulatory proceedings in Germany. This argument has, however, been dismissed by the Federal Constitutional Court. It reasoned, inter alia, that even though a German office was involved, the law firm itself as an international entity (a general partnership in the state of Ohio, USA) could not invoke this particular constitutional right that only applies to German citizens and entities.

At present, the European Court of Human Rights is dealing with two complaints from the international law firm and some of the lawyers employed there against Germany (1022/19 and 1125/19).

In late 2021, another raid took place at a large German law firm, and documents compiled during an internal investigation conducted for a client were seized. It is not publicly known whether the law firm has taken legal action against this.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

There is a high risk that such communications will not be considered as privileged. This is particularly true if the subject is not (yet) accused in criminal proceedings and/or the interview is conducted with a person which is not the lawyer's client.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Privileged documents must not be seized by public authorities and are protected from disclosure by the Criminal Procedure Code. However, the scope of privilege in that sense is rather limited. Its main scope of application is written correspondence between the accused and persons who may refuse testimony (such as lawyers) or documents prepared for defense purposes.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

At present, a political debate is ongoing on how to deal with internal investigations (which are a relatively new phenomenon in Germany). The legislature may thus take action to provide legal certainty as to the application and scope of privilege in internal investigations. In 2020, a draft law on corporate criminal law was presented, which also included provisions on internal investigations. It was

foreseen that the results of an internal investigation would not enjoy the privilege from seizure according to section 97 of the Criminal Procedure Code. This was highly criticized as it may prevent companies from conducting such an investigation. As a result, the draft law was not adopted. It remains to be seen whether a new attempt for a corresponding law will be made.

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Hungary

01 - Discovery

What disclosure/discovery is required in litigation?

General rules

In Hungarian civil procedure, no pre-trial disclosure/discovery is required in litigation in the sense that these concepts exist in common law jurisdictions.

Parties to civil litigation are only obliged to present or specify the evidence on which they intend to rely. In addition, any party may request the court to require the other party to present a particular document to the court and the requesting party, but only if substantive civil law requires the document to be presented. For example, a party would be required to disclose a document which relates to negotiations concerning a legal relationship involving the requesting party. Failure to comply is not sanctioned, however, if the court finds it probable that (i) necessary data is held by the other party and the requesting party made the necessary efforts to obtain such data, (ii) the requesting party cannot prove the alleged facts, but the other party can be expected to rebut the alleged facts, or (iii) the other party hindered proof, the court is entitled to consider the fact alleged by the requesting party as true.

The presentation of documents in the possession of third parties may also be requested through the court. However, documents and information containing business or professional secrets may be exempt from the possible obligation to present them in the litigation if the holder of such documents or information does not consent to their disclosure.

Special rules

A limited disclosure regime applies to damages actions in cases of competition law infringement. Either party may request the court to order the other party to produce specific documents, evidence or data, or categories thereof, if these are not available to the requesting party, but it can prove significant facts or circumstances. The court has to assess the proportionality of the request, including the evidence already available to the requesting party and the volume and scope of the requested evidence. Confidential information may also be made available, even without the consent of the party. However, in this case access is limited: no copies or notes can be made and the evidence can only be used in the damages litigation. Documents falling under legal privilege, leniency statements and settlement submissions, as well as all information on the basis of which inferences can be drawn about the content of the leniency statement or the settlement submission, are exempt from disclosure.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Professional secrecy

The Act on Activities of Attorneys provides that an attorney-at-law (ügyvéd) is bound by professional secrecy with regards to all facts, information and data obtained in the course of carrying out activities of an attorney, irrespective of the nature of such facts, information and data. Professional secrecy provides protection irrespective of the type of the attorney's activities during which the facts, information or data is obtained.

The professional secrecy obligations cover the members and employees of the law firm. An attorney is bound by this obligation even after ceasing activities of an attorney. Professional secrecy covers all

documents prepared by an attorney and all other documents in the attorney's possession that contain any facts or data subject to confidentiality.

Violating the obligation pertaining to professional secrecy could result in sanctions ordered by courts independent of attributability under the Civil Code. Such sanctions include declaratory findings, cease and desist orders, appropriate restitution, in integrum restitutio, unjust enrichment claims and grievance payments.

In the course of an on-site inspection, the attorney is entitled and obliged to refuse to provide documents and data covered by professional secrecy, unless the right holder (usually the client) waives the secrecy obligation. An attorney is also entitled and obliged to refuse to testify as a witness in relation to such documents and data, again unless a waiver is given. A waiver may not be validly given in relation to information obtained as a criminal defense attorney.

However, professional secrecy does block authorities from obtaining and using information covered by professional secrecy. Specifically, while an attorney is obliged to refuse to provide information or documents to an authority during a revision, inspection or on-site search, they may not hinder the authority's procedure with reference to professional secrecy, and documents obtained by the authorities may be used as evidence.

Legal professional privilege

The Act on Activities of Attorneys affords additional protection to documents or parts thereof created in the course of communications between the client and the attorney relating to the defense of the client in public authority proceedings, or as a record of the contents of such communications, as long as its privileged nature is apparent from the document itself and the document is held either by the client or the attorney.

Such documents may not be used as evidence in public authority proceedings, and the authorities may not access, seize or copy these documents. Furthermore, the attorney may refuse to grant access to these documents.

The Competition Act and the Medicine Supply Act provide for legal privilege in proceedings of the Hungarian Competition Authority and the National Institute of Pharmacy and Nutrition.

In competition law cases, it has been confirmed by the Supreme Court (Kúria) that legal privilege is not limited to documents that relate to the subject-matter of an investigation or documents that were created after the start of an investigation. The current practice of Hungarian courts follows the principles set by the Court of Justice of the European Union in the *Akzo* case. It remains to be seen if courts will apply this judicial practice in other type of cases.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

For a document to qualify as legally privileged, it is not necessary to be in the possession of the attorney. Documents meeting the criteria and in the possession of the client are also protected. Legal privilege does not cover documents which are no longer in the possession of the attorney or the client, unless they were removed from their possession unlawfully or in a criminal procedure.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

As of 1 January 2018, legal privilege has been extended to communication between the client and its in-house lawyer (employee), as long as the in-house lawyer is admitted to the lawyer's bar association

as a registered in-house counsel (kamarai jogtanácsos). It must be noted that the registered in-house counsel can carry out activities of attorneys for its employer, the employer's affiliated companies and the entity controlling the employer. Thus, communication with any of these entities may be considered as legally privileged.

Does privilege extend to internal communications between in-house lawyers?

Probably yes, but the judicial practice needs to confirm this interpretation.

Are foreign lawyers recognized for the purposes of privilege?

Attorneys registered in the European Economic Area (EEA) may carry out all activities of attorneys in Hungary, as long as the attorney is admitted to the lawyer's bar association as a European lawyer (európai közösségi jogász). European lawyers are subject to the same obligations and enjoy the same rights as Hungarian attorneys, with the exception of representation in criminal proceedings. Thus, communication with European lawyers is also covered by legal privilege.

Attorneys registered outside the EEA can only provide legal advice in Hungary on a permanent basis if admitted to the lawyer's bar association as foreign legal adviser (külföldi jogi tanácsadó). Although the fact that a foreign legal adviser may only provide legal advice with respect to their domestic law or international law would render it unlikely that communication between a client and a foreign legal adviser is covered by legal privilege, the circumstances that the foreign legal adviser can only provide legal advice on the basis of a cooperation agreement with a Hungarian attorney make it likely that the communication would fall under legal privilege.

Additionally, communication with foreign attorneys not registered in Hungary may fall under legal privilege in accordance with the rules of the domestic law applicable to the foreign attorney.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Professional secrecy obligations extend to several nonlegal professionals:

- Employees of the attorney/law firm
- Data storage, archiving, safeguarding and processing service providers
- Accountants
- Other advisers participating in the engagement with the consent of the client

However, legal privilege is explicitly limited to communication with a person carrying out the activities of an attorney.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

A document cannot be given to a third party without waiving privilege, as legal professional privilege exists only if the privileged document is in the possession of the client or the attorney. If the client or the attorney was illegally deprived of the possession of such documents, legal privilege still applies, provided that the client can prove the illegal deprivation. Professional secrecy obligations, however, continue to apply to the attorney regardless of who possesses the documents containing the confidential information.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Legal professional privilege applies to all administrative, judicial or other public authority proceedings. Professional secrecy obligations equally apply to all attorney's activities. However, special rules apply to criminal proceedings, as a waiver may not be given for disclosure of, or giving a witness statement concerning, any information that was obtained as a defense attorney.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

As documents created during a compliance investigation can be considered as documents prepared in the interest of exercising rights of defense, it is possible that such documents, including notes of interviews with the employees of the client, fall under legal privilege. This has not been confirmed by the courts yet. Thus, it must be carefully assessed whether a specific document meets the following criteria: (i) it is apparent from the document that it is legally privileged, (ii) it is in the possession of the client or the attorney, (iii) it is at least temporarily in the possession of the attorney (i.e., it was communicated to the attorney), and (iv) it closely relates to the subject-matter of the subsequent proceedings of the public authority.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Legally privileged documents are not admissible as evidence in administrative, judicial or other public proceedings without the express waiver of the client, which may not be given in a criminal proceeding. The attorney may reject granting access to documents falling under legal professional privilege. The public authority can access the legally privileged document only to a degree absolutely necessary to determine whether invoking legal privilege is clearly unfounded. In the event of a dispute between the public authority and the party, the document remains in the possession of the public authority in a container, which prevents access or tampering. The public authority may not otherwise examine, seize or copy a document failing under legal professional privilege.

However, in respect of information that does not fall under legal professional privilege, but merely falls under the professional secrecy rules, an attorney may not hinder the authority's procedure during the revision, inspection or on-site search, and documents obtained by the authorities may be used as evidence.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The current rules of legal privilege were introduced by the Act on Activities of Attorneys and became effective as of 1 January 2018. The Act on Activities of Attorneys had been introduced as a part of judicial system reform package including, among other things, (i) the Civil Procedure Code regulating all civil litigation, (ii) the General Administrative Procedure Code regulating all administrative proceedings, (iii) the Code of Administrative Court Procedure regulating the judicial review of administrative decisions, and (iv) the Criminal Procedure Code. The court practice reflecting this reform of the judicial system is still shaping, among other things, how the extension of legal privilege to communication with registered in-house counsel will be applied in practice.

In addition, as of 1 January 2020, there has been an amendment to the Act on Activities of Attorneys concerning legal professional privilege. Prior to this amendment, if there was a dispute between the client and the authority as to whether a document falls under legal professional privilege, the court decided the issue on the basis of the request of the authority and after hearing the client concerned. If the court found that the document fell under legal professional privilege, it released it to the client. In the case of a contrary decision, the court released the document to the authority. However, this general rule has been abolished and the applicable procedural provisions shall be applied instead, depending on the type of the procedure. In competition law cases, the client has an eight day period to make a statement on whether the document falls under legal professional privilege. In the case of failure to make such a statement, the document will not be protected. If such a statement has been made, the documents concerned shall be sorted out by the investigator in the presence of the client and the document shall be handed over to the client. If the investigator contests the statement of the client, it is the Budapest Metropolitan Court that shall render a decision in a non-contentious administrative procedure.

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Italy

01 - Discovery

What disclosure/discovery is required in litigation?

In Italy, in contrast to common law jurisdictions, the formal process of disclosure of documents is considered to be an exceptional measure.

Only in certain limited cases and under specific conditions may the court order the parties, or third parties, to make specific disclosure of certain documents, either on application of the parties or of its own motion. In particular, pursuant to the Italian Code of Civil Procedure, the court may only order the production of documents that it deems necessary to resolve a crucial issue in the case, and only where the facts cannot otherwise be proved. Disclosure can also only be ordered where the documents have been specifically identified and it is certain that they exist. Disclosure cannot be used to circumvent the requesting party's burden of proof.

For the sake of completeness, it is worth noting that documents would have to be handed over to the Italian authorities in the case of inspections ordered by the public prosecutor/district attorney in charge of a criminal investigation, or in the case of ordinary raids by authorities such as the Tax Police, Antitrust Authority, Privacy Authority, etc., who are responsible for conducting random inspections to make sure that companies comply with the law.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The concept of privilege in Italy may be assessed from two different perspectives:

- Legal professional secrecy, which requires Italian lawyers to keep confidential all documents and information provided to them by clients, former clients and persons who have consulted lawyers without signing any engagement letters. Such legal professional secrecy also protects the confidentiality of documents and information exchanged between lawyers in the context of their professional activities.
- Legal privilege under legislative decree 216/2017 which, under a reasonable interpretation of Italian law and court precedents, provides that communications between Italian lawyers and their clients are protected against inspections if (i) a valid power-of-attorney has been granted to the lawyers under article 391-nonies of the Italian Code of Criminal Procedure, to carry out the so-called defensive investigations, and (ii) such communications are marked as "correspondence for reason of justice" and indicate the client's and lawyer's full names, the lawyer's professional qualification, the signature of the sender, and the details of the proceedings/case number to which the communications refer.

With that in mind, it is worth noting that the Italian provisions on legal professional secrecy are contained in the Criminal Code, the Code of Criminal Procedure and the Professional Code of Conduct.

Under the Criminal Code, divulging a professional secret without justification or using it for the profit of oneself or a third party and thereby causing damage, is an offense that is punishable by up to one-year imprisonment or a fine of up to EUR 516. Under this provision, there is no criminal liability if the professional divulges the secret information for a "justified reason." This concept is quite wide and must be analyzed on a case by case basis, balancing the opposing interests of one party in not

disclosing the secret information and of the other in obtaining the disclosure in order to achieve a result that would be impossible to reach by other means.

Similarly, the Italian Code of Criminal Procedure provides that Italian lawyers must keep confidential all documents and information provided to them in the context of their professional activities. In particular, documents exchanged between lawyers in the context of their professional activities are protected by professional secrecy ("**segreto professionale**").

In the course of investigations carried out by judicial or regulatory authorities in the lawyer's office, a lawyer can refuse to hand over documents or any other object in their office provided to them by a client on the basis of professional secrecy. In such cases, a judge has the authority to verify whether there are any grounds to oppose the professional secrecy claim. A judge should cautiously investigate the matter prior to authorizing the seizure of the alleged confidential documents. Such investigation should be aimed at assessing whether the requirements of segreto professionale exist, that is, whether the lawyer involved has obtained or drafted a certain document for the purpose of carrying out their professional responsibilities or for unrelated purposes. There would be no segreto professionale if the documents were obtained or drafted for unrelated purposes. Where professional secrecy does not apply, lawyers must hand over any documents received from or drafted for their client in their original form, if so required.

The disclosure of documents protected by segreto professionale amounts to a criminal offense by the lawyer, and damages may be sought against the lawyer, unless there was legitimate justification for the disclosure (e.g., in extreme cases such as the actual danger of physical harm to a third party).

The duty of segreto professionale is also codified in the Professional Code of Conduct, which requires lawyers to maintain absolute secrecy regarding their services and information provided by the client or which has become known to them in the course of providing legal assistance. This duty extends to former clients and to persons who have consulted the lawyer without formally retaining them.

The legal privilege ensures the confidentiality of information given to the attorney in the context of their judicial or extra-judicial activity, for the purpose of obtaining legal advice. Italian courts usually do not recognize privilege in communications containing business advice.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Documents related to the defense strategy or investigations, including correspondence between lawyers and clients (if it is identifiable from specific signs printed on the envelope) may not be subject to inspection, search or seizure if they are placed in the lawyer's premises, unless they constitute the evidence of a crime (i.e., corpus delicti). According to some court decisions, documents related to the defense strategy or investigations may not be seized even when such documents are held in places other than the lawyer's premises, because the confidentiality guaranteed by the privilege is related to the role of the lawyer, rather than to the place where such documents are held.

Where a lawyer-client communication that may constitute a corpus delicti (i.e., proof that a crime has occurred) is held at the lawyer's office, in order for the judge to carry out an inspection, a raid or a seizure, the judge must inform the Bar Association in advance so that the chair of the Bar Association or its representative can be present at the activities relating to the inspection, raid or seizure. Where lawyer-client communication is in the client's possession and does not constitute a corpus delicti, it is privileged provided that it is marked as "correspondence for reason of justice" (corrispondenza per ragioni di giustizia) and indicates the following information:

- Client's full name

- Lawyer's full name
- Lawyer's professional qualification
- Signature of the sender
- Details of the proceedings/case number to which the communication refers

Under a reasonable interpretation of Italian law, it is also necessary that a valid power-of-attorney has been granted to the external counsel under article 391-nonies of the Italian Code of Criminal Procedure, to carry out the so-called defensive investigations.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In Italy in-house lawyers are not bound by the same concept of privilege because in-house lawyers are not recognized as lawyers under Italian law. In other words, the in-house counsel's professional activity is neither recognized nor regulated by any legal provision or statute. If they wish, in-house lawyers may take the bar exam but they are not required to pass the bar exam to work as in-house lawyers and, even if they pass the bar exam, in-house lawyers may not be enrolled with the bar (with some limited exceptions).

In a nutshell, in-house lawyers are mere employees of companies with a legal background rather than lawyers, and they may not use the title "lawyer" even if they passed the bar exam. In-house lawyers should not even be called "lawyers" because, under Italian law, only lawyers who are enrolled with the bar may be called "lawyers". Thus, in-house lawyers are deprived of all rights and privileges attaching to independent lawyers who are members of the Italian bar, including the protections afforded by the Italian law of privilege. Therefore, any documents held by in-house counsel, other than communications from external lawyers, may have to be handed over to judicial or regulatory authorities.

In-house counsel, in their capacity as employees, are subject to article 2105 of the Italian Civil Code concerning duty of loyalty (obbligo di fedeltà), under which in-house counsel are allowed neither to spread information about the company's manufacturing organization and methods, nor to use such information to the detriment of the company. Moreover, article 2105 of the Italian Civil Code provides that all employees of a company (including, therefore, in-house lawyers) are never allowed to compete with the employer, to spread information about the employer's manufacturing organization and methods, or to use such information to the detriment of the employer. Therefore, article 2105 of the Italian Civil Code means to say that in-house lawyers, as employees of a company, cannot act independently from their employer's interests, and confirms that legal privilege does not apply to legal documents created by in-house lawyers.

Does privilege extend to internal communications between in-house lawyers?

No. In-house lawyers' professional activity is neither recognized nor regulated by any legal provision or statute. Accordingly, no concept of privilege or other form of protection applies to in-house lawyers.

It is worth noting that the privilege could attach to communications between in-house counsel and external counsel, provided that (i) the communications include certain information (i.e., the case number, external counsel's full name and professional qualification, the client's full name, the signature of the sender), and the same communications are marked as "correspondence for reason of justice"; and/or (ii) under a reasonable interpretation of Italian law, privilege attaches to communications between in-house counsel and external counsel if a valid power-of-attorney has been granted to the external counsel under article 391-nonies of the Italian Code of Criminal Procedure, to carry out the so-called defensive investigations.

Are foreign lawyers recognized for the purposes of privilege?

The Italian Criminal Code and Code of Criminal Procedure do not expressly provide that professional secrecy is exclusively applicable to Italian lawyers, but rather make reference to lawyers in general enrolled with the Italian bar. The wording of the provisions therefore suggests that professional secrecy could be extended to foreign lawyers, provided that (i) they are admitted to their national bar, and (ii) their title is recognized by the Italian system, thus leading to registration with the Italian bar. In this respect, registration with the Italian bar can be verified on the website of the Consiglio Nazionale Forense (CNF) through the name of the lawyer (https://www.consiglionazionaleforense.it/ricerca-avvocati).

Although there are no Italian court precedents that confirm this conclusion with respect to lawyers, there are precedents which extend the benefit of professional secrecy to foreign private investigators, who are entitled to exercise their profession in accordance with the rules of their jurisdiction, provided that their title is recognized in the jurisdiction where the proceedings are pending.

This approach is in line with the position taken by the European Court of Justice when addressing the scope of attorney-client privilege during an antitrust investigation. However, that case suggests that the scope of privilege may be limited to European Union lawyers.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege is normally extended to nonlegal professionals. The provision of the Code of Criminal Procedure, according to which a lawyer cannot be obliged to disclose any information acquired by reason of their professional activity, also applies to professional accountants, tax accountants, notaries, technical consultants, medical doctors and, more generally, to any individual who, due to their work, acquires confidential information and is therefore bound by the duty of professional secrecy.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Under Italian law, the only circumstances in which professional secrecy does not apply are those where the disclosure of certain information regarding the lawyer's client becomes necessary, for example:

- In connection with preparing the defense of the client
- To prevent the client from committing any particularly serious crime (reato di particolare gravità)
- To prove facts in a dispute between the lawyer and the client
- In proceedings concerning how the client's interests were handled

The disclosure of privileged documents and/or information must be limited to those facts strictly necessary to achieve the limited purposes set out above.

The majority of commentators take the view that the possession by any third party of a document which is subject to professional secrecy is unlawful if possession was obtained as a result of a breach of the lawyer's duty of professional secrecy. According to this view, a third party is required to maintain the secrecy of any confidential documents received from lawyers in breach of their duty of

professional secrecy. This conclusion is indirectly confirmed by the Italian Code of Criminal Procedure, which prohibits the use of evidence obtained in breach of the law.

Where a third party has received confidential documents by mistake, it is possible to bring a legal action for a court order requiring the third party to return the documents.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In the context of criminal proceedings, all documents can generally be seized, except for those held by an attorney enrolled with the Italian bar and whom has been granted a valid power-of-attorney under article 391-nonies of the Italian Code of Criminal Procedure, to carry out the so-called defensive investigations.

When a confidential document is held by the client, the attorney could invoke the existence of professional secrecy connected to the right of defense of the defendant (for example, because the document has been drafted in preparation of litigation). If the public prosecutor decides to seize such document, the attorney will have to challenge the future use of such document in the criminal proceedings based on the fact that such document represents evidence collected in violation of the law.

In the context of civil litigation, in contrast to common law jurisdictions, the disclosure of documents is considered an exceptional measure. Only in certain limited cases and under specific conditions, either upon request of the parties (i.e., plaintiffs or defendants) or because the judge believes that it is crucial to collect certain documents, the judge may order the plaintiffs, defendants or third parties, to file documents with the court. It must be noted that under Italian law judges may only order the submission of documents: (i) which judges deem necessary to resolve a crucial issue of the case, and only when such issue may not be resolved in a different way; and (ii) when such documents have been clearly identified and it is certain that they exist. In any case, disclosure is not allowed to circumvent the rules concerning the burden of proof.

When a governmental regulator requires a lawyer to disclose documents, under the Professional Code of Conduct the lawyer can refuse to provide any confidential documents covered by professional secrecy. In some instances, the Italian Antitrust Authority has simply seized the privileged document without regard to its nature, whilst in other cases the same authority has not physically seized the document but nonetheless read its contents during the inspection in order to get a picture of the purpose of the legal opinion and possibly clarify some relevant issues or facts. In order to avoid such situations, it is common practice amongst antitrust practitioners to have an attorney closely shadowing inspectors from the Italian Antitrust Authority during all phases of an investigation so as to be able to immediately oppose the seizure of privileged documents protected by professional secrecy.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

There is neither a specific legal provision nor jurisprudence stating that notes of interviews with employees are covered by privilege. Based on the general rules, notes of interviews with employees are covered by privilege only if such notes can be described as documents related to the defense strategy or investigations, unless such notes were prepared by in-house counsel. In the latter case, judges are entitled to expressly authorize privilege over such notes, based on a case-by-case assessment. For the sake of completeness it is worth noting that there are commentators saying that privilege attaches to notes of interviews even if certain requirements are missing (e.g., case number) provided that it is undisputable that such notes are part of communications to Italian lawyers

empowered by a valid power-of-attorney under article 391-nonies of the Italian Code of Criminal Procedure, to carry out the so-called defensive investigations.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Under the Professional Code of Conduct, where a governmental regulator requires a lawyer to disclose documents (e.g., in the case of inspections ordered by the public prosecutor/district attorney in charge of a criminal investigation, or in the case of ordinary raids by authorities such as the Tax Police, Antitrust Authority, Privacy Authority, etc., who are responsible for conducting random inspections to make sure that companies comply with the law), the lawyer can refuse to provide any confidential documents that are subject to professional secrecy. Similarly, the Italian Criminal Code also protects professional secrecy. Only a court order can compel an attorney to disclose documents protected by professional secrecy to a government regulator. This may occur when a judge, after investigation, finds that professional secrecy does not apply because the documents were obtained or drafted for a reason unrelated to the exercise of the lawyer's profession.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Issues concerning lawyer-client privilege are, to date, largely untested in Italy. Legal privilege in Italy does not have the benefit, in practical terms, of the safeguards that have been implemented in other jurisdictions. It is hoped that in the future, Italian authorities will comply at least with the principle set forth in EU case law that lawyer-client confidentiality covers correspondence between a client and an independent lawyer established within the EU.

According to some legal authors, correspondence exchanged between clients and lawyers in Italy should not be seized during regulatory raids in light of the broad constitutional right of legal defense. However, this theory (though legally persuasive) has not yet been supported by case law and appears to be somewhat neglected by Italian authorities.

In some instances, the Italian Antitrust Authority has simply seized privileged documents without regard to their nature, whilst in other cases, the same authority has not physically seized the documents but nonetheless read their contents during an inspection in order to gain an understanding of the purpose of a legal opinion and possibly clarify some relevant issues or facts. In order to avoid such situations, it is common practice amongst antitrust practitioners to have attorneys closely shadowing inspectors from the Italian Antitrust Authority during all phases of an investigation so as to be able to immediately oppose the seizure of privileged documents protected by professional secrecy.

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Luxembourg

01 - Discovery

What disclosure/discovery is required in litigation?

As a general rule, Luxembourg has the concept of "contradictory" (principe du contradictoire) under which parties shall disclose to opposing parties the documents and evidence upon which they wish to base their claim/defense during the proceedings. Parties are also not obliged to produce all of the documents in their possession, but may select those that are useful for the resolution of the case.

There is generally no disclosure/discovery in Luxembourg. Parties must provide the court with all documents supporting their claims, and all documents referred to in their submissions should be provided to the opposing parties.

A party may, before initiating an action, ask in summary proceedings to be provided with documents in the possession of another party, provided that there is no other way to obtain the documents and that said party can evidence that the documents are required to file an action on the merits against the same defendant(s).

When an action has been initiated, parties may also, during said proceedings, request the court to order the production of documents in the possession of the opposing party or of a third party. The judge has a discretionary power to grant or deny the request. The request will be denied if the judge considers that the documents are not relevant to the case or that the request is overly broad. The request will also be denied if the party in possession of the document successfully claims that the document is privileged or, more generally, confidential. The scope for production of documents is thus relatively limited.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

In general, attorneys registered with the Luxembourg Bar (avocats liste II and liste IV and avocats à la Cour) ("**Luxembourg attorneys**") are subject to an obligation of absolute professional secrecy under the Luxembourg Bar Regulation (Règlement Intérieur de l'Ordre des Avocats de Luxembourg (RIO)).

Luxembourg attorneys cannot disclose confidential client information or legal opinions provided to clients. Although there is no formal definition of confidential client information, experience has shown that client confidential information includes any and all information provided by a client in any form whether written–electronic, physical documents, exhibits or oral (letters, email, telephone conversations, tapes, photographs, electronic documents, etc.). The duty to maintain confidentiality extends to any information that the lawyer has obtained from the client or third party as a result of being instructed on a matter, whether or not the information concerns the client and/or a third party.

Communications between a Luxembourg attorney and their client – whether to advise or to defend – are covered by legal privilege. A breach of duty by a Luxembourg attorney constitutes professional misconduct and a criminal offense.[1] A Luxembourg attorney may disclose confidential client information only when defending themselves against a charge alleged by the client. A client may also disclose information with no limitation. The client is entitled to waive the confidentiality covering a document and decide whether to disclose it. Based on such waiver, a lawyer is then entitled to disclose the document with express consent from the client.

[1] See Luxembourg Criminal Code (Article 458).

Communications between Luxembourg attorneys are privileged and their contents may not be divulged to the courts unless such communications have been labelled as "official" or are to be considered as official by their nature.

Under Luxembourg ethical rules, in-house counsel are not subject to the obligation of professional secrecy. Thus, in-house counsel are also not subject to legal privilege.

Communications between Luxembourg lawyers and foreign lawyers are only privileged if specially marked as such and comply with the rules applicable for each of the jurisdictions concerned (see as an example the European code of conduct - article 5).

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Attorney-client communications are also privileged when a copy is held by the client. However, the obligation to preserve the confidentiality of the communications is only imposed on the lawyer, who is subject to the duty of professional secrecy. Consequently, the confidentiality of the communications is not imposed on the client who can disclose said communications in a court action.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Under Luxembourg law, there is a strict difference between the status of in-house counsel and attorneys registered with the Luxembourg Bar ("**Luxembourg attorneys**"). In-house counsel are not admitted to the bar and therefore are not bound by the specific professional and ethical rules applicable to Luxembourg attorneys. Luxembourg attorneys are bound to remain independent from their clients while in-house counsel are only bound by professional secrecy and confidentiality in light of the information they have received as a consequence of their position within their employer.

As only Luxembourg attorneys are subject to a strict code of professional conduct, legal privilege is not extended to communications between in-house counsel and employees, officers or directors of a company where such communications were created for the purpose of obtaining legal opinions on matters relating to the company's activities.

Does privilege extend to internal communications between in-house lawyers?

Legal privilege does not extend to communications issued by in-house lawyers, who are not subject to the ethical rules applicable to attorneys registered with the Luxembourg Bar. As such, in-house lawyers do not benefit from any legal privilege concerning their own internal communications, since they are not legally subject to strict professional secrecy.

Are foreign lawyers recognized for the purposes of privilege?

The position of foreign lawyers with regard to privilege depends on whether the foreign lawyer is an EU lawyer and whether the issue of confidentiality arises with regard to acts performed in Luxembourg or abroad.

EU lawyers

If the lawyer is admitted to a bar association within the EU, their communications with clients are governed by the professional and ethical rules applicable to their bar.

In relation to documents exchanged between an attorney registered with the Luxembourg Bar ("**Luxembourg attorney**") and a lawyer from different European bar associations, the rule is that

these shall be privileged if the Luxembourg attorney has sought the prior acceptance of the foreign lawyer to be bound by the professional secrecy arising out from the Luxembourg ethical rules.

Non-EU lawyer working in Luxembourg as in-house counsel

Privilege does not extend to communications (written or oral) between a company and its in-house counsel working in Luxembourg, even where the in-house counsel is admitted to a foreign bar association in a jurisdiction where privilege is extended to in-house counsel.

Non-EU lawyer working abroad

Luxembourg ethical rules do not address the application of privilege to communications (written or oral) between a lawyer admitted to a bar association outside the EU and a client located in Luxembourg.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Legal privilege rules for non-attorney tax advisers

Generally, tax advisers who are not simultaneously attorneys registered with the Luxembourg Bar ("**Luxembourg attorneys**") cannot invoke legal privilege as only attorneys are subject to a strict code of professional conduct. Nevertheless, the professional secrecy provisions of article 458 of the Luxembourg Criminal Code restrict non-attorney tax advisers from voluntarily disclosing facts learned in the course of their professional activity. Any breach of their professional secrecy may lead to criminal sanctions.

In limited circumstances, when non-attorney tax advisers perform their duties in law firms that are supervised by the Luxembourg Bar, their advice may be protected by legal privilege. If a non-attorney tax adviser issues an opinion to a Luxembourg law firm client while being affiliated with the firm, the content of said opinion may be deemed as having been issued by the law firm and hence, be covered by legal privilege. Note, tax advisers in law firms may be required to cooperate with public authorities, as legal privilege is only applicable to tax advisers that are also attorneys.

Confidentiality obligations for tax advisers

Luxembourg tax advisers may perform their duties in other environments as well. Tax advisers working in accountancy firms, such as the Big Four,[2] that are supervised by the Institut des Réviseurs d'Entreprises (IRE) and the Commission de Surveillance du Secteur Financier (CSSF) in Luxembourg are subject to professional secrecy by law.[3] According to these provisions, statutory auditors, approved statutory auditors, audit firms, approved audit firms, and the persons working for them must maintain confidential the information entrusted to them in the course of their professional activity. Any breach of professional secrecy will lead to fines and/or imprisonment. However, the professional secrecy obligations of auditors and employees of audit firms are not absolute as they have the obligation to cooperate as fully as possible with any legal request made to them by public authorities.

Tax advisers performing their duties as independent professionals or working for professional accountants supervised by the Ordre des Experts-Comptables (OEC) are subject to confidentiality obligations. These tax advisers are obligated to refrain from disclosing confidential information without proper and specific authority or unless there is a legal or professional right or duty to disclose. Tax advisers who are not also attorneys may disclose confidential information where it is permitted by law

[2] Deloitte, Ernst & Young, KPMG, and PricewaterhouseCoopers.
[3] Article 28 of the law of 23 July 2016 concerning the audit profession.

and is authorized by the client or where disclosure is required by law, including for the following purposes:

- The production of documents or other provision of evidence in the course of legal proceedings
- Disclosure to the appropriate public authorities of infringements of the law that come to light
- Pursuant to a professional duty or right to disclose, when not prohibited by law, such as
    - To comply with the quality review of a member body or professional body
    - To respond to an inquiry or investigation by a member body or regulatory body
    - To protect the professional interests of a professional accountant in legal proceedings
    - To comply with technical standards and ethics requirements

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Confidentiality is generally lost whenever a privileged document or information is disclosed to a third party, save where it has been disclosed under a legal requirement and to a specific public authority. The most effective manner to protect confidentiality in such a case is to enter into a nondisclosure agreement (NDA) with the third party. Such NDA shall, however, not prevent confidential documents from being seized by public or criminal authorities when it is permitted by law.

It should be noted that attorneys registered with the Luxembourg Bar ("**Luxembourg attorneys**") remain bound by confidentiality even when such confidentiality is lost by the client, i.e., if the document or information has already been disclosed to a third party.

Clients may disclose privileged communications without prior authorization of their Luxembourg attorneys.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Legal privilege protects documents in all civil, criminal, regulatory and investigatory situations, meaning that documents covered by privilege can be seized or disclosed only in certain limited circumstances, strictly controlled by a judge.

With respect to antitrust provisions, agents may gather all information required allowing the authority to ascertain certain infringements. The documentation and information may not be disclosed publicly but the decisions of the authority may refer to this information and documentation in order to be grounded.

Further, under the anti-money laundering legislation, attorneys registered with the Luxembourg Bar have an obligation to report in good faith on any relevant information to the competent Luxembourg authorities.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

All information obtained by lawyers defending or representing clients in court (including administrative courts or commissions) and in determining the legal status of clients (including advising clients in preparing or executing transactions) is subject to professional confidentiality.

However, the notes of interviews conducted by an attorney registered with the Luxembourg Bar ("**Luxembourg attorney**") acting as investigator on behalf of a private company may not be privileged as if the Luxembourg attorney had acted under a client relationship. The Luxembourg Bar has issued recommendations and considered that a Luxembourg attorney acting as investigator for their client may not defend the case because they would be considered as having a conflict of interest. However, the Luxembourg attorney can neither communicate the results of its investigation to third parties nor any documents collected in the course of such investigation, unless expressly authorized by their client.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

A search directed against an attorney registered with the Luxembourg Bar ("**Luxembourg attorney**") and the seizure of privileged documents located in the law firm premises are only possible if these measures are likely to prove that the Luxembourg attorney or a third party committed a criminal offense. In these cases, the search must be conducted by an investigating judge or public prosecutor, in the presence of the President of the Luxembourg Bar Association (Bâtonnier) who will ensure the protection of legal privilege.

Disclosure of privileged documents or information remains exceptional, and any seizure of privileged documents and information must be limited to the documents strictly necessary to establish the truth. Documents prepared specifically for the defense of the prosecuted person cannot be seized.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

On 13 July 2021, the Luxembourg Administrative Court issued seven rulings in the so-called "Panama Papers" cases. The Panama Papers cases mainly concerned the question of the enforceability of the professional secrecy of attorneys registered with the Luxembourg Bar ("**Luxembourg attorneys**") in the context of tax audits conducted by the tax authorities, following the revelations of the international consortium of investigative journalists regarding the so-called "Panama Papers" tax structuring.

The Luxembourg Administrative Court essentially overturned the first instance judgments by recognizing the right of the tax authorities to initiate investigations on the basis of the general tax surveillance regime and the right to request information from Luxembourg attorneys in this context. Furthermore, the Luxembourg Administrative Court ruled that the professional secrecy of Luxembourg attorneys solicited as third parties within the framework of a tax audit conducted by the tax authorities could not be invoked.

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The Netherlands

01 - Discovery

What disclosure/discovery is required in litigation?

Dutch law does not provide for full discovery of documents. The legislature and the courts are wary of "fishing expeditions." However, the Dutch Code of Civil Procedure does allow a party that is considered to have a justified interest to demand inspection, a copy, or extract of identifiable documents that relate to a legal relationship to which it is a party. A contract or alleged wrongful act committed by one party against the other constitutes such a legal relationship. The party that asks for inspection must be able to identify the documents, or at least a specified category of documents. The party may demand this information from any party that has these documents at its disposal or in its possession. If necessary, the court will decide the manner in which inspection is taken, and in which an extract or a copy of a document must be given.

The court will not order the disclosure of the documents if in its view any of the following holds:

- The confidentiality of the information amounts to a compelling reason not to comply with the demand
- The proper administration of justice can be guaranteed without providing the requested documents
- The respondent's interest in not divulging the information outweighs the applicant's interest in obtaining it

If litigation is started, parties are obliged to state all facts completely and truthfully insofar as they may be material to the outcome of the case. If a party fails to do so, the court may draw any conclusion that it deems fit. In connection with this obligation, the court may order the parties to expand on their statements or to provide documents that relate to the case at any stage of the proceedings. Parties may refuse if they have a compelling reason to do so; the confidentiality of information may be such a reason. If the court decides that the refusal is not justified, the court may draw any conclusion from the non-submission that it deems fit.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes, Dutch law recognizes the concept of legal professional privilege and secrecy for lawyers admitted to the Dutch bar for both communications (lawyer-client communication and communication between lawyers) and documents. Unlike in other jurisdictions, no distinction is made between legal advice privilege and litigation privilege.

The obligation of secrecy is provided for in the Dutch Criminal Code, the Rules of Professional Conduct of the Netherlands Bar Association and, in more general terms, in the Lawyer Act. The Dutch Code of Civil Procedure, Code of Criminal Procedure and General Administrative Act provide for a corresponding form of privilege: a person who by virtue of their appointment, profession or employment is bound by confidentiality can be excused from the obligation to testify regarding information that has been entrusted to them within that capacity. The obligation of secrecy and the right to legal professional privilege are both endorsed in case law of the Supreme Court.

The basis of the right of legal professional privilege is a general principle under Dutch law that the right to turn to a lawyer freely and without fear of publication of what has been discussed prevails over the public interest of bringing the truth to light in court.

There is an obligation under Dutch law to report serious crimes. This obligation applies to everyone, except for lawyers who are discharged from this obligation if, and insofar as, the knowledge of the serious crimes have been entrusted to them in their capacity as lawyers. Nevertheless, if a lawyer is suspected of serious crimes, such as a joint criminal venture with clients, the right to legal professional privilege and the obligation of secrecy may be set aside.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

No, attorney-client communications, such as e-mails, remain privileged even when sent to the client. The same goes for documents exchanged between the lawyer and the client.

Be that as it may, the right to legal professional privilege is the personal right of the lawyer. If the lawyer takes the position that the communication or document contains information which is covered by their right to legal privilege, this position must be respected, unless this position is evidently incorrect. For that purpose, it is irrelevant whether the information is held by the lawyer or their clients.

While the client or legal entity that has turned to a lawyer for advice or assistance does not have a derivative right to legal professional privilege, it does have a legitimate interest to refuse the disclosure of privileged documents. This follows from the general principle under Dutch law that the right to turn to a lawyer freely and without fear of publication of what has been discussed prevails over the public interest of bringing the truth to light in court.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Dutch law distinguishes between two types of in-house lawyers: (i) those admitted to the bar, known as Cohen-advocaten; and (ii) those not admitted to the bar.

In-house lawyers not admitted to the bar do not enjoy the right to legal privilege and are not bound by the bar rules of professional conduct. Their communications with, for example, employees, officers or directors of the company are not covered by legal privilege.

In-house lawyers admitted to the bar enjoy the same rights and obligations as external lawyers admitted to the bar, subject to several conditions specified by the Dutch Bar Association. One of the most important conditions is that Dutch in-house lawyers must demonstrate their independence from their employer by signing the professional statute (professioneel statuut) available via the Netherlands Bar Association website. Non-Dutch in-house lawyers should sign a similar professional statute to safeguard their right of privilege.

The scope of legal professional privilege only extends to information that has been entrusted to the lawyer in their capacity as in-house lawyer (e.g., not in a private or business context). This should be determined on a case-by-case basis, whereby it is of particular importance whether the services performed by the in-house lawyer are related to pending or expected legal proceedings.

In a recent judgment, the Dutch Supreme Court reiterated the EU Court of Justice's settled case law that in-house lawyers cannot rely on the right of legal professional privilege in the context of EU competition law because they lack sufficient independence in relation to their employers when it comes to those type of cases.

Does privilege extend to internal communications between in-house lawyers?

Yes, provided that one of the in-house lawyers can rely on legal privilege and except for communications with a lawyer who works in the field of EU competition law.

Are foreign lawyers recognized for the purposes of privilege?

Yes, subject to certain conditions. As a general rule, the right of privilege is acknowledged when the foreign lawyer has a right to legal privilege in its home jurisdiction as well.

In a recent judgment, the Dutch Supreme court set out the right of legal privilege in relation to foreign in-house lawyers. The Dutch Supreme Court ruled that a distinction should be made between (i) Dutch in-house lawyers, (ii) so-called "visiting in-house lawyers," and (iii) other foreign in-house lawyers.

Dutch in-house lawyers registered at the Netherlands bar must demonstrate their independence by signing the professional statute available via the Netherlands bar association website. Simply put, foreign in-house lawyers, whether visiting or not, should sign an equivalent professional statute to safeguard their right of legal privilege.

So-called visiting in-house lawyers (lawyers – i.e., the equivalent of an advocaat – registered to the bar in an EU member state, jurisdictions within the European Economic Area, and Switzerland) are subject to the same rules as Dutch lawyers and must therefore also sign the professional statute available via the website of the Netherlands bar association or a similar agreement that sufficiently ensures their independence toward their employer, provided that this is permitted under the laws of their country of origin.

Other foreign lawyers (lawyers registered to the bar in jurisdictions outside the EU, the European Economic Area and Switzerland) are subject to a two-pronged test to invoke legal privilege:

- The foreign lawyer must be able to invoke legal privilege in their home jurisdiction
- The right to legal privilege should also exist for a Dutch lawyer if they would have performed the specific activities in question

The Supreme Court also found that in order to invoke legal privilege, a foreign in-house lawyer must be able to demonstrate that similar safeguards exist as the ones included in, and safeguarded by, a professional statute.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Staff employed by the lawyer, such as secretaries, may rely on a derivative right of legal professional privilege. Nonlegal professionals who are employed by a lawyer admitted to the bar or nonlegal professionals who provide services or information for the benefit of such a lawyer (such as accountants and third party experts) also have a derivative right of legal professional privilege. This derivative right of legal privilege prevents a party from seeking disclosure of privileged information from these nonlegal professionals. The analysis of whether certain information is subject to legal privilege remains with the lawyer from whom the right to privilege is derived.

It is customary for the nonlegal professional to use their derivative right of legal professional privilege in the same manner as the lawyer (and to consult with the lawyer in the case of disclosure requests). However, in some circumstances, the nonlegal professional could make a different assessment of the interests involved and decide not to use their derivative right of privilege.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

The right to legal professional privilege is the personal right of the lawyer. Disclosure of confidential information to a third party (or the client) does not affect the lawyer's right to legal privilege. Privilege can only be waived by the lawyer, but only after approval of the client. The client, however, cannot instruct the lawyer to disclose or testify about information obtained in their capacity as a lawyer.

If the lawyer, accompanied by their client, has had negotiations with a third or adverse party that have led to a legally enforceable result, the contents of those negotiations are no longer considered to be entrusted to the lawyer in their professional capacity. Therefore, the lawyer can be obliged to testify about these negotiations.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

No, there are no differences, and the duties are expressed in similar terms in civil, criminal and administrative legislation.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Yes, as long as these notes have been drafted by or shared with a lawyer who can rely on the right of legal professional privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

No. Dutch regulators do not have powers to require disclosure of privileged or confidential documents from a lawyer. The Fiscal Intelligence Unit, which deals with the prevention of money laundering and terrorist financing, is exempt from this general rule. As in other European jurisdictions, lawyers have a duty to report unusual or suspicious transactions to this unit.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

On 24 May 2022, the Dutch Supreme Court passed judgment in a case between a multinational company with a large number of both national and international in-house counsel and 15 of its in-house lawyers on the one hand, and the Dutch Public Prosecution Service on the other.[1] Although the parties' complaints were inadmissible, the Supreme Court took the opportunity to provide some insights in relation to the scope and application of legal professional privilege of in-house lawyers by way of obiter dictum. The Supreme Court ruled that in-house lawyers have the right to privilege, subject to certain conditions.

One of these conditions is that in-house lawyers sign a professional statute or a similar agreement that sufficiently ensures the independence of the in-house lawyer. Once signed, visiting in-house

[1] HR 24 May 2022, ECLI:NL:HR:2022:760.

lawyers (i.e., lawyers registered to the bar in an EU member state, jurisdictions within the European Economic Area, and Switzerland) may invoke the right to legal professional privilege in the Netherlands when they enjoy the same right in their home jurisdiction as well. Foreign in-house lawyers (i.e., lawyers registered to the bar in jurisdictions outside the EU, the European Economic Area and Switzerland) should additionally be able to demonstrate that their work in the Netherlands is of such a nature that were it to be performed by a Dutch lawyer, that lawyer would be entitled to invoke the right to legal professional privilege.

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Poland

01 - Discovery

What disclosure/discovery is required in litigation?

Generally, in Polish civil litigation the parties provide a list of the documentary evidence relied upon in their first pleading, usually the statement of claim or answer to the statement of claim. Based on the pleadings, the chairman of the court may order the parties to present additional documentary evidence. Under the Code of Civil Procedure, the chairman may also order national or local government bodies to provide evidence in their possession that a party is not otherwise able to obtain or order a third party to provide evidence in their possession. However, such orders can only be made if the evidence is material to the decision. The holder of a document may be entitled to refuse to comply with the order in certain circumstances, for instance if complying would expose them to criminal liability or a risk of severe and direct damage to property. Classified information is also exempt.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The legal profession in Poland is divided into two roles: advocates and legal advisers. The distinction between these two roles is now practically historic as the traditional difference between advocates and legal advisers was repealed on 1 July 2015. Advocates and legal advisers now have equal standing and both can provide a full range of legal services, including in criminal proceedings. Both advocates and legal advisers are under a statutory obligation of confidentiality (attorney-client privilege).

Pursuant to the Act of 26 May 1982 on advocates, advocates must not disclose any communication made to them in the course of providing professional legal advice. This obligation of confidentiality cannot be limited in time and, as a rule, advocates cannot be exempted from the obligation of confidentiality as to facts that they learned in the course of providing professional legal advice or in the course of leading a case. The same obligation of confidentiality is provided for by the Act of 6 July 1982 on legal advisers.

Both roles are exempt from the obligation of confidentiality with respect to information disclosed under the Act of 16 November 2000 on the prevention of money laundering and terrorist financing. The Act implements the provisions of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

Where circumstances indicate that transactions may be in connection with money laundering or terrorist financing activities, advocates, legal advisers and foreign lawyers are obliged to record such transactions in addition to promptly notifying the General Inspector of Financial Information, who may subsequently relay this information to the competent prosecuting authorities. However, the above obligations will only apply to advocates, legal advisers and foreign lawyers if they participate in transactions by providing legal services to their client that assist in the planning or execution of transactions concerning the following:

- The buying and selling of real property or enterprises
- The managing of client money, securities or other assets
- The opening or management of accounts

- The organization of contributions necessary for the creation, operation or management of companies
- The creation, operation or management of enterprises in other organizational structures

The obligation of confidentiality is also embodied in the Advocate's Code of Ethics and in the Legal Adviser's Code of Ethics. The Advocate's Code of Ethics and the Legal Adviser's Code of Ethics expressly stipulate that the obligation of confidentiality is not limited in time. In the case of legal advisers, the Code of Ethics provides that the obligation of confidentiality continues to apply even after the legal relationship under which the legal adviser provided legal services is terminated.

The Advocate's Code of Ethics provides as follows:

- All materials located in the advocate's files are covered by attorney-client privilege.
- All messages, communications, notes and documents concerning the case that were received from the client or other people, regardless of where they are located, are also covered by attorney-client privilege.
- An advocate is required to oblige their co-workers and staff and all the people employed by them within the course of performing their profession to observe the duty of professional privilege.
- Any transfer of information covered by the duty of professional privilege by electronic and other similar means of communication must be done with special care and subject to prior notice to the client of the risk connected with the preservation of the confidentiality of information transferred by such means of communication.
- An advocate is not allowed to submit as evidence any testimony taken from a witness who is an advocate or legal adviser for the purpose of disclosing information obtained by that witness in connection with the practice of a legal profession.

Similar rules are set out in the Legal Adviser's Code of Ethics.

Poland has not developed solutions that allow refusal to disclose a document on the grounds that it has been produced in the course of providing legal assistance by lawyers, or has been produced in connection with or for the purpose of litigation (similar to the common law concept of attorney work product).

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The Advocate's Code of Ethics provides as follows:

- All materials located in the advocate's files are covered by attorney-client privilege.
- All messages, communications, notes and documents concerning the case and received from the client or other people, regardless of where they are located, are also covered by attorney-client privilege.
- Advocates are required to oblige their co-workers and staff and all the people employed by them in the course of performing their profession to observe the duty of professional privilege.

Similar rules are set out in the Legal Adviser's Code of Ethics. However, there are no legal rules or requirements which deal with copies held by the client.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Advocates are not allowed to act as in-house lawyers (this is virtually the only remnant of the division between advocates and legal advisers). Legal advisers are allowed to provide legal advice as in-house lawyers under an employment agreement. Under Polish law, they are in principle treated in the same way as external lawyers for determining privilege.

Does privilege extend to internal communications between in-house lawyers?

Under Polish law, in-house lawyers are in principle treated in the same way as external lawyers for determining privilege. Thus, internal communications between in-house lawyers regarding client matters are also privileged.

Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers, once enrolled on one of the lists of foreign lawyers as required by the Act of 5 July 2002 on providing legal services by foreign lawyers in the Republic of Poland, are subject to the statutory obligation of confidentiality.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

There are specific provisions that regulate this matter. For example, under the Law of 5 July 1996 on the provision of tax advice, tax consultants are obliged not to disclose any information or facts gathered in the course of providing professional legal advice. This obligation of confidentiality cannot be limited in time and, as a rule, tax consultants cannot be exempted from the obligation of confidentiality as to facts that they learned in the course of providing professional legal advice or in the course of leading a case.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

There is no express provision that addresses this issue. Information about a case, matter or client obtained by a lawyer during the course of their practice cannot be provided to a third party, unless the client's prior consent has been obtained or the court has decided otherwise.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In general, attorney-client privilege in litigation (and administrative or tax procedures) has the effect that a lawyer can refuse to answer particular questions, but if they do not, the evidence from the testimony will be valid, and the lawyer themselves will only face disciplinary liability. In contrast, in a criminal trial, attorney-client privilege is covered by the evidentiary ban, so regardless of the lawyer's will, their testimony cannot be used as evidence. An exception to this is the power of the court to exclude attorney-client privilege, but this is rare and does not apply to defenders of the accused.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

All messages, communications, notes and documents concerning the case that were received from the client or other people, regardless of where they are located, are covered by attorney-client privilege.

However, in criminal proceedings the general rule is that evidence cannot be held inadmissible only on the basis than it was obtained illegally or in contrary to the provisions of the Code of Criminal Proceedings.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

In criminal proceedings, under the Criminal Procedure Code, advocates and legal advisers may be examined as to facts that are subject to legal professional privilege only when this is absolutely necessary in the interests of justice and the facts cannot be established by use of any other measures of inquiry. The same rule applies to documents that fall within the scope of the protection afforded by legal professional privilege.

In civil and administrative proceedings, under the Civil Procedure Code and Administrative Procedure Code, advocates and legal advisers may refuse to give testimony or to produce a document requested by a court or public authorities if doing so would expose them to infringing the obligation of confidentiality.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There are no current issues concerning privilege in Poland.

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South Africa

01 - Discovery

What disclosure/discovery is required in litigation?

Most of the principles in the South African law of evidence stem from the English system of adversarial (accusatorial) trials; an important aspect of which is that parties are not entitled to be informed, prior to trial, of the evidence which the opposing party intends to present at trial. One of the major exceptions to this principle is that parties to litigation are entitled to be informed of all documentary evidence (including tape recordings) that the opposing party intends on using at the trial. The purpose of this discovery procedure is to enable all parties to adequately prepare for trial.

After the close of pleadings, a party may, on notice, request the opposing parties to make discovery. The party required to make discovery must, within 20 days of receipt of the notice, deliver a discovery affidavit listing:

- All documents in a party's possession that relate to a matter in question in the litigation and that the party intends to produce
- All documents that the party has a valid objection to producing (i.e., privileged documents)

The other party is entitled to inspect and make copies of the discovered documents.

South African courts have held that a party is only obliged to discover documents which either directly or indirectly damage its own case or which advance the case of the opposing party – documents which tend only to advance the case of the party making the discovery or which tend to damage the case of the opposing party need not be discovered (*Carpede v. Choene*). This rule is subject to certain exceptions. Documents that do not need to be discovered include statements of witnesses taken for the purposes of the proceedings; communications between the attorney and client and attorney and advocate; and pleadings, affidavits and notices in the action. In a sense, privileged documents do need to be discovered, insofar as they must be listed in the discovery affidavit, although they need not be handed over to the opposing party.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

The general rule in South African law is that communications between a lawyer and their client, as well as documents prepared by lawyers for their clients, may not be disclosed without the client's consent. Legal professional privilege (or, simply, "privilege") may be invoked if the communication or document in question was (i) made to a legal adviser (ii) acting in a professional capacity, (iii) in confidence, (iv) for the purpose of pending litigation or for the purpose of obtaining professional advice. The privilege relates to communications of both an oral and a written nature.

A litigant is not obliged, either before or during a trial, to disclose any document brought into existence for the purpose of the litigation. This includes communication between a party's legal adviser and expert witness, instructions given to the expert witness and interim reports compiled by the expert witness in forming their opinion (*Mason v. Mason NO*). Such privilege can extend to parts or portions of documents, which may be redacted (*A Company v. Commissioner, South Africa Revenue Services*).

A statement made by a party involved in a dispute which is genuinely aimed at achieving a compromise is protected from disclosure. These statements are usually marked "without prejudice"

and can only be accepted into evidence with the consent of both parties. Recently, the court held that, depending on the surrounding circumstances, such an offer can be taken into consideration in determining whether punitive costs should be awarded (*AD v. MEC for Health and Social Development, Western Cape*).

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Privilege belongs to the client, and must be claimed by the client in order to be effective. Although the legal adviser may claim privilege on their client's behalf, they act as the client's agent in so doing. Accordingly, a copy of privileged documentation held by the client, as the notional principal in the attorney-client relationship, would be afforded full protection in terms of legal professional privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Yes, but only where an in-house lawyer acts in a professional capacity; a question of fact to be determined in each case.

Recent judgments have drawn on English authorities supporting the view that legal professional privilege also attaches to communications between an employer and its salaried in-house lawyers in circumstances where the communication would otherwise meet the test for claiming privilege, there being no justifiable basis in law to limit the scope of privilege to clients and lawyers in private practice.

Does privilege extend to internal communications between in-house lawyers?

Privilege extends to interpreters, articled clerks, secretaries and other employees of the law firm (*S v. Mushimba*). Privilege would also extend to internal communications between in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

To the extent that a foreign lawyer is acting in a professional capacity, and the communication was made by the client in confidence for the purposes of pending litigation or obtaining professional advice, the communication will be privileged, and the same principles in relation to privilege will apply as in relation to domestic legal professionals and in-house lawyers.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

As it stands, professional privilege in South Africa pertains only to the lawyer-client relationship and does not extend to any other professional relationships for any purpose whatsoever (*Trust Sentrum (Kaapstad) (Edms) Bpk v. Zevenburg*). It has been held, in particular, that privilege does not extend to accountants (*Jeeva v. Receiver of Revenue, Port Elizabeth*), although submissions have been made to the South African Revenue Service that legal professional privilege should be extended to chartered accountants.

In terms of section 42A of the Tax Administration Laws Amendment Act 2015, a taxpayer claiming legal professional privilege will have to prove the validity of such privilege by providing a list of extensive information which includes – but is not limited to – a description of each and every document not provided and full details of the legal practitioner.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Inadvertent disclosure

The principle underpinning privilege in South African law is confidence, and "when confidence ceases, privilege ceases" (*Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others (2)*). Thus, where a third party acquires knowledge of a privileged communication, or possession of a privileged document, there is no rule at common law to prevent them from disclosing its contents, and privilege may therefore be defeated. It is only if such knowledge or possession came about as a result of an unlawful act (e.g., theft), that a court may refuse admission of such evidence by use of its inherent discretion to exclude unfairly obtained evidence.

In a recent case, the court emphasized the distinction between legal advice privilege and litigation privilege (*South African Airways Soc v. BDFM Publishers (Pty) Ltd and Others*). The court stated that while the right to legal professional privilege was a necessary means of protecting South Africa's adversarial justice system, it was not an absolute right. The client invoking the privilege would be invoking a "negative right", making legal advice provided to them by a legal practitioner inadmissible as evidence. The court was of the opinion that this right could not be interpreted as a positive right, which would otherwise entitle a client to suppress publication once confidentiality has already been breached.

Litigation privilege

Since it is in the public interest to facilitate the obtaining and preparation of evidence, where communications are made between the legal adviser or client and a third party, privilege (commonly known as "litigation privilege") will extend to such communications if: (i) the communication was made for the purpose of being submitted to a legal adviser; and (ii) the communication was made after litigation was contemplated (*General Accident, Fire and Life Assurance Corporation Ltd v. Goldberg*). It is only in these circumstances that a privileged document may be furnished to a third party without losing protection.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There is no distinction drawn between legal professional privilege in the context of civil, criminal, regulatory or investigatory situations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Any communication that satisfies the requirements of legal professional privilege is protected. As such, where interviews are conducted with employees of a client for the purposes of carrying out an investigation, then such information will be privileged as such information is given for the purposes of giving legal advice. It is worth noting here that, prior to the start of each interview, the attorney should make it clear to the employee that they represent the employer and that the interviews are conducted in furtherance of the giving of legal advice to that same employer and as such the information arising from the interview is privileged.

Documents produced by attorneys during the investigation process, for the same reasons as stated above, will also be privileged.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Legal privilege in South Africa is a fundamental substantive right rather than a mere evidentiary rule, and "any claim to a relaxation of the privilege…must be approached with the greatest circumspection" (*Euroshipping Corporation of Monrovia v. Minister of Agricultural Economics and Marketing*). As such, unless expressly empowered by statute, a governmental regulator is prohibited from encroaching on this right. Communications between a lawyer and client for the purpose of obtaining advice to enable the client to commit an offense are, however, not protected by the privilege (*Thint (Pty) Ltd v. National Director of Public Prosecutions; Zuma v. National Director of Public Prosecutions*).

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

A recent decision dealing with legal professional privilege is that of *Thint (Pty) Ltd v. National Director of Public Prosecutions and Others; Zuma v. National Director of Public Prosecutions and Others*. The Constitutional Court held that where a search pursuant to a search warrant is conducted at an attorney's office, there is a much greater risk of invasion of legal professional privilege than when the search is conducted elsewhere. In this case, however, the scope of the search was fairly narrow and, as a result, the ordinary concerns relating to the seizure of privileged materials in searches of attorneys' offices did not arise. The court found that no actual prejudice to the applicants had been established, and that their claim was based on the hypothetical ground that there was a possibility that privileged documents may have been seized.

The recent enactment of the Protection of Personal Information Act has resulted in the codification of some common law principles and new obligations on parties processing personal information. Under the new statute, communication between a legal adviser and their client is considered to be exempt from a warrant issued by the information regulator, subject to the legal advice being in respect of the client's obligations, liabilities or rights. In addition, communication between a legal adviser and their client and any other person, made in contemplation of legal proceedings, is considered exempt. It further prohibits the information regulator from requesting privileged information from a responsible person, such as a legal adviser.

Finally and most recently, in the context of a widely reported case of alleged corporate fraud (*Tiso Blackstar Group and Others v. Steinhoff International Holdings N.V.*), two media houses successfully applied to court for access to certain accounting reports and records of Steinhoff. When allegations of accounting irregularities arose, Steinhoff appointed an independent accounting firm in South Africa to investigate. The media houses approached the accounting firm directly to request access to its report under the Promotion of Access to Information Act. The firm refused, relying on legal privilege, along with other grounds. The court granted access on a number of grounds, including a rejection of the claim of privilege in the absence of evidence that the report was commissioned in anticipation of contemplated litigation. The judgment will be the subject of an appeal but remains important in considering the balance between the media's right to information in the public interest and the necessary facts that a party will be required to prove in order to successfully claim privilege.

08 - Authors

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Spain

01 - Discovery

What disclosure/discovery is required in litigation?

The Spanish Civil Procedure Act provides for limited disclosure of documents in the following instances:

- In certain cases, prior to the commencement of proceedings, the claimant is entitled to request the disclosure of certain documents that may be in the possession of the other party or a third party, if such documents are necessary for the claimant to properly build its case and bring a civil action. This procedure is known as diligencias preliminares. For example, a claimant may request medical records to determine whether or not there has been medical malpractice.
- At a pre-trial hearing, both parties are entitled to request that the other party or a third party be ordered to produce a document in its possession.
- If any of the requested documents are not produced before the trial for reasons other than those beyond the control of the parties, the judge may order that the documents be produced after the trial as final evidence (diligencia final).

Although the parties have an obligation to produce such documents once requested by the court, if they don't, the judge cannot force their production, for instance, by or through enforcement measures such as a search of premises. The only consequence for not producing the documents requested by the court is that the judge may consider proven those facts that the requesting party intends to prove through those documents, provided that those facts are in line with other evidence available to the court.

In Spanish criminal proceedings, discovery/disclosure is not applicable per se. However, the examining magistrate should conduct whatever enquiries they believe may lead to the clarification of the facts, as the objective of criminal proceedings is to establish the material truth. In this regard, there is an important difference between the judge requiring evidence from (i) any third party or (ii) a defendant. While the third party has the obligation to respond to the request and provide the evidence, the defendant can claim constitutional rights of defense under article 24.2 of the Spanish Constitution (principally the right of protection from self-incrimination and the right not to give a statement against oneself).

However, if the defendant refuses to respond to the request and to provide the evidence, the examining magistrate may, depending on the importance and significance of the documental evidence requested, adopt more restrictive measures such as a search of a corporate or commercial domicile or of a personal domicile.

Additionally, and although the defendant's lawyer is under no obligation to disclose confidential documents that are protected by the attorney-client privilege, under certain circumstances, especially serious crimes, reasonable and well-founded suspicions that the defendant's lawyer may be an accomplice to or co-author of a crime, etc., the judge may adopt reasonable measures to be provided with the evidence (e.g., a search of the professional domicile of the attorney, interception of telephone calls, etc.).

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

In Spain, the concept of "privilege" does not exist as such. However, according to professional conduct regulations, lawyers have the duty not to disclose confidential information or documents obtained in the course of their professional activity. In effect, it takes the shape of a duty owed by the lawyer to their client, but also a right of the lawyer, vis-à-vis the judicial authorities, not to disclose information protected by professional secrecy, and to prevent the seizure by the police or judicial authorities of documents containing such information.

The duty of professional secrecy is established by laws and regulations of varying rank, such as the Spanish Constitution, the General Statute on the Spanish Legal Profession (Estatuto General de la Abogacía Española or EGAE), the Code of Conduct for Spanish Lawyers (Código Deontológico de la Abogacía Española or CDAE), the Code of Conduct for Lawyers in the European Union, the Organic Law of the Judicial Power (Ley Orgánica del Poder Judicial or LOPJ), the Criminal Procedure Act and the Criminal Code.

According to article 22.1 EGAE, professional secrecy covers all the facts, communications, data, information, documents and proposals that a lawyer has become aware of, issued or received through the course of their professional activity. Therefore, both, legal communications and documents prepared by or for lawyers, are duly protected.

Additionally, by virtue of article 5 CDAE, professional secrecy in Spain extends to the following:

- Any facts or information that a lawyer may learn by reason of any of the fields of their professional activity
- Secrets and plans of the client, the opposing party and the lawyer's colleagues
- Any facts or documents that the lawyer may have learned or received by reason of their professional activity
- Letters, communications or memoranda received by the lawyer from the other party
- Conversations held with clients, opposing parties or their lawyers, whether face to face or by telephone or other electronic means. Such conversations may not be recorded unless the parties involved have been given notice and have consented to the recording.

The right and duty to maintain professional secrecy remains even after the services provided to the client have ceased, without limitation in time. Even the death of the client does not result in the lapsing of the right and duty. However, there are a number of exceptions to legal professional secrecy, which are discussed below.

If the lawyer becomes aware of a client's criminal intent, they must disclose this information prior to the commission of the offense. This is because it is generally accepted that the public interest must prevail over the duty to preserve the confidential nature of that information. The intended criminal conduct must be such that it would affect the life, integrity, health, freedom or sexual freedom of any person. A lawyer's failure to act could result in them being held criminally liable, as their conduct would be regarded as an act of concealment.

The accused's lawyers will be exempt under the Criminal Procedure Act from making any statement with regard to the facts that the accused has confided to them in their capacity as legal counsel. A

lawyer may also disclose protected information on the basis of necessity, subject to the principle of proportionality and an assessment of the disputed rights, in the following events:

- When keeping the secret may lead to the conviction of an innocent party
- When the lawyer needs to defend themselves against accusations by the client
- When disclosure of the secret is to the benefit of the client

Such an exemption is considered to be justified when the requirements of the Spanish Criminal Code are satisfied, more particularly (i) when the wrong caused is not greater than the wrong that it intends to avoid; (ii) when the situation of necessity has not been deliberately caused by the person concerned; and (iii) when the person facing such necessity does not have, by reason of their business or position, the obligation to forfeit their interests in the interest of others.

The EGAE confers disciplinary powers on bar associations to impose penalties on lawyers who act in breach of the duty of professional secrecy.

In addition, the disclosure of information protected by professional secrecy is classified as an offense under the Spanish Criminal Code, although this offense may only be prosecuted at the request of the injured party.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Attorney-client communications in Spain are not privileged per se, but lawyers have the right and the obligation not to disclose confidential information, including but not limited to communications with clients. Although clients are not subjected to the same duty of secrecy, they cannot be forced to disclose attorney-client communications in their possession. In criminal proceedings, where the parties can be forced to produce documents under certain circumstances, copies of attorney-client communications held by the client are also safeguarded by the constitutional right of the client to avoid self-incrimination and not to provide documents that could be used against them.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

According to article 39 of the current General Statute on the Spanish Legal Profession (Estatuto General de la Abogacía Española or EGAE), approved on 2 March 2021, and as a consequence of the *Akzo* ruling rendered by the European Court of Justice on 14 September 2010, in-house lawyers are now treated in the same way as external lawyers, but it is uncertain whether this Spanish protection for in-house lawyers may apply in case of investigations conducted by EU authorities.

Does privilege extend to internal communications between in-house lawyers?

Professional secrecy applies to all information and documents exchanged between in-house lawyers, and between them and their companies, provided that they have become aware of, issued or received through the course of their professional activity.

Are foreign lawyers recognized for the purposes of privilege?

The legal obligation of professional secrecy, that is, the obligation not to disclose legal communications and documents prepared by or for lawyers, applies to foreign lawyers when practicing in Spain either on a temporary or permanent basis.

Spanish law distinguishes between lawyers who are nationals of a Member State of the European Union (EU) or European Economic Area (EEA) and obtained their professional qualification in one of those states, and lawyers from other jurisdictions. Lawyers from an EU or EEA Member State can practice in Spain either on a permanent or on a temporary basis, using the qualification obtained in their jurisdiction, provided that they are registered in one of the Spanish bar associations. Those professionals must fulfil the same obligations as Spanish lawyers, in addition to the professional obligations imposed on them by their jurisdiction of origin, especially the obligation of confidentiality. On the other hand, lawyers who are not nationals of an EU or EEA Member State may only practice in Spain on a permanent basis and once their qualifications have been officially validated. Such professionals also have the same obligations as Spanish lawyers, including, but not limited to confidentiality.

Finally, there is a generic statement in the Code of Conduct for Spanish Lawyers (Código Deontológico de la Abogacía Española or CDAE) that "communications with foreign lawyers should be treated as sensitive or confidential."

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The concept of professional secrecy is recognized by Spanish law as a right and duty of lawyers. In turn, a lawyer is any law graduate who is professionally instructed to defend parties in any kind of proceedings or to provide legal advice.

Therefore, privilege cannot be extended to nonlegal professionals despite the fact that such professionals may give advice on related issues, such as accounting matters. In addition, and as an example of the above, Spanish case law has stated that in the context of a tax inspection, the courts may compel auditors to disclose information gathered from their clients, since professional secrecy does not apply to nonlegal professionals.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Pursuant to article 22.6 General Statute on the Spanish Legal Profession (Estatuto General de la Abogacía Española or EGAE), lawyers could disclose data, documents, communications and information protected by professional secrecy, provided that they are expressly authorized by clients and the information disclosed only refers to the authorizing client. However, it is the lawyer who will ultimately decide whether or not to disclose them, since professional secrecy is also a right of the lawyer. Where the lawyer is requested by the court to disclose documents and is expressly authorized by the client to do so, the lawyer must comply.

On the other hand, since professional secrecy must be observed not only with respect to a client's information, but also with respect to information pertaining to the other party or any third party, when knowledge of such information is gained as a result of the professional activity of the lawyer, a client's authorization may not be sufficient to release the lawyer from their obligation. Therefore, professional secrecy must be observed with respect to the information relating to the other party or third party, despite any authorization that the client may have granted.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The privilege (the lawyers' duty of professional secrecy) operates in the same way irrespective of the field in which it may be applicable.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

If the notes are taken by an external lawyer, those notes and any other information or documents produced during the meeting are covered by legal professional privilege. In any other circumstance, those notes and documents could be used in court if they were seized during a search, unless it could be proven than they were drawn up or gathered with the sole aim of seeking legal advice from an external lawyer.

The defendant cannot be forced to show or submit those notes and documents in case they could be self-incriminating.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Under the umbrella of professional secrecy, lawyers may refuse to provide to government authorities any document relating to their clients that is protected, unless one of the following exceptions applies.

- If the lawyer becomes aware of a client's criminal intent which would affect the life, integrity, health, freedom or sexual freedom of any person, they must disclose this information prior to the commission of the offense.
- The lawyer may disclose protected information on the basis of necessity, when the requirements of the Spanish Criminal Code are satisfied, and subject to the principle of proportionality and an assessment of the disputed rights, in the following events:
    - When keeping the secret may lead to the conviction of an innocent party
    - When the lawyer needs to defend themselves against accusations by the client
    - When disclosure of the secret is to the benefit of the client

The right to refuse to provide a particular document will be assessed on a case-by-case basis and will vary depending on the authority carrying out the investigation, the subject matter of the investigation, the content of the document, and the parties who have been involved in the preparation of the document.

The investigatory powers of government bodies (administrative and judicial) are not absolute. Thus, when conducting an investigation in respect of a client, the government authorities must respect the constitutional right to a fair defense without self-incrimination in respect of criminal or administrative matters. On the basis of this right, the client may seek to refuse to produce documents that contain legal advice provided by a lawyer. However, in our experience, it is more difficult for the client to obtain an exemption from producing the document than it is for the lawyer.

As with any other constitutional right, the client's right to a fair defense must be appraised in conjunction with any conflicting constitutional rights of other parties, and such conflicts must be resolved in a proportional manner.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The most recent developments regarding legal privilege relate to competition law infringements. The Spanish Competition Authorities have applied EU case law on attorney-client legal privilege, which is fairly well established and detailed. Effectively, the Spanish Competition Authorities have recognized that correspondence exchanged with an external lawyer who practices within the European Economic Area "for the purpose and the interests of the client's rights of defense" is covered by legal privilege. The protection of legal privilege also covers "internal memoranda which are confined to reporting the text or the content" of communications exchanged with external lawyers.

Although EU case law on attorney-client legal privilege has been applied by the Spanish Competition Authorities in the course of a competition law investigation, it is not clear whether the same principles will be applicable in a straightforward manner in the course of other kinds of investigations conducted by other authorities.

In relation to criminal matters, recent developments focus on the relationship between professional secrecy and attorney-client privileged communications when the client is imprisoned. In a recent Spanish case, an Examining Magistrate's Court authorized the interception of the defendants' communications whilst they were in jail, even where those communications were with their lawyers. The defendants' appeal was eventually upheld by the Criminal Court of the High Court of Justice of Madrid on the basis that, according to the Spanish Penitentiary Act, communications between a lawyer and a client, even when the client is imprisoned, are protected by professional secrecy. Judges may only intercept their communications if two requirements are satisfied: (i) the defendant is charged with an offense of terrorism; and (ii) the intervention is authorized by the Prison Authority and approved by the judge on the basis that it is necessary to ascertain the truth of the case.

The examining magistrate who authorized the interception of the communications of the imprisoned defendants was found guilty of a criminal offense by a judgment issued by the Spanish Supreme Court on 17 January 2012.

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Sweden

01 - Discovery

What disclosure/discovery is required in litigation?

The main rule under Swedish procedural law is that anyone holding a written document that may be assumed to be of importance as evidence is obliged to produce it. There is a general obligation under Swedish procedural law for non-parties in the case to give evidence. At the request of a party in a civil case, the court may thus order the opposing party and/or a third party, under penalty of a fine, to produce documents in their possession that may be of importance to a claim or defense as evidence.

However, there is a restriction to this obligation arising from a corresponding restriction regarding the obligation to testify. There is no obligation for lawyers who are members of the Swedish Bar Association ("**Advokats**") or their associates to produce a document if it may be assumed that its contents are such that the Advokat may not be heard as a witness in relation to it, i.e., where the document was entrusted in confidence or its content otherwise learned by the Advokat in the exercise of their profession. In addition, the party for whose benefit an obligation of confidentiality is imposed is not obliged to produce the document.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Sweden recognizes the concept of legal privilege for lawyers who are members of the Swedish Bar Association and their associates. For other lawyers, e.g., in-house lawyers, legal privilege only applies when they act as counsel at court, i.e., as trial lawyers.

According to the Swedish Code of Judicial Procedure, lawyers who are members of the Swedish Bar Association ("**Advokats**") are, when good professional ethics so require, bound by an obligation of confidentiality in relation to what they learn in the exercise of their profession. The Swedish Bar Association's Code of Professional Conduct, which all Advokats must observe, provides guidance concerning the issue of what constitutes good professional ethics.

The Code of Professional Conduct stipulates that Advokats as well as their associates have a duty of confidentiality in respect of matters disclosed to them in the context of their legal practice or that become known to them in connection with it. Moreover, Advokats are obliged to impose the same duty of confidentiality on their staff. The duty of confidentiality encompasses both legal communications, written or oral, and documents prepared by or for lawyers. There is a limited legal privilege available to lawyers who are neither Advokats nor associates of an Advokat as well. However, this privilege is only available when they are acting as trial lawyers. The Code of Judicial Procedure states that such trial lawyers may be heard as witnesses concerning matters entrusted to them in the performance of their assignment only if the client gives consent. This legal privilege for trial lawyers only protects confidential client communications entrusted to the lawyer for the purposes of the litigation in question.

Exceptions from the duty of confidentiality apply if the client consents to the disclosure or where there is a legal obligation to provide the information. An exception also applies if disclosure is necessary to enable the Advokat to defend complaints by the client or to pursue a justified claim for compensation in respect of the assignment concerned.

In addition, the Swedish Code of Judicial Procedure states that Advokats may not testify concerning matters entrusted to them or discovered by them in their professional capacity, unless the

examination is authorized by law or is consented to by the person for whose benefit the duty of secrecy is imposed. An Advokat may be compelled to testify in cases concerning serious criminal activities, i.e., crimes for which a person may be sentenced to at least two years' imprisonment. However, this obligation to testify does not apply to defense counsel.

Further, documents containing information that is of such a nature that an Advokat cannot be compelled to testify, i.e., entrusted in confidence or otherwise learned by the Advokat in their profession, may not be produced.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The legal privilege applies to lawyers who are members of the Swedish Bar Association (Advokats) and their associates within the scope of the law practice. Thus, attorney-client communications in the lawyer's possession are protected under the concept of legal privilege. However, when a document is held by the party for whose benefit the legal privilege is imposed, that party is not obliged to produce the document, and such documents are thus protected. Moreover, if the client is a trial lawyer and the communication is entrusted to them for the purpose of the litigation in question, such communication is subject to privilege.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Apart from the limited legal privilege available to trial lawyers, which also applies to in-house lawyers acting as counsel in court, the statutory legal privilege only applies to lawyers who are members of the Swedish Bar Association ("**Advokats**") and their associates. An Advokat may only work at an independent law firm. In-house lawyers cannot be Advokats and consequently do not fall within the scope of the legal privilege applicable to Advokats and their associates. An Advokat who accepts a position as in-house lawyer may no longer use the title "Advokat" and has to resign from the Swedish Bar Association.

As to the position in EU competition investigations, please see the European Union chapter.

Does privilege extend to internal communications between in-house lawyers?

Apart from the limited legal privilege for trial lawyers, no legal privilege exists for in-house lawyers. Thus, privilege does not extend to internal communications between in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers are generally not recognized for the purpose of privilege in Sweden. Apart from the limited legal privilege available to trial lawyers, which also applies to foreign lawyers acting as counsel in court, the statutory legal privilege merely applies to lawyers who are members of the Swedish Bar Association ("**Advokats**") and their associates.

However, the provisions of the Code of Judicial Procedure or any other act governing Advokats do, where applicable, also apply to a lawyer who is authorized as the equivalent of an Advokat in another state in the European Union, the European Economic Area or Switzerland and is practicing law in Sweden.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The concept of privilege only applies to those who are lawyers who are members of the Swedish Bar Association (Advokats) and their associates. Thus, the concept of legal privilege is not extended to nonlegal professionals who advise on legal issues, unless they are acting as trial lawyers.

However, accountants benefit from privilege due to their rules of professional conduct. These impose an obligation of confidentiality that prohibits an accountant from disclosing the identity of the client as well as the substance of the advice given to that client. This also extends to documents that refer to the identity of the client or the substance of the advice.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Legal privilege extends only to the client. The main rule is that privilege is retained by the client and its prospective employees. In addition, assistants to a lawyer who is a member of the Swedish Bar Association ("**Advokat**") also fall within the scope of legal privilege. Such assistants could arguably include experts hired by the Advokat in order to carry out the assignment. Disclosure to another Advokat in order to obtain other or further advice will also not result in a loss of privilege. However, legal privilege will be lost in the case of disclosure to other third parties.

Exceptions from the duty of confidentiality apply if the client consents thereto or where a legal obligation to provide the information is at hand. An exception also applies if disclosure is necessary to enable the Advokat to aver complaints by the client, e.g., in a dispute concerning a claim for damages from the client, or to pursue a justified claim for compensation in respect of the mandate concerned.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

The concept of privilege basically operates in the same manner in civil, criminal, regulatory and investigatory situations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and other documents produced during investigations by lawyers who are members of the Swedish Bar Association ("**Advokats**") and their associates and assistants as well as lawyers who are authorized as the equivalent of an Advokat in another state in the European Union, the European Economic Area or Switzerland and are practicing law in Sweden can be covered by privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

In general, the concept of privilege is respected and applied by governmental regulators. However, exceptions can be made. In cases concerning serious criminal activities, i.e., crimes for which a person may be sentenced to at least two years' imprisonment, law enforcement agencies may require a privileged document to be provided, except by defense counsel. One notable exception concerns

the regulation of rules on money laundering and terrorist financing (The Money Laundering and Terrorist Financing (Prevention) Act). There are several provisions in the Act which constitute exceptions to legal privilege and even require lawyers who are members of the Swedish Bar Association ("**Advokats**") to actively ensure that what they have been told in confidence comes to the attention of the authorities. Furthermore, the Swedish Tax Authority may for instance, according to case law, for tax control purposes require an Advokat to submit confidential and privileged information in the form of client names and debited amounts.

With regard to criminal cases, Swedish law stipulates that if it may be assumed that a document contains information that an Advokat may not disclose in testimony, the document may not be seized from the possession of that Advokat or the person to whom the duty of confidentiality is owed.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The Swedish Supreme Court has rendered a decision regarding seizure of documents at an independent law firm. The facts of the case were that a lawyer who was a member of the Swedish Bar Association ("**Advokat**") at the Swedish law firm was suspected of having committed several serious crimes in his role as representative for a client, for which he acted as a member of the board. The Stockholm District Court granted permission for a search of the law firm's premises, and during the search the police seized several objects and documents relating to the client in question.

The Supreme Court held that the seizures were to be invalidated because of the statutory legal privilege. In its decision, the Supreme Court emphasized that the fact the Advokat was a member of the client's board was not of importance. Nor did the Supreme Court find that the fact that the Advokat himself was suspected of having committed crimes was decisive in the case. The Supreme Court stressed that the prohibition against seizure aims at protecting a client's interest of confidentiality and that said interest is not necessarily lessened merely because the client's Advokat is suspected of having committed crimes.

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Turkey

01 - Discovery

What disclosure/discovery is required in litigation?

As a general rule, parties to litigation are under an obligation to provide to the court documents that are in their possession and that are relied upon as evidence by either party to prove a matter in dispute.

Where a party fails to do so, the court may order the disclosure of the document concerned if it concludes that the document is essential to prove an assertion made, that the request for disclosure is in compliance with the law and that the opposing party has either admitted possession of the document, remained silent despite a request to disclose, or the document's existence is established from an official record or admitted in another document.

Where a party fails to disclose a document requested absent a satisfactory reason, or refuses to state on oath before court that it does not have possession of the document, the court will, depending on the circumstances, accept the other party's assertions as to the contents of the document the disclosure of which is requested. The court can also order disclosure by third parties where disclosure of the document is required to prove an assertion.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Turkish law does not expressly recognize the concept of legal privilege. However, the Law on Attorneys (Law No. 1136) ("**Law**"), provides that lawyers are obliged to keep information entrusted to them by a client confidential in cases where the information shared by the client relates to the provision of legal services.

Although the Law does not expressly refer to legal privilege in the technical sense, it is universally accepted both in doctrine and in practice, and by the judiciary, that this provision creates a form of privilege. As a result, a lawyer is not only entitled to refuse disclosure of confidential information, but is also obligated to do so. This applies equally to demands for disclosure by administrative or judicial bodies. Whether the duty of confidentiality embodied in the Law can be invoked upon by the client to prevent disclosure of legal advice provided by its lawyer is, however, unclear. We have not seen any reported court decisions on this.

The duty of confidentiality is highly regarded and respected, to the extent that lawyers cannot be searched in person by police or other security forces. This is due to the concern that, if permitted, such searches could result in a lawyer revealing a client's confidential information. The only exception to this rule is that, in circumstances where a lawyer is caught committing a "serious" crime, the lawyer and their offices may be searched.

The penalty for a lawyer's breach of their confidentiality obligation is severe, including both civil and criminal liability. This duty extends to the lawyer's trainees and assistants.

The duty of confidentiality also prevents lawyers from giving evidence as witnesses in circumstances where such evidence would relate to matters falling within the scope of the duty of confidentiality. A lawyer is entitled to refuse to act as witness even where the client authorizes disclosure. A lawyer cannot be held liable for their refusal to act as witness.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Absent an express provision or court decision regulating privilege and its boundaries, the position in respect of documents held by the client is unclear. Consequently, in the event of a request for disclosure by a judicial or an administrative body, a client is at risk of not being able to prevent the disclosure.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Any person who qualifies under the Law on Attorneys (Law No. 1136) ("**Law**") as an "attorney" is entitled to invoke the duty of confidentiality and thereby refrain from disclosure. The Law does not distinguish between in-house and external lawyers. The duty of confidentiality appears to apply to the legal profession as a whole. In the absence of a court decision stipulating otherwise, it may be said that the rights annexed to the duty of confidentiality are also at the disposal of in-house lawyers.

We would also like to note that the Guide to Examination of Digital Data During On-Site Inspections published by the Turkish Competition Authority makes a distinction between in-house lawyers and external lawyers. According to article 12 of the guide, during on-site inspections, only external lawyers may benefit from attorney-client privilege. However, it should be noted that this is not a law/regulation but a guide which relates only to competition law related inspections.

Does privilege extend to internal communications between in-house lawyers?

Given that Turkish law does not distinguish between external lawyers and in-house lawyers, and that the duty of confidentiality applies and covers tasks performed by trainees and assistants, internal communications between in-house lawyers are also likely to fall within the scope of the duty of confidentiality. In circumstances where both in-house lawyers have the authority to represent the company and are acting as its legal representatives, the provision of confidential information by one of the lawyers to another would be treated in the same way as a communication from a representative of the company to an external lawyer, and should therefore fall within the scope of the protection provided by the Law.

Are foreign lawyers recognized for the purposes of privilege?

Only Turkish citizens are entitled to practice as an attorney in Turkey, within the meaning of the Law on Attorneys (Law No. 1136) ("**Law**"). Foreign lawyers are only permitted to provide legal advice on matters relating to foreign and international laws through attorney partnerships. As the Regulation on Attorney Partnerships provides that foreign attorney partnerships and their partners are under an obligation to adhere to the Law, the regulations and professional rules, the duty and right of confidentiality contained in the Law also applies to foreign attorney partnerships and their foreign partners/lawyers.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The duty of confidentiality and, by indirect reasoning, legal privilege, is exclusive to attorneys, as defined in the Law on Attorneys (Law No. 1136). Consequently, the provision of legal advice does not, on its own, activate legal privilege. The said legal advice must be provided by an "attorney" (avukat).

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

As privilege is afforded on the basis of profession and not the nature of the information concerned, it is lost once confidential information (including a document containing such information) is disclosed to a third party who is neither a trainee nor an assistant of the attorney.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

As legal privilege attaches by virtue of the profession being exercised, so long as the confidential information is possessed by an attorney, its disclosure by the attorney cannot be requested. There should not therefore be any difference as to whether the information concerns a civil or a criminal trial, or a regulatory or an investigatory situation.

However, the following limitations have recently been imposed on legal privilege concerning clients charged with certain serious and/or terrorism related offenses:

- Under article 6 of Law No. 6749 and the Law on Criminal Execution No. 5275, officials may be present and seize any documents exchanged during meetings between an attorney and a suspect who has been detained on suspicion of crimes endangering the State's security and organized and/or terrorism related crimes, where there is sufficient information and/or evidence demonstrating the possibility of any of the following:
    - A threat to the public and/or members of penal institutions
    - Guidance to or orders relating to terror or criminal organizations being given
    - The conveyance of confidential messages relating to terror or criminal organizations
- Under article 3(i) of Law No. 6755, in the case of crimes endangering the State's security or organized and/or terrorism offenses, an attorney's offices may be searched by the police and documents may be seized upon an order of the public prosecutor.
- Under Law No. 7672, which regulates the "Prevention of Financing the Proliferation of Weapons of Mass Destruction", self-employed lawyers are under an obligation to report suspicious transactions in relation to the sale and purchase of immovable properties; the establishment, liquidation, management and acquisition of companies, foundations and associations; banks, moveable assets and any types of accounts, and the administration of the assets in these accounts. A joint declaration was issued by 71 bar associations in Turkey regarding this regulation, stating that it ignores the right to defense and is incompatible with the nature of attorneyship, and an action for nullity is pending before the Constitutional Court.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and other documents produced during investigations should be covered by legal privilege to the extent that such notes are in the attorney's possession.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Legal privilege entitles Turkish lawyers to refuse to disclose confidential information. The duty of confidentiality, and legal privilege, is protected by the Law on Attorneys (Law No. 1136). Judicial and administrative bodies are, therefore, not entitled to demand the disclosure of confidential information unless an express exception is contained in statute.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Turkey witnessed a coup attempt on 15 July 2016. Estimates show that almost 50,000 people have been remanded in custody and 170,000 suspects have been and currently are being investigated for allegedly having links to the terrorist organization which masterminded the coup (FETO).

A response to this unusual event was the declaration of a state of emergency by the Turkish Parliament. The bill passed also granted the government the right to rule by decree, which have the force of statute unless overturned by the Parliament. Some of these decrees relate to legal privilege, directly or indirectly:

- Decree Law No. 667, article 6 provides that meetings between an attorney and suspects detained on suspicion of crimes endangering the State's security and organized and/or terrorism related crimes may be sound and video recorded, officials may be present during such meetings and documents exchanged may be seized, where there is sufficient information and/or evidence demonstrating the possibility of a threat to the safety of the public and/or members of penal institutions; guidance to or orders relating to terror or criminal organizations being given; or the conveyance of confidential messages to the terror or criminal organizations. Decree Law No. 667 was later enacted as Law No. 6749 and the same provision is included under article 6 of Law No. 6749. This provision is also incorporated into the Law on Criminal Execution No. 5275. Detainees and attorneys are warned of the above prior to the meeting.
- Further to the above, article 3(i) of Law No. 6755 provides that, with respect to crimes endangering the State's security or organized and/or terrorism related offenses, an attorney's offices may be searched by the police, and documents may be seized, upon an order of the public prosecutor.

Aside from the regulations specified above, the Grand National Assembly of Turkey passed Law No. 7672 which regulates the "Prevention of Financing the Proliferation of Weapons of Mass Destruction" on 27 December 2020. With this regulation, article 2 of the Law Regarding the Prevention of Laundering of Crime Revenues No. 5549 was amended. According to the amendment, self-employed lawyers are under the obligation to report suspicious transactions in relation to the purchase and sale of immovable properties; the establishment, liquidation, management and acquisition of companies, foundations and associations; banks, movable assets and any types of accounts and the administration of assets in these accounts. A joint declaration regarding this amendment was issued by 71 bar associations in Turkey, stating that the regulation ignores the right to defense and is incompatible with the nature of attorneyship. An action for nullity was filed, which is pending before the Constitutional Court.

In light of the above, it seems that legal privilege will have little force if advanced with respect to the confidential information of clients who are suspected of certain serious and/or terrorism related offenses.

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United Arab Emirates

01 - Discovery

What disclosure/discovery is required in litigation?

In the UAE, there are laws and regulations that apply in the UAE mainland and there are another set of commercial and civil laws that apply in the Dubai International Financial Centre (DIFC) which is a financial free zone in the Emirate of Dubai. The DIFC is not subject to the federal civil and commercial laws of the UAE mainland and operates largely as a self-regulated common law jurisdiction. However, UAE criminal laws and specific federal regulations, such as the regulations on anti-money laundering, apply in the DIFC.

Another financial free zone has been established in the Emirate of Abu Dhabi (Abu Dhabi Global Market) that enjoys relative legislative autonomy and applies common law.

Under the UAE Law of Evidence (applicable in the UAE mainland), a party may request the court to compel the adverse party to produce a document held in its possession, subject to a number of conditions.

Under the Rules of the Dubai International Financial Centre Courts, there is a process for the standard production of documents whereby the court may order each party to submit to the other parties (i) all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party; and (ii) the documents which they are required to produce by any law, rule or practice direction.

Moreover, any party may submit to the other party a request to produce for the specific production of documents.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

In the UAE mainland, there is no concept of legal privilege as it is understood in common law jurisdictions.

Communications between an attorney and client are treated as confidential. The principle of the confidentiality of communication between attorneys and clients is entrenched in professional codes of conduct and laws governing the legal profession.

These laws and codes bind members of the legal profession and do not apply to or restrict disclosure by clients of information and advice provided by external legal advisers at the client's request.

Disclosure is permissible in very limited cases, including where:

- The written consent of the client or the written consent of the rightful owner of the confidential information has been obtained
- An express court judgment ordering such disclosure has been obtained, and then only to the extent needed by the court
- The attorney, their partners or employees are accused of a criminal charge or a civil claim arising from the relationship with the client or of negligence or professional misconduct

In the Dubai International Financial Centre (DIFC), there are provisions in the DIFC laws and regulations that are relevant to the concept of privilege:

- The Code of Conduct of Legal Practitioners in the DIFC courts imposes a duty on practitioners to keep information communicated by their client confidential unless such disclosure is authorized by the client, ordered by the DIFC court or required by law. This duty continues even after the practitioner has ceased to act for the client.
- The glossary of the DIFC courts includes a definition of "privilege", and it is the right of a party to refuse to disclose or produce a document or to refuse to answer questions on the ground of some special interest recognized by law.
- Moreover, a "privileged communication" is defined in the set of regulations of the Dubai Financial Supervisory Authority (DFSA), the regulator of financial services in the DIFC, as "a communication attracting a privilege arising from the provision of professional legal advice and any other privilege properly applicable at law to the communication in question, but does not include a general duty of confidentiality."

In the ordinary course of events, a "privileged communication" would be protected against compulsory disclosure, except in circumstances where the DFSA, as the regulator of banks and financial institutions licensed in the DIFC, requests the disclosure of such information and documents in the context of an audit or investigation of a regulated entity.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

In the UAE mainland, the client is the lawful owner of the information communicated with the attorney and therefore, copies held by the client, if disclosed by the client, are not deemed confidential any longer.

In the Dubai International Financial Centre (DIFC), existing legislation does not detail the extent of privilege. Accordingly, it is likely that the DIFC courts would rely on the law of England and Wales regarding the legal principles of privilege when determining its extension to in-house counsel.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

In the UAE mainland, privilege applies only to advocates. In-house counsel are not subject to privilege rules. However, they are regarded as employees and are subject to the customary duty to keep the secrets of their employers. They may be subject to criminal liability, under article 380 (bis) of the Penal Code, if they unlawfully copy, distribute or disclose information obtained in the performance of their job.

In the Dubai International Financial Centre (DIFC), there is no legislation that specifically deals with privilege extending to in-house counsel. Accordingly, it is likely that the DIFC courts would rely on the law of England and Wales regarding the legal principles of privilege when determining its extension to in-house counsel.

Does privilege extend to internal communications between in-house lawyers?

In the UAE mainland, privilege applies only to advocates. In-house counsel are not subject to privilege rules.

In the Dubai International Financial Centre (DIFC), there is no legislation that specifically deals with privilege extending to in-house counsel. Accordingly, it is likely that the DIFC courts would rely on the

law of England and Wales regarding the legal principles of privilege when determining its extension to in-house counsel.

Are foreign lawyers recognized for the purposes of privilege?

In the UAE mainland, the Federal Code of Ethics applies to (i) all advocates practicing in the UAE; (ii) all legal consultants practicing in the UAE; (iii) all law firms licensed in the UAE; (iv) all foreign advocates and legal consultants temporarily authorized to provide services in the UAE; and (v) the representatives of parties in the arbitration centers licensed in the UAE.

In the Dubai International Financial Centre (DIFC), the duty is set out in the Code of Conduct of Legal Practitioners in the DIFC courts (i.e., those licensed by the DIFC courts).

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Nonlegal professionals may be subject to a different set of rules and regulations. The professional codes in the UAE mainland apply only to advocates. In the Dubai International Financial Centre (DIFC), a "privileged communication" means a communication attracting a privilege arising from the provision of professional legal advice and any other privilege applicable at law, but does not include a "general duty of confidentiality."

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Communications between an attorney and client are treated as confidential and disclosure is permissible in very limited cases, including where:

- The written consent of the client or the written consent of the lawful owner of the confidential information has been obtained
- An express court judgment ordering such disclosure has been obtained, and then only to the extent needed by the court
- The attorney, their partners or employees are accused of a criminal charge or a civil claim arising from the relationship with the client or of negligence or professional misconduct

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In the UAE mainland, there is a duty of confidentiality and there are no differences in how the confidentiality operates in civil, criminal, regulatory or investigatory situations.

In the context of anti-money laundering, article 15 of Federal Decree-Law No. 20 of 2018 on Anti-Money Laundering and Countering the Financing of Terrorism was recently replaced by virtue of article 1 of Federal Decree-Law No. 26 of 2021. This provides that if institutions, businesses and service providers suspect that certain funds or transactions are related to crime they are required to inform the Financial Intelligence Unit (FIU) and provide all necessary documents and reports that support their suspicions directly. In circumstances where the FIU request additional information regarding the matter said institutions will not be able to use provisions regarding confidentiality to deny turning in any documents. However, legal professionals will be exempt if the information was acquired under professional confidentiality.

Article 17 of Federal Decree-Law No. 20 of 2018 on Anti-Money Laundering and Countering the Financing of Terrorism was recently replaced by virtue of article 1 of Federal Decree-Law No. 26 of 2021. This provides that any information that has come into the possession of authorities regarding suspicious funds and transactions shall be deemed confidential by law and will only be used for necessary investigations and cases in relation to the violation of the provision.

In the Dubai International Financial Centre (DIFC), it is likely that the DIFC courts would rely on the law of England and Wales regarding legal principles of privilege when determining any such differences.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

In the UAE mainland, the notes taken by in-house counsel during an employee's interview or any other documents produced during investigations are unlikely to be considered subject to the legal advice confidentiality requirement. However, article 380 (bis) of the Penal Code provides that it is a crime to unlawfully copy, distribute or provide a third party with the content of a telephone call, message, information, data or anything else viewed/examined while performing their job. This may potentially apply to all types of communication. There are no precedents on the application of this new legislative text.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Governmental regulators that are granted judicial powers and are expressly authorized by virtue of a legal text may be entitled to demand the disclosure of privileged documents.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no amendments to Federal Law No. 23 of 1991 regulating the legal profession or Ministerial Decision No. 666 of 2015 on the Rules of Professional Conduct and Ethics of the Legal Profession in UAE.

The Implementing Regulation of the Legal Profession was issued in 2017 (Ministerial Decision No. 972/2017) and amended in 2019, however it does not contain anything regarding privilege.

The Dubai International Financial Centre (DIFC) Code of Conduct of Legal Practitioners in the DIFC courts has not been amended post 2019.

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Latin America

Argentina

01 - Discovery

What disclosure/discovery is required in litigation?

No discovery is allowed for in Argentine litigation. It is not contemplated in the National Code of Civil and Commercial Procedure nor in the Procedural Codes of each provincial jurisdiction.

On the contrary, a party filing a complaint must attach to the complaint, at the very least, all the documentary evidence supporting its claim. In some jurisdictions, the plaintiff must also offer with its complaint the remaining (non-documentary) evidence it intends to rely on in order to prove its case.

However, there are several mechanisms that allow for a wider production of evidence, sometimes before a judicial complaint is filed.

Preliminary measures: Procedural Codes usually allow the plaintiff or the defendant to produce "preliminary measures" (diligencias preliminares) to obtain information necessary to the complaint or to secure evidence that could be destroyed or misplaced before trial. However, preliminary measures must be requested from, and conducted through, the court, and they are restricted and exceptional. If the opposing party or the third party, to whom the request is addressed, is domiciled abroad, the court can request international legal cooperation from the competent authority of a foreign jurisdiction by means of a letter rogatory (e.g., by the rules of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, executed at the Hague Conference on Private International Law on 18 March 1970). The information or the evidence will be always obtained in accordance with the foreign jurisdiction's provisions of the law.

Specific document request: A party may request the opposing party to attach specific documents in its possession. However, such requests require strict identification of said documents, and cannot be made in a broad fashion simply as a means to explore what documentary evidence is in the opposing party's possession. This kind of request has a very limited effect in practice, since the opposing party has an overriding constitutional right against self-incrimination.

Information request: Procedural Codes usually allow the parties to request specific information from private or public entities or persons, provided that this information can be obtained from the recipient's business records. A person or entity receiving an information request must respond in writing to the requesting court within 10 business days from the date on which the request has been received. The information request procedure is conducted only within the evidentiary stage of a pending lawsuit.

In any of the preceding cases, however, the parties or third parties subject to confidentiality obligations or "professional secrecy" ("**secreto profesional**") may deny the disclosure of a document if confronted with a request to do so (prueba informativa), or may refuse to give testimony on any matter covered by secreto profesional in the event they are called as witnesses (prueba testimonial).

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

"Professional secrecy" ("**secreto profesional**") in the legal profession is subject to local regulations which apply to their corresponding jurisdiction, and its scope and boundaries may vary from one jurisdiction to another. Secreto profesional and simple confidentiality have different sources and boundaries under Argentine law. Secreto profesional is imposed mostly by ethical codes of conduct, providing an obligation of confidentiality in relation to the knowledge obtained by an individual in their

professional work. On the other hand, simple confidentiality can only be imposed by contract and will provide for different obligations on the part of the parties to each agreement.

Under Law No. 23.187, which regulates the practice of law in the City of Buenos Aires, all communications between lawyers and their clients are subject to secreto profesional, i.e., the inability to disclose any documents or information to any third party regarding their legal matters. Only two exceptions allow disclosure under this legislation: (i) consent from the client or (ii) the lawyer's need to defend themselves (Section 10 of the Ethics Code of the City of Buenos Aires Public Bar). This way, not even a court order can release the lawyer from secreto profesional if the client does not give their consent. Moreover, some local legislation (e.g., the Code of Ethics of the Province of Buenos Aires) specifies certain obligations to maintain secrecy even when a client has authorized disclosure.

Secreto profesional is one of the grounds for refusing to give testimony as a witness under the National Code of Civil and Commercial Procedure. It also imposes a duty on lawyers to abstain from being witnesses in any criminal investigation related to secret facts known to them by virtue of the performance of their work under the National Criminal Procedural Code.

However, a court could theoretically have the power to order the search and seizure of documents protected by secreto profesional, insofar as the lawyer is not required to deliver them or to expressly reveal their content. Nonetheless, this is an extremely rare situation which lacks sufficient judicial practice or supporting case law and eventually would require the involvement of the Ethics Committee of the relevant Public Bar Association.

A breach of secreto profesional by the lawyer is punishable as a criminal offense under the Argentine Criminal Code, and additionally as part of the ethical code of conduct of the legal profession in force in each jurisdiction (lawyers breaching secreto profesional can be disbarred).

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Professional secrecy ("**secreto profesional**") can only be invoked by lawyers but protection from disclosure may also be claimed in certain situations by the client and third parties. In particular, clients may be able to avoid disclosing attorney-client communications in their possession if they can allege that the information should be considered secret for other reasons (e.g., tax information, patents, etc.) or if it can be labeled as self-incriminatory. One of the rationales of secreto profesional is to protect the client's rights by avoiding the disclosure of secrets and/or potentially self-incriminating information.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Argentine law does not distinguish between in-house and external lawyers for the purposes of imposing professional secrecy ("**secreto profesional**"). Rather, secreto profesional obligations under Law No. 23.187 apply to the legal profession as a whole. While there is no express legislation or settled case law in this regard, there would be a reasonable basis upon which to conclude that in-house lawyers are also subject to secreto profesional. Labor legislation would confirm this privilege by mandating that each employee comply with all professional legislation, which in the case of lawyers would include the obligation to comply with the ethical code of conduct set forth in each jurisdiction where they are practicing.

Does privilege extend to internal communications between in-house lawyers?

While there is no express legislation or settled case law in this regard, as professional secrecy ("**secreto profesional**") obligations apply to the legal profession as a whole and labor legislation

requires employees to comply with all professional legislation, there is a reasonable basis to conclude that secreto profesional obligations extend to internal communications between in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

Argentine law does not have any provision distinguishing between local and foreign attorneys with regard to professional secrecy ("**secreto profesional**"). Each jurisdiction within Argentina imposes this obligation as part of its ethical code of conduct, therefore mandating local compliance. However, existing laws require foreign lawyers to validate their degree before an Argentinean university and license before the public bar associations (colegios públicos) to be able to legally provide legal counsel.

There would be no legal basis for denying foreign lawyers, who are subject to a confidentiality obligation equivalent to secreto profesional in their own jurisdiction, the ability to rely on secreto profesional if summoned to give testimony. No express or implied reference to the contrary can be found in the National Code of Civil and Commercial Procedure.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

While there is no express legislation or settled case law in this regard, there are reasonable grounds to conclude that professional secrecy ("**secreto profesional**") also extends to nonlegal professionals with whom the attorney or the client has shared information or documents for the purposes of legal representation.

In addition, the profession's own ethical code of conduct would apply. For example, certified public accountants are also required to keep secreto profesional.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Lawyers must faithfully observe professional secrecy ("**secreto profesional**") unless there is a reliable authorization from the client. Secreto profesional can only be waived by the client. In principle, giving a document to a third party – assuming the client's consent was given – will not waive secreto profesional. However, this is a matter that should be analyzed on a case by case basis. Under Argentine law, there is no express legislation or settled case law about the concepts of limited waiver, common interest privilege or joint defense privilege. Duties of loyalty, probity and good faith prohibit lawyers from providing advice or counsel to parties with opposing interests.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Professional secrecy (secreto profesional) operates similarly in civil, criminal, regulatory and investigatory situations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

While this is a matter that should be analyzed on a case by case basis, in principle notes produced during investigations are covered by professional secrecy (secreto profesional).

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Even if requested by a local court or by a governmental regulator, a lawyer subject to professional secrecy (secreto profesional) is required to keep the requested information secret.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no relevant issues publicly discussed in relation to privilege in the jurisdiction.

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Brazil

01 - Discovery

What disclosure/discovery is required in litigation?

Under Brazilian law, the basic rule is that the plaintiff has the burden of proving its rights and the defendant has the burden of proving its arguments of defense. That is to say, in principle each party must produce its own evidence and it is not obliged to disclose documents against its interests (this is set forth in the Constitution, in the Code of Criminal Procedure, in the American Convention of Human Rights and in the Code of Civil Procedure).

However, a party may request the presentation of "common" documents in the other party's possession. A common document is not only a document that directly involves both parties (e.g., a contract), but also a document that relates to or has a connection with an existing legal relationship between the parties, or between one of the parties and a third party. As a result, the scope of a request for documents in the Brazilian system is narrower than the discovery/disclosure proceedings available in some common law jurisdictions.

Under Brazilian law, a party may not present in civil litigation generic and overly broad requests for documentation. Claims for disclosure require a detailed description and identification of the requested documents and an indication of the purpose for which they are being sought. The requesting party may also be compelled to state the reasons why they believe that the requested documents exist and are in the other party's possession.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

A broad concept of protection is found in the Brazilian constitution and comprises the following:

- The confidentiality of legal communications prepared for professional use
- Client-lawyer privilege, which covers all communications related to the attorney's professional activity with a client, and applies to any lawyer licensed at the competent Brazilian bar
- The inviolability of lawyers' offices and related work files

As a result of this constitutional protection, written communications between a client and their lawyer (i.e., duly registered before the competent bar), whether in paper or electronic form, are deemed to be confidential and not subject to disclosure to third parties. Lawyers are also prevented from serving as witnesses in the course of legal work, unless the client authorizes the deposition. Below the constitutional level, several pieces of legislation also grant similar protection to the legal profession and to the confidentiality of attorney-client communications, such as: (i) the Code of Ethical Conduct issued by the Brazilian Bar Association; (ii) Federal Law 8.906/94, which governs the Brazilian legal profession; (iii) the Code of Civil Procedure; (iv) the Code of Criminal Procedure; and (v) the criminal code.

Exceptions to the general rule of confidentiality occur in very few situations and need to be carefully analyzed on a case by case basis. As a general overview, lawyers may be allowed to breach client-lawyer confidentiality in the following situations:

- In cases of risk or threat to one's life or honor

- For the lawyer's own protection and defense against the client, but limited to such defense purposes
- When previously authorized by a client (waiver), except to serve as witnesses

To reinforce the client-lawyer privilege rule and avoid abuses in searches made by police officers in law firms during criminal investigations, the Federal Law 8.906/94, which governs the Brazilian legal profession, has specific rules to guarantee that lawyers are entitled to resist the following:

- Searches of their law firm or place of work
- Turning over letters, electronic files, documents and conversations produced during the exercise of the legal profession

Article 7(II) of Federal Law 8.906/94 sets forth that a lawyer has the right to the inviolability of their office or place of work, as well as their work instruments, and written, electronic, telephonic and telematic communications, as long as these are related to the practice of the legal profession. Note that there is no difference if the material was prepared in anticipation of litigation or in anticipation of trial, since the law determines that attorneys' work instruments are covered by the principle of inviolability.

The same law also requires a representative of the local bar association during the execution of any judicial order allowing the search of any law firm.

The exceptions mentioned above represent situations in which the attorney may breach confidentiality and the corresponding arguments may be raised at any time (i.e., during litigation and/or any other proceedings in which the attorney intends to disclose the privileged documents). In addition, it is important to mention that courts may disregard the protections for attorney-client communications where justice so requires.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

In Brazil, written communications between clients and their lawyers, whether in paper or electronic form, are deemed to be confidential. However, it is not clear within the Brazilian legal community whether (i) the privilege attaches to the communications themselves, which means they would still be privileged when in the client's possession; or (ii) the privilege applies only to the person of the lawyer, and thus copies held by the client would not be protected.

Although we believe that the former position is stronger (i.e., the communications remain confidential in the client's possession), case law has not yet settled this issue. The court decisions involving this matter only state that a communication will be considered privileged and confidential as long as it is exchanged between the licensed attorney and their client during the exercise of the legal profession.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Yes. Brazilian law draws no specific distinction between external and in-house lawyers in relation to lawyers' professional rights and duties. Although the legislation does not make a distinction, some prerogatives such as privilege were constantly being questioned. As a result, in August 2021, the Provision No. 207/2021 of the Brazilian Bar Association regulated the prerogatives of in-house lawyers, establishing that they must be treated in the same way as those related to external lawyers, and ensuring that the same rights of confidentiality and privilege of attorney-client communications

apply. According to the Ethics Code of the Brazilian Bar Association, in-house lawyers are required to be as independent as any other lawyer and are thus subject to the same rights and duties.

Does privilege extend to internal communications between in-house lawyers?

Yes. Brazilian law draws no specific distinction between external and in-house lawyers in relation to lawyers' professional rights and duties. As long as the communication involves legal issues and the in-house counsel is licensed and registered at the competent Brazilian bar, the privilege extends to internal communications amongst in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

Under federal law, foreign lawyers have the same rights, duties and protections granted to Brazilian lawyers in relation to privilege, provided that they hold a Brazilian bar license authorizing them to practice in Brazil.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

In general, under the Brazilian system, nonlegal professionals are not allowed to advise on legal issues. In the exceptional cases in which they are authorized to do so, nonlegal professionals cannot benefit from privilege, which is exclusive to those duly licensed at the Brazilian Bar.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

If a document is given to a third party by the client or with the client's authorization, the client will be deemed to have waived confidentiality, and confidentiality will be lost. Such a document may have to be disclosed in litigation if the other party is able to provide a sufficiently detailed description of the document along with evidence that it has come into the third party's possession and the purpose of obtaining such information (article 397, Brazilian Code of Civil Procedure). In contrast, if a document is given to the third party by the lawyer in breach of the obligation of confidentiality, then confidentiality will not have been waived.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Brazil, attorney-client privilege encompasses any activity related to the practice of law in general.

However, the Provision No. 188/2018 from the Brazilian Bar Association provides additional protection to internal investigations conducted by lawyers with the purpose of supporting their client's defense in the context of criminal proceedings, whether administrative (criminal investigations/inquiries/precautionary measures) or judicial (criminal lawsuits). The Provision states that lawyers may directly take the investigative measures that are necessary to clarify the facts, such as conducting interviews, data collection and research, and obtaining information available from public or private agencies, among other things. During the investigation, the lawyer must preserve the confidentiality of the information collected and will not have a duty to inform the authority about the results of the investigation.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

The issue of privilege in interviews with employees during internal investigations is not specifically regulated under Brazilian Law. On one hand, it is likely that the interview of an employee during internal investigations will be deemed to be subject to legal privilege, if the interviewers are all lawyers licensed to practice in Brazil. On the other hand, if there is someone interviewing the employee who is not a lawyer licensed to practice in Brazil, it is possible that the notes and recollections of such individual will not be considered to be subject to privilege under Brazilian Law.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Lawyers cannot be compelled to breach the duty of client-lawyer confidentiality without a judicial order. Brazilian courts can order the breach of client-lawyer privilege in exceptional and very restricted circumstances based on reasonable grounds (i.e., if the lawyer is involved with the client in a crime or where there is a paramount interest of justice). In any event, the disclosure of information obtained for professional use must be limited to the minimum extent necessary to permit the use in question.

In this sense, the Appeals Court for the 1 Region (Case Records # 1000399-80.2019.4.01.0000), in an injunction decision, ruled that unless there are reasons to believe that the attorney is involved in a criminal activity with their client, they may not be compelled to disclose information.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

On April 2016, the new Code of Ethical Conduct of the Brazilian Bar Association became effective. This new code strengthened the protection for "communications of any nature" exchanged between a client and their lawyer. Such expression, "of any nature", was not encompassed in the previous Code, so it is possible to conclude that the concept of communication became wider, giving more protection to the documents related to the exercise of the legal profession.

Also, on 19 September 2017, the Superior Council of the Brazilian Bar Association delegated powers to the Federal Council of the Brazilian Bar Association to adopt constitutional measures to ensure that the Supreme Court takes actions to apply a restrictive interpretation with regards to article 7(II) of the Federal Law 8.906/94, which governs the Brazilian legal profession, and sets forth that a lawyer has the right to the inviolability of their office or place of work, as well as their work instruments, and written, electronic, telephonic and telematic communications, as long as these are related to the practice of the legal profession. The Brazilian Bar Association was motivated by court decisions determining the interception of conferences between attorneys and their clients during investigations and criminal proceedings. The Brazilian Bar Association claims that no distinction is being made with regards to the content of such communications, and as a result, privileged conferences between clients and their attorneys are being recorded.

The Provision No. 188/2018 from the Brazilian Bar Association provides additional guarantees to internal investigations conducted by lawyers for the defense of their clients in criminal proceedings and the Provision No. 207/2021 equates the prerogatives/rights of in-house lawyers with those of external lawyers. Both provisions increase the protection for attorney-client communications and attorney work product.

In June 2022, the Law 14.365/22 added new rules to the Code of Ethical Conduct of the Brazilian Bar Association involving the legal profession and lawyers' activities. In relation to privilege, this law

strengthened the protection regarding the inviolability of lawyers' offices, since it brought in a specific rule to determine that injunctions aiming to violate lawyers' offices/work places are exceptional and require proper evidence.

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Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

Mexico

01 - Discovery

What disclosure/discovery is required in litigation?

As with most civil law jurisdictions, Mexico does not have a formal discovery process. Under Mexican law, in civil and commercial proceedings, a party to litigation has no obligation to deliver or disclose to the counterparty any information related to the subject matter of the dispute. However, Mexican law establishes means to obtain the evidence in question following the commencement of proceedings, either as a pre-trial preparatory procedure (medios preparatorios a juicio) or during the evidentiary stage of the trial.

The obligation to produce documents arises if such documents are related to a proceeding and are requested by a court. In order for a court to order the disclosure of documents by a party to proceedings (and/or a third party), the following conditions must be satisfied:

- The documents are not obtainable from a party to the litigation
- The documents are necessary, as relevant evidence to prove the disputed facts, in order to prosecute or defend the action
- The documents are specifically identified by the requesting party (as opposed to a generic description)

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Mexican law recognizes the concept of privilege, although it is not established as an attorney-client privilege but as a "professional secrecy obligation." The obligation allows certain persons or professionals such as lawyers, doctors, ministers, or priests to refuse to produce information or give witness statements in certain circumstances. Specifically, attorneys have the right and obligation not to disclose any information that they have received in the course of a particular matter in which they are involved or which is connected to a matter entrusted to them. The information may only be disclosed if the lawyer has express authorization from the person who provided it.

Moreover, Mexican law establishes severe penalties for professionals who disclose any privileged information without authorization. Such penalties could take the form of a fine, revocation of the lawyer's license, or even imprisonment, depending on the loss caused by the disclosure.

In addition, bar associations in Mexico follow a Code of Ethics with respect to privilege. Under these ethical codes, the disclosure of information may result in "disbarment." Such a consequence does not necessarily prevent the lawyer from practicing, since it is not mandatory for lawyers in Mexico to be members of any bar or similar association.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

There is no express provision under the applicable Mexican law providing that a copy of an attorney-client communication held by the client is also protected. The professional secrecy obligation applies

only to the lawyer. It is commonly a matter of agreement between the parties that any information that the lawyer, in the strict exercise of their profession, provides to the client should be kept confidential.

Both in civil and criminal matters, Mexican law regulates who has the obligation to maintain professional secrecy, in order to protect fundamental rights to intimacy, defense, privacy and the inviolability of communications.

There is a general obligation for third parties to assist the courts in finding out the truth, with the exception of precisely those obliged to maintain professional secrecy (in addition to direct relatives in the vertical line and spouses).

When a client is facing criminal proceedings, the privilege of the secrecy of communications between lawyer and client consists in the fact that the lawyer has a duty to preserve the confidentiality of information and documents referred to by the client, in order to be in a position to produce their defense, and they are therefore exempt from the obligation to inform the authorities of facts that could be related to the commission of an illegal act. Therefore, the information in the lawyer's possession is considered confidential information, in terms of the General Law of Transparency and Access to Public Information.

The exception to this rule is that the privilege of confidentiality does not operate when there are indications that may implicate the lawyer, not as a defense attorney, but as a co-participant in an unlawful act.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Mexican law does not make any distinction between in-house or external lawyers with respect to privilege.

However, even though in principle both should be treated equally for such purposes, a court or administrative authority seeking the requested information might take the view that the relationship between an in-house lawyer and their employer client is based on an employment agreement and is not an attorney-client relationship. If that view is taken, the court or administrative authority may seek to compel an in-house lawyer to produce the requested information. The question of whether privilege exists will depend on a judge's decision on the specific facts of the case.

In order to minimize the risk of having to produce evidence, our recommendation for in-house lawyers is to enter into a non-disclosure agreement with their employer (i.e., client) that contains confidentiality clauses protecting any information the employer has provided.

Does privilege extend to internal communications between in-house lawyers?

Mexican law does not make a distinction between in-house lawyers and external lawyers. However, it can be assumed that in-house lawyers will be obliged to keep their employer clients' matters confidential only to the extent that such information was entrusted to them as attorneys and not as mere employees of the company; therefore, internal communications that do not relate to their employer clients' matters would not be subject to privilege.

Are foreign lawyers recognized for the purposes of privilege?

As a general rule, foreign lawyers are not allowed to practice law in Mexico and therefore cannot invoke privilege under the professional secrecy concept. However, there are some international treaties that allow foreign lawyers to practice in Mexico under some conditions. In this case, they would be able to invoke privilege, as they would be subject to Mexican Law.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The Federal Law of Professions provides that all professionals, not only legal professionals, are obliged to preserve the secrecy of the information provided by their clients, with the exception of reports that are required by any applicable laws.

Certain people (doctors, lawyers, financial institutions, accountants, priests, among others) are obliged to maintain professional secrecy, and cannot disclose information obtained in the exercise of their professional activities, with respect to others. This obligation is effective against third parties and authorities, since they are required to respect the duty of confidentiality.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

There is no specific provision under Mexican law governing addressing the instances in which a document may be given to a third party without losing confidentiality. However, only the client, not the attorney, may waive privilege.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Under Mexican law there is no distinction as to how privilege operates. The regulation applies as a "professional secrecy obligation", which is different from other jurisdictions.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Yes, notes of interviews and other documents produced during investigations by a professional are covered by privilege, unless disclosure is expressly authorized by the interviewee.

Under the provisions of the General Law of Transparency and Access to Public Information, confidential information is considered to be that which contains personal data concerning an identified or identifiable person. Confidential information will not be subject to any time frame and only the owners of such information, their representatives and authorized Public Officers may have access to it. Confidential information includes banking, fiduciary, industrial, commercial, fiscal, stock and postal secrets, whose ownership corresponds to individuals, subjects of international law or regulated entities when it does not involve the use of public resources.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Yes, Mexican authorities can require the production of certain privileged information, but only through a court order. However, there are several constitutional procedures and remedies to challenge the authority's request with respect to a privileged document. Moreover, if the authority wrongly orders a person to produce privileged information, the authority might be acting in violation of federal law, which could constitute a crime.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The Mexican Federal Courts have ruled that professionals (e.g., doctors, lawyers, financial institutions, accountants, and priests) have a right to refuse to provide a court with facts or evidence that could jeopardize the confidentiality of the documents or information provided to them by one of their clients or patients, unless the client or patient waives that privilege.

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Peru

01 - Discovery

What disclosure/discovery is required in litigation?

Unlike common law jurisdictions, Peruvian law does not provide for a disclosure/discovery process in civil and commercial proceedings. Evidence must be contained in the lawsuit or in the response of the counterparty.

If a party needs to produce evidence that it believes is in the possession of the opposing party, such party may request its production, provided that it identifies the specific document. It is not permitted to request the production of documents that are not properly identified.

This request can also be made before the trial to collect evidence in a procedure called "anticipated evidence", which is included in the Civil Procedure Law. This mechanism is only allowed if it is demonstrated that waiting until the beginning of the trial will result in the impossibility of obtaining the evidence.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

In Peru, the common law concepts of legal advice privilege and litigation privilege are encompassed within professional secrecy, which is recognized as a constitutional right not only for the legal profession, but also for all professionals who, through their profession, employment or another kind of relationship, obtain information from their clients.

This right applies regardless of the instrument in which the confidential information is recorded, and indeed even if it is not recorded. It also applies to information that is not provided by the client, but acquired by the professional because of the relationship with their client. In this sense, according to the Peruvian Constitutional Court, which is the entity in charge of interpreting the Peruvian Constitution, professional secrecy obligations extend to several professions in order to maintain confidentiality in information handled by a client, with regard to statements, facts and other forms of information.

The law protects the owners of confidential information by allowing them to prevent its disclosure, and also protects professionals who may rely on this right if someone (whether a state entity or private individual) requires that such information be disclosed. Therefore, according to binding decisions of the Peruvian Constitutional Court, legal communications and documents prepared by or for lawyers are protected under the scope of professional secrecy.

Nonetheless, the legal privilege consists of not only a right, but also a duty of loyalty and confidentiality on the part of the professional and a duty on the part of the government and third parties to refrain from any act of coercion against the professional to obtain the disclosure of protected information.

In addition to the constitutional provision, professional secrecy is recognized in other provisions. The Civil Procedure Act and the Criminal Procedure Act provide that no one may be compelled to testify about facts or information obtained under professional secrecy. On the other hand, the Criminal Code criminalizes the disclosure of information obtained under professional secrecy without consent, if the disclosure may cause damage. The exception, according to the Penal Code, is where such professionals are under the obligation to deliver such information according to the limits established by the Peruvian Constitution.

Moreover, Peruvian lawyers, who must be licensed by a bar association in Peru, are subject to the Attorney's Code of Ethics (2012), which is the result of a joint decision of the Deans of the Peruvian Bar Associations. This code regulates attorney-client privilege, stating, primarily, the following provisions:

- If the attorney discloses confidential information that causes any damage, they are liable for such losses
- The attorney-client privilege is permanent
- The attorney-client privilege extends to the lawyer's office or firm
- The attorney is permitted to produce academic texts including information obtained in their legal practice, but must not reveal details of the case or the identities of the people involved, except with the consent of the client
- The attorney may reveal information with the consent of their client and/or if disclosure is necessary to protect legitimate interests
- The attorney must disclose information protected by professional secrecy as necessary to prevent the client from causing serious harm to the physical or psychological wellbeing or life of a third person

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Attorney-client privilege understood as professional secrecy (since privilege is not provided for in Peruvian legislation) can be invoked to avoid the disclosure of information that a lawyer obtained from a client in any form. It also may be invoked by the lawyer before a governmental authority or third party that requires the disclosure of information obtained from the client.

Therefore, professional secrecy extends only to documents or information that remain in the possession and control of the lawyer, not to documents or information that are held by the client. Peruvian laws consider professional secrecy as a mechanism to ensure client confidence in the lawyer, not vice versa. Indeed, according to Peruvian law, the application of professional secrecy recognizes (i) the protection of the confidential information granted by the client to the lawyer, together with (ii) the protection of the lawyer themselves, in order to avoid any circumstance in which the state or another private individual intends to violate the confidentiality, disseminating the information. In this sense, the protection granted to lawyers implies a special duty for the Peruvian state to preserve its compliance and develop adequate legislation, since there are certain professions that are closely related to the promotion of fundamental rights, such as freedom of expression within journalism and the right of defense within the legal profession.

In fields other than judicial litigation, the protection is broader. For example, in arbitration, the Peruvian Arbitration Act recognizes the application of international parameters for attorney-client privilege, which should protect not only information that remains in the lawyer's possession, but also a copy held by the client.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

The rules concerning attorney-client privilege do not distinguish between in-house lawyers and external lawyers and apply to both.

Does privilege extend to internal communications between in-house lawyers?

Yes, provided the communications concern information obtained because of the relationship between the lawyer and their client. Professional secrecy and attorney-client privilege do not distinguish between in-house lawyers and external lawyers. Therefore, they should apply to both external and in-house lawyers.

Are foreign lawyers recognized for the purposes of privilege?

Since professional secrecy is a constitutional right and does not distinguish between foreign and national lawyers, it would also apply to foreign lawyers.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Attorney-client privilege only extends to a legal professional who represents the interests of a client (as well as to the lawyer's office, association or firm, including the personnel that work there). If the lawyer requires the advice of a nonlegal professional, with the consent of their client, the lawyer must take the necessary steps to protect such confidential information. So, if said nonlegal professionals receive confidential information, they would also be subject to professional secrecy under the Peruvian constitution and their own profession's rules of conduct.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Peruvian law does not contemplate common law concepts equivalent to limited waiver, common interest privilege or joint defense privilege. However, pursuant to the Attorney's Code of Ethics, an attorney can disclose information without losing protection if either of the following occurs:

- The client has previously consented to the information's disclosure
- The disclosure is necessary to protect the lawyer's legitimate interests, which must be recognized and protected by the Peruvian legal system (e.g., if the lawyer needs to disclose said information to avoid being involved in a crime)

The Attorney's Code of Ethics also provides that the disclosure will be obligatory if the information is necessary to prevent the client from causing serious harm to the physical or psychological wellbeing or life of a third person.

Information should also be disclosed if a judge orders it to protect other fundamental rights. In that case, the order must be necessary, fulfill a high standard of due motivation and respect the principle of proportionality, since the order restricts fundamental rights.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

According to the Attorney's Code of Ethics, the situation does not change if it is a criminal, regulatory or civil investigation. The information shared by the client must be kept secret. The exceptions are regulated by the Attorney's Code of Ethics, according to which an attorney can disclose information if either of the following apply:

- The client has previously consented to the information's disclosure

- The disclosure is necessary to protect the lawyer's legitimate interests, which must be recognized and protected by the Peruvian legal system

The Attorney's Code of Ethics also provides that the disclosure will be mandatory if the information is necessary to prevent the client from causing serious harm to the physical or psychological wellbeing or life of a third person.

In the case of the Peruvian Criminal Code, penalties are established for professionals who reveal confidential information without the consent of their client, provided that the disclosure may cause damage. Therefore, noncompliance with professional secrecy in a client-attorney context, if true, would carry a sanction. An exception to this would be where a judge orders disclosure in order to protect other fundamental rights. Said orders must be necessary to protect those rights, fulfill a high standard of due motivation and respect the principle of proportionality.

Another exception was set in a regulation which has been in force since 2018. According to this regulation, attorneys are obliged to collaborate with the Unidad de Inteligencia Financiera (UIF) of the Superintendencia de Banca y Seguros Peruana. The aim is to prevent money laundering and terrorist financing. Under these provisions, attorneys who act as representatives (with proxies) of companies for specific transactional operations (e.g., purchase agreements, company formation, etc.) must comply with certain obligations, including the disclosure of information that would be otherwise protected under professional secrecy. The nonfulfillment of these obligations is sanctioned and can be considered as a crime.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Professional secrecy is recognized as a constitutional right not only for the legal profession, but also for all professionals who, through their profession, employment or another kind of relationship, obtain information from their clients.

As long as the investigation is being carried out by a professional under this duty, and the interviews and documents are confidential in nature, they are protected by privilege. This is because the investigation as a whole comprises confidential information and will be protected by attorney-client privilege.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Professional secrecy, as a constitutional right, protects professionals from disclosing information obtained from their clients before governmental regulators.

The duty of attorneys to cooperate by providing information to the Unidad de Inteligencia Financiera (UIF) de la Superintendencia de Banca y Seguros Peruana is an exception to the general rule regarding disclosure of privileged information.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no recent issues in relation to privilege in Peru. In general, there has been little jurisprudence in relation to professional secrecy. The two paradigmatic cases establishing the parameters of this right are rulings issued by the Constitutional Court (Tribunal Constitucional) in 2001 (*Marlon Eloy Huamán García*) and 2005 (*Víctor Jesús Chávarri Carahuatay*).

In recent years, in criminal investigations regarding corruption in Peru and other Latin American jurisdictions, the authorities have been requesting confidential information, although it is protected under the scope of professional secrecy. In those cases, information is requested to ensure the protection of other fundamental rights. Said requests must be necessary to protect those rights, and have to fulfill a high standard of due motivation and respect the principle of proportionality.

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North America

Canada

01 - Discovery

What disclosure/discovery is required in litigation?

Under the rules that govern civil procedure in most provinces and territories of Canada, during the initial stages of the litigation process, the parties must produce an affidavit of documents, which is a list of all documents relevant to a given proceeding that are or have been in a party's possession, control or power. The listing is contained in an affidavit made under oath or solemnly affirmed. Following the exchange of the parties' affidavit of documents, the listed non-privileged documents are exchanged, and each party will have an opportunity to conduct oral examinations in respect of them.

While the parties are generally not required to turn over privileged documents to one another, they are required to list in a schedule to their affidavit of documents the documents that are relevant to the proceeding but which are not being produced because of their privileged status. All documents for which privilege is claimed must be listed separately, setting out the nature and date of the document and other particulars sufficient to identify it. The grounds for claiming privilege must also be set out for each document. The purpose of this degree of description of the privileged documents is to enable the other parties to the litigation to test, if necessary, the claim of privilege. If one party claims privilege over a document and another party wishes to dispute that claim, a motion can be brought to the court to decide whether a claim of privilege may have been improperly made, and the court may order any of the following:

- Cross-examination on the affidavit of documents
- Service of a further and better or more specific affidavit of documents
- Disclosure or production for inspection of the document, if it is not privileged
- Inspection of the document to determine the document's relevance or the validity of the claim of privilege

The purpose of claiming privilege is to prevent the document from being used at trial. However, there are two circumstances in which a party may be able to use a document for which privilege has been claimed:

- A party may, by written notice, abandon a claim for privilege by disclosing the document or producing it for inspection within 90 days before the start of the trial.
- If the claim for privilege is not abandoned, the document may be used only to impeach (dispute, deny or contradict) the testimony of a witness or with leave (permission) of the court.

In a motion for leave of the court to use a privileged document, the court must grant leave on whatever terms and conditions are appropriate, including an adjournment, unless permitting the document to be used at trial would cause prejudice or unduly delay the trial.

While the above sets out the general law in Canada on the use of privileged documents in civil proceedings, every province and territory has its own civil procedure legislation, each with its own particularities. For the specific requirements in each of Canada's provinces and territories, reference must be made to the governing legislation in the relevant jurisdiction.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Canadian common law recognizes the concept of privilege as a shield that protects against the mandatory disclosure of much of the communication that passes back and forth between a lawyer and their client. The privilege belongs to the client, not the lawyer, and can therefore be waived only by the client. In the province of Quebec, a civil law jurisdiction, solicitor-client privilege is referred to as "professional secrecy".

Solicitor-client (or attorney-client) privilege protects the direct communications – both oral and documentary – prepared by the lawyer or client and flowing between them in connection with the provision of legal advice. To be protected, the communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law. Solicitor-client privilege is no longer considered to be a rule of evidence in Canada, but a substantive rule that has evolved into a fundamental civil and constitutional right. The privilege is not absolute, but it is as close to absolute as possible to ensure public confidence and retain relevance. It will yield only in certain clearly defined circumstances, including where an accused's innocence is at stake, where the communications at issue are criminal or have a view to facilitating the commission of a crime, where public safety requires protection, where a client puts their reliance on legal advice in issue, or where a client and lawyer are adversaries in litigation.

Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated. As set out by the Supreme Court of Canada in *Blank v. Canada*, the purpose of the privilege, "[…] is to create a 'zone of privacy' in relation to pending or apprehended litigation" so that litigants can, "[…] prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." The privilege is lost when litigation-privileged materials are tendered or relied upon in court.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

As the privilege belongs to the client and not the lawyer, copies of attorney-client communications possessed by the client are protected, so long as the communications were intended to be made in confidence, they were sought in the course of the client's attorney providing legal advice, and the advice was based on the attorney's expertise. The copy will be protected so long as the client has not previously waived their privilege.

As set out in *S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, waiver of privilege is normally established where it is shown that the client both:

- Knows of the privilege attached to the communications
- Voluntarily makes clear an intention to waive that privilege

In the event that privileged communications have been inadvertently released, a court will engage in an objective test to discern whether the client's conduct demonstrates an intention to waive privilege (e.g., the client participated or gave instructions specific to actions that led to the release of the privileged communications).

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Solicitor-client privilege applies to communications with internal and external counsel. The difficult question arises when work done by in-house counsel straddles the line between business and legal advice; privilege will generally apply to the latter, but not the former. As set out by the Supreme Court of Canada in *Pritchard v. Ontario*, legal advice from in-house counsel may be subject to increased scrutiny:

> "Owing to the nature of the work of in-house counsel, often having both legal and nonlegal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose"… "[However,] [i]f an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is 'in-house' does not remove the privilege, or change its nature."

Does privilege extend to internal communications between in-house lawyers?

While in-house counsel may be subject to increased scrutiny, so long as the communications between the in-house lawyers meet the aforementioned test for privilege (i.e., the communications involved legal advice and not business advice, and the communications concern the in-house counsel's function as a lawyer), the privilege will extend to the communications.

Are foreign lawyers recognized for the purposes of privilege?

The modern view in Canada is that solicitor-client communications are protected by privilege even where the solicitor providing the advice is not qualified to practice in the jurisdiction in which the advice was given. As set out by the Manitoba Court of Appeal in *Gower v. Tolko Manitoba Inc.*:

> "So long as one of the parties to the communication is a lawyer, though perhaps not called to the bar of the jurisdiction in which the issue arises, [solicitor-client] privilege attaches. To hold otherwise would be to ignore the realities of the modern practice of law."

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege may extend, in the right circumstances, to third parties who are performing functions that are central to the existence or operation of the lawyer-client relationship. These could include accountants or tax consultants advising on tax law, so long as they are performing their specialized duties in their areas of expertise, and are included in group communications and receive legal advice from legal counsel. The scope of this "deal team" privilege will depend on the facts of each case and is discussed in greater detail below.

However, attorney-client privilege will not extend to communications of nonlawyers in the provision of advice on legal issues related to their field if this advice falls outside of any existing attorney-client relationship.

In *Canada (National Revenue) v. Atlas Tube Canada ULC*, the Federal Court ruled that the Canada Revenue Agency (CRA) could compel a private corporation to disclose a tax due diligence report in the course of an audit. In its analysis, the court determined that the dominant purpose of the report was to inform a business decision and the effect of the report on informing legal advice was ancillary to the business decision. Further, the court found that the contents of the report were accounting opinions, not prepared for the purpose of obtaining legal advice on the structuring of the transaction. Therefore, the report was not protected by solicitor-client privilege.

Canadian courts have also recognized patent agent privilege. In a recent case, the Federal Court ruled that patent agent privilege does not include all communications involving patent strategy, patentability or infringement. To be privileged, the communication must relate to the protection of an invention.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Privilege belongs to the client and can be waived only by the client through their informed consent. The client's compelled or unintended disclosure does not constitute waiver; only voluntary disclosure to a third party constitutes waiver. However, waiver can occur in the absence of an intention to waive, where fairness and consistency so require. Fairness only applies where the information sought to be disclosed is relevant to the issues in the proceeding.

The common-interest doctrine is an exception to the rule that disclosure of privileged information to a third party waives solicitor-client privilege. The exception applies where privileged information is confidentially shared among parties pursuing a common goal or seeking a common outcome. Legal opinions can be shared without loss or waiver of privilege, where such sharing of information facilitates the completion of a transaction because the parties are able to become informed of the respective legal opinions of others. Parties have been found to have a sufficient common interest where they "shared a united front against a common foe"; they wished to see the successful completion of a commercial transaction; and when a fiduciary duty has been found to exist between them.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There are generally no differences as to how privilege will be applied in the criminal, civil, regulatory or investigatory context. However, courts or tribunals may take into account the context when determining whether certain exceptions apply. For example, in *Bone v. Person*, the Manitoba Court of Appeal held that where solicitor-client privilege was waived when defending criminal charges, privilege of the same communication was deemed to be waived for subsequent civil proceedings.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Information and records that are created as a result of an internal investigation may be considered privileged and thus protected from disclosure. Both litigation privilege and solicitor-client privilege may apply to these types of documents. Litigation privilege, described above, may cover notes of interviews with employees and other documents produced during investigations. In order for the communication to be protected by litigation privilege, there must be current litigation or a reasonable contemplation of litigation and the dominant purpose of the communication must be for use in the current or contemplated litigation. Litigation need not be the only purpose for the communication; however, it must be the primary purpose. Litigation privilege is not limited to communications between solicitor and client, but can be asserted against third parties, such as third-party investigators with a duty of confidentiality. Where an investigation is preliminary, the documents or communications may not be considered privileged.

Recently, the Alberta Court of Appeal in *Alberta v. Suncor Energy Inc.* confirmed that the records of an internal investigation may be privileged, notwithstanding a statutory obligation to carry out an investigation and prepare a report. However, the Court of Appeal emphasized that a court must

analyze the claim of privilege for each record, and cautioned against blanket claims of privilege for all documents created in the context of an investigation.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Absent a specific and explicit statutory term, governmental regulators do not have a general power to insist that privileged documents be produced for the purposes of their investigations. The Supreme Court of Canada confirmed this principle in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*.

In *Canada v. Chambre des notaires du Quebec*, the Supreme Court of Canada upheld a lawyer's obligation to protect confidential client information by ruling various sections of the federal Income Tax Act unconstitutional. The section required that legal professionals, upon request from the CRA, provide the CRA with client documents for income tax purposes. The court stated that the sections were unconstitutional insofar as they applied to lawyers or notaries because they amounted to an unreasonable seizure in breach of section 8 of the Charter.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

Advisory privilege

A recent decision of the Federal Court of Appeal has clarified the law around deal or advisory privilege. This form of privilege extends to shared privileged communications exchanged during the course of due diligence with the purpose of furthering a proposed transaction. In *Minister of National Revenue v. Iggillis Holdings Inc.*, the Court overturned a controversial decision that had held that deal team or advisory privilege should not be recognized in Canada and which was influenced by a recent academic article and US jurisprudence.

The CRA, Canada's tax administration body, sought production of a memorandum that was shared between separately retained defense counsel. The memorandum had been prepared during the course of a commercial transaction and set out a strategy for completing the sale in such a way to obtain the most tax efficient basis for both parties. The Federal Court found that privilege over the document was lost when it was shared between the vendor and purchaser.

In a unanimous decision, the Federal Court of Appeal overturned the lower court's decision and confirmed that deal or advisory privilege is a legitimate legal doctrine in Canada and that it was not waived when the memorandum was shared. In affirming the notion of deal or advisory privilege, the Federal Court of Appeal acknowledged the policy rationale that underlies the doctrine – to serve legitimate business interests by facilitating efficient transactions. The Federal Court of Appeal rejected the lower court's suggestion that parties were using claims of deal privilege as a shield to protect abusive tax avoidance schemes. This appellate level decision represents a clear re-alignment with the established case law in Canada. The Supreme Court of Canada denied the CRA's application for leave to appeal.

Settlement privilege

The Supreme Court of Canada extended settlement privilege to Quebec's family mediation process in *Association de médiation familiale du Québec v. Bouvier*. In confirming that a rule of absolute confidentiality is not required in certain circumstances, the court applied its own precedent from *Union Carbide Canada Inc v. Bombardier Inc*. In *Union Carbide*, the court stated that the disclosure of

protected communications will be sometimes necessary to confirm that a settlement has arisen from mediation. As a result, where necessary, courts can breach the presumed confidentiality of the family mediation process to adduce the presence or scope of an agreement between the participating parties.

Public interest privilege

In *Vancouver Airport Authority v. Commissioner of Competition*, the Federal Court of Appeal rejected the Commissioner of Competition's position that public interest privilege can be claimed as a class privilege. As a result, the Competition Bureau must now establish public interest privilege on a case-by-case basis.

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United States

01 - Discovery

What disclosure/discovery is required in litigation?

The United States legal systems, both state and federal, are characterized by liberal discovery policies. The Federal Rules of Civil Procedure provide for a broad disclosure in litigation in the federal courts, permitting parties to seek discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Importantly, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." The "discovery provisions are to be applied as broadly and liberally as possible," according to the US Supreme Court. The states have adopted similarly generous disclosure rules.

Under the Federal Rules of Civil Procedure, initial disclosures are made by the parties on the commencement of a lawsuit. The parties have an ongoing duty to "supplement" their disclosures as new information becomes available that is responsive to discovery requests, subject, of course, to the attorney-client privilege and work product protection. Except in the case of a criminal trial, the parties are also entitled to take depositions of the parties. Depositions of other witnesses, including witnesses chosen to represent corporations or other entities, are commonplace, as are written interrogatories, requests for admission of facts, and requests for the production of documents and things or the right to inspect premises or to undertake physical examinations of a person.

Objections to the scope and substance of discovery may limit the duty to disclose; such objections may include invocations of the attorney-client privilege and work product doctrine, as well as lack of relevance and undue burden. Non-parties may also be subpoenaed or otherwise required to turn over documents or things, again subject to the claims of privilege or work product.

Discovery-related disputes are generally resolved by the courts on motions for protective orders or motions to compel. Failures to comply with discovery-related court orders may be sanctioned by the court.

Evidence may be sought from non-US entities or persons pursuant to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (also called the Hague Evidence Convention) or pursuant to other conventions of which both the United States and the other nation are signatories. In the case of litigation involving parties that are beyond the court's subpoena powers, as prescribed by the Federal Rules of Civil Procedure, the court may issue and serve a subpoena directed to a US national or resident who is in a foreign country. Conversely, a federal statute allows a party to a legal proceeding outside the United States to apply to a court in the United States to obtain evidence for use in the foreign proceeding.

02 - Type of privilege

Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Founded on English common law, "attorney-client privilege" is a well-established and robust protection that is recognized in all courts in the United States. Where the privilege applies, it protects from compelled disclosure an oral communication or a document in any form. In addition, courts in the United States recognize a "work product doctrine," often called a "work product privilege," which

protects from disclosure those documents, in any form, that were prepared by the attorney or by an agent of the attorney, "in anticipation of litigation."

These protections are durable and, assuming they are not waived, will apply not only to the case that occasioned the establishment of the protection, but also to any related or unrelated legal proceedings thereafter. But waiver, too, is enduring. Once waived, or deemed waived, the privilege or protection cannot be recaptured.

The importance of these protections in the context of litigation in the United States cannot be overemphasized. Unlike the vast majority of nations, whose courts do not permit litigants to engage in extensive formal discovery, the judicial systems in the United States provide for the liberal production and examination of documents and other information in preparation for trial, as well as for the testimony of, and production of documents by, witnesses who are not even parties to the case. Balancing the right of the litigant to engage in such "US-style" discovery by seeking information from the opponent is the right of the opponent to these protections. Thus, generally, litigants may preserve communications that are privileged because they were made between an attorney and their client for the purpose of seeking or giving legal advice or that are "work product," because they are documents prepared by the attorney in order to defend the client or to advocate on their behalf.

The two protections are considered separately below:

Attorney-client privilege

The attorney-client privilege is recognized under federal common law and is also codified in state statutes. Additionally, under the American Bar Association Model Rules of Professional Conduct, attorneys in the United States are bound by an ethical duty to keep confidential any privileged communications or other confidential information, the disclosure of which would likely be detrimental to the client. This obligation is subject to specific exceptions, as discussed below. The attorney-client privilege is based on the societal goal of fostering the relationship between the lawyer and the client by facilitating the free exchange of information.

General criteria for the attorney-client privilege

Iterations of the attorney-client privilege by scholars and courts are innumerable, but four basic criteria can be said to define the privilege:

- A communication
- Made between privileged persons (attorney and client)
- In confidence
- For the purpose of seeking, obtaining, or providing legal assistance

The privilege applies to both oral communications and documents and other records that reflect communications between privileged persons, including emails. Importantly, a pre-existing document conveyed by a client to an attorney does not become privileged as a result of the transfer. The content within the document itself must be privileged for the document to be protected by the privilege. Similarly, with regard to emails, parties cannot assert the privilege over communications where they have merely cc'd an attorney. Rather, emails, like all other communications, are only protected by the privilege if they reflect a confidential request for legal advice.

In the corporate context, it is often difficult to determine whether the purpose of a particular communication was to seek, obtain, or provide legal assistance because communications often have mixed business and legal purposes. Under these circumstances, courts uphold the privilege if the primary purpose of the communication was to obtain or provide legal advice.

To be recognized in legal proceedings, the attorney-client privilege must be affirmatively asserted or invoked by the client. A further condition for the application of the privilege is that it has not been "waived" by the client with respect to the communication at issue, such as by disclosing the content of the communication to, or making an oral communication in the presence of, a third party.

Although the client is generally the holder of the attorney-client privilege, an exception is that, in some jurisdictions, communications intended only for internal review by a law firm that represents the client are privileged and need not be disclosed to the client - even though the client presumptively has access to the file maintained by the attorney. Thus, in the securities litigation In re Refco Securities Litigation, where investors sued a law firm for legal malpractice with respect to a bankruptcy and for aiding and abetting a breach of fiduciary duty, a federal court ruled, under New York law, that the law firm's internal email about the client was not discoverable absent a showing of a clear need. Permitting a law firm to withhold such internal communications is in the client's interest, allowing attorneys to privately record their thoughts in order to ensure effective representation.

Choice of law for attorney-client privilege

The judicial system in the United States is marked by two "sovereign" systems, state and federal, that are governed by different procedural rules and by different substantive law of privilege and work product. Every court in the United States, state or federal, recognizes the attorney-client privilege where the basic criteria enumerated above are found to apply. Although the basic privilege precept remains consistent from jurisdiction to jurisdiction, the scope of the privilege may vary considerably under particular circumstances, as may the conditions that constitute its waiver. Given the variations in the privilege laws across jurisdictions, an important consideration in current or prospective litigation is the choice of law, i.e., whose privilege law applies.

The procedural aspects of privilege in federal courts are governed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and in state courts by similar rules enacted by the legislatures of those states. As to the substantive law, the federal courts usually apply either the federal common law of privilege, or else the substantive privilege law of the US state in which they sit.

In federal court, the choice depends on the basis for the federal court's subject-matter jurisdiction to hear the claims at issue. Where subject-matter jurisdiction is based on a "federal question" – that is, where the claim itself arises under federal law – the federal common law of privilege applies to determine the substantive law of privilege. Where, however, the federal court's subject-matter jurisdiction is based on the amount in controversy and complete "diversity of citizenship" – that is, where the alleged damages exceed USD 75,000 and the claims are founded on state law, but the plaintiff and defendant hail from different nations or from different US states – the court, by default, will apply the substantive privilege law of the state in which the federal court sits ("**forum state**").

Parties may occasionally attempt to gain a tactical advantage by invoking the privilege law of a jurisdiction that is more favorable to them than the privilege law that would normally apply – either to protect their own documents from disclosure or to convince the court that an adversary's documents should be disclosed. Under these circumstances, the party arguing that the court should apply a foreign jurisdiction's privilege must satisfy two criteria: (i) it must show that the foreign privilege law conflicts with the law that would ordinarily apply (i.e., the communications are privileged under the laws of only one of the jurisdictions); and (ii) if the court agrees that the two jurisdictions' privilege laws are in conflict, it must show that the foreign jurisdiction has the "most significant relationship" with the communications at issue. Under this test, the jurisdiction with the most significant relationship with the communication at issue will usually be the jurisdiction in which that communication took place. The most significant relationship test, which most state courts have adopted, is liberal and often favors disclosure, permitting the communication to be entered into evidence if either it would be admissible under the privilege law of the forum state (absent a special reason that weighs in favor of nondisclosure) or it would be admissible under the privilege law of the jurisdiction with the most

significant relationship with the communication (absent a strong policy of the forum state indicating that nondisclosure is appropriate).

In the international context, application of the most significant relationship test may put a non-US litigant at a disadvantage because privilege laws in other nations are generally not as robust. For example, a US resident who files a lawsuit in the United States against a corporation in another nation may seek to invoke the privilege law of that nation so as to require the corporation to produce its communications with its in-house counsel abroad. If the communications occurred in the non-US jurisdiction, the court may determine that the non-US jurisdiction has the most significant relationship with the communications and apply the privilege law of that jurisdiction. If the court determines that the communication would not be privileged under the foreign law but would be privileged under the applicable US law, the communication will be admitted absent a strong public policy of the forum.

And even if the reverse is true – that is, the communication would be privileged under the foreign law but is discoverable under US law – the court likely will deem the communication discoverable provided that no special reason barred admissibility.

Some courts also apply a "touch base" analysis to determine whether a communication that occurred in a foreign country is protected by the privilege. Under this test, the communications will be protected by the privilege provided that they touch base with the United States, in that they have had more than an incidental connection with the United States. For example, in *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010), the court ruled that communications with Italian counsel, and maintained on an Italian server, touched base with the United States because they related to a company's legal strategy to prosecute trademark infringement actions in both Italy and the US. Accordingly, it applied US law to determine whether the communications were privileged.

In short, the choice-of-privilege-law question in diversity-based suits in federal court may be of particular consequence where the communications at issue occurred or were produced outside of the United States, particularly where they were between in-house counsel and their corporate clients in jurisdictions that do not recognize a privilege with respect to communications between corporate representatives and in-house counsel.

Other types of privilege

In addition to attorney-client privilege, some US jurisdictions recognize other types of privileges that protect communications. For example, some US states recognize a privilege with respect to communications or confidences between physicians and patients, or between priests or ministers and their confessors (although these privileges are not recognized under federal common law or the Federal Rules of Evidence). Some states have recognized an accountant-client privilege. The Federally Authorized Tax Practitioner Privilege extends common law privileges to certain communications between a taxpayer and a federally authorized tax practitioner for the purposes of noncriminal tax matters before the US Internal Revenue Service. Communications of foreign patent agents may also be entitled to a form of privilege in courts in the United States.

Work product protection, also called work product privilege, differs from attorney-client privilege in respects that are best understood in the context of the differing goals of the two protections. While the attorney-client privilege exists to encourage free communication between attorneys and their clients so as to protect and foster that important relationship, the work product doctrine exists to encourage careful and thorough preparation by the attorney. Work product protection thus serves the adversarial system.

Additionally, work product protection is invoked and waived by the attorney, in contrast to attorney-client privilege, which belongs to and is invoked by the client. Because of this difference, a waiver of work product protection does not constitute a waiver of attorney-client privilege, and vice-versa. Another major difference is that while the attorney-client privilege protects communications, the work

product doctrine protects from disclosure documents (in any form) and tangible things. And while the attorney-client privilege is nearly absolute – the finding that a communication or document is privileged bars compelled disclosure – a court may compel the disclosure of work product under certain conditions, depending on the nature of the documents or things and the opposing party's ability to demonstrate a need for the information therein.

Like attorney-client privilege, the work product doctrine varies from state to state. However, federal courts generally apply the federal work product law, regardless of the basis of their subject-matter jurisdiction with respect to the claims at issue. This section considers the federal rules governing work product protection, although (as with the attorney-client privilege) state statutes codifying work product protection, and used by the state courts, vary from state to state.

The federal definition of "work product," codified in the Federal Rules of Civil Procedure, is typical, providing a qualified protection from discovery when the items sought are:

- Documents and tangible things that are otherwise discoverable
- Prepared in anticipation of litigation or for trial
- Prepared by or for another party or by or for that other party's representative

Key to identifying protected work product is the finding that the documents or things were prepared "in anticipation of litigation." Actual litigation need not have commenced at the time the attorney prepared the documents or things at issue. However, the court, in applying work product protection, must be satisfied that they were prepared at a time when there was a risk of litigation and that they were not merely prepared in the ordinary course of business. Generally, the federal courts will follow either of two tests for determining whether a document was prepared "in anticipation of litigation":

- The "primary purpose" test, in which the court must, in order for the work product doctrine to apply, find that the primary motivating purpose behind the creation of the documents or things at issue was to aid in possible future litigation
- The "because of test," in which the court must, in order for the work product doctrine to apply, find that the documents or things at issue can fairly be said to have been prepared or obtained because of the prospect of litigation in light of the nature of the document and the factual situation in the particular case

The latter test does not consider the motivation for creating the document and, therefore, is arguably the more protective and more inclusive of the two tests – especially with respect to documents or things prepared both for a regular business need and for the purposes of current or future litigation.

However, even if the documents or things at issue are found to have been prepared in anticipation of litigation under the relevant test (and all other requirements for the work product doctrine are met), the party seeking disclosure may overcome the work product protection. In the federal courts, under the Federal Rules of Civil Procedure, work product privilege is overcome when the party seeking disclosure demonstrates both of the following:

- A "substantial need" for the documents or materials in order to prepare the party's case
- The inability of the party seeking discovery to obtain the substantial equivalent of the information by other means without "undue hardship"

Federal courts have determined that a "substantial need" for the information must be specifically articulated by a litigant who argues for the disclosure; general statements by the party seeking the discovery will not suffice. Courts may conduct an in camera inspection of the documents or things to determine whether they serve a "substantial need." For example, the fact that an accident site or other key locale has fundamentally altered, thus depriving one party of the ability to collect evidence from

the site, may give rise to a "substantial need" that entitles that litigant to the work product that would otherwise be protected. A showing that a key witness is deceased, mentally ill, or unavailable may constitute a "substantial need" for witness statements or other work product of an attorney. Consideration of financial cost alone does not, however, constitute a "substantial need."

Cost may, however, be a consideration in the analysis of "undue hardship," the second requirement a litigant must meet in order to overcome its adversary's right to work product protection. Courts have found "undue hardship" where re-creating the information contained in the work product would be time-consuming, impracticable because of the volume of information at issue, and costly. In determining whether the "undue hardship" criterion is met, the court will likely weigh the abilities and resources of the parties to undertake these efforts.

Despite these exceptions to the work product doctrine, an attorney's mental impressions, conclusions, opinions, and legal theories remain protected as "core" or "opinion" work product. An example of core work product is prior drafts of a brief, letter, or answers to discovery requests. If prepared with the client's assistance, such documents would also be subject to attorney-client privilege and would not be discoverable. Documents and things that constitute core or opinion work product of one party's attorney are almost never discoverable under the Federal Rules of Civil Procedure, even if the opponent can show a "substantial need" for such information and "undue hardship" resulting from nondisclosure.

The fact that a communication is protected by the attorney-client privilege does not mean that a document containing that communication is protected work product, or vice versa. Generally, courts in the United States, whether state or federal, require parties to identify on a "privilege log" documents that are withheld during discovery on the basis of the attorney-client privilege (or other privilege) or on the grounds of work product protection. Failure to note that a privileged document is also work product may foreclose a party's ability to invoke work product protection should the claim of privilege fail. Therefore, the privilege log must be carefully drafted.

Changes to Rule 26 of the Federal Rules of Civil Procedure ("**Rule**") have expressly extended work product protection to all drafts of expert reports in any form and exempt from discovery most communications between the trial counsel for a party and those of its testifying experts whom the Rule requires to submit an expert report. Under this "attorney-expert" privilege, all communications, whether oral, written, or electronic, between trial counsel and the expert are protected unless they relate to the testifying expert's compensation; they identify facts or data that the party's attorney provided, and that the expert considered, in forming the opinions expressed; or they identify assumptions that the party's attorney provided to the expert, and upon which the expert relied in forming their opinions. Since the enactment of these changes, courts have grappled with questions left unanswered by the Rule's new language. For instance, district courts have come to different conclusions as to whether an expert's notes (as opposed to their drafts of an expert report) related to a matter are protected. Similarly, there is some uncertainty as to whether communications between attorneys and experts who are not required by the Rule to submit an expert report are privileged or discoverable.

03 - Scope of privilege

Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Typically, the "attorney-client privilege" protection is invoked and held by the client. The client maintains the right to waive the protection by disclosing the content of the communication or making an oral communication in the presence of a third party not retained for purposes of the representation. Thus, whether the attorney or client physically possess any attorney-client privileged communication is of no consequence.

Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Unlike many nations, and as alluded to above, all federal and state courts of the United States recognize that communications between corporations and their in-house attorneys who are active members of a bar association may be protected by the attorney-client privilege. However, the question of who can speak for the client – the corporation – is essential to determining whether a specific communication with an in-house lawyer is privileged. The rules governing this analysis vary considerably by jurisdiction in the United States.

In the seminal case of *Upjohn Co. v. United States*, the US Supreme Court considered whether the attorney-client privilege attached to written communications relating to a suspected illegal payment by a US corporation's foreign subsidiary to the foreign government to secure a government contract. The communications, which were demanded by a federal governmental agency, were between the in-house counsel of the US corporation and the subsidiary and were produced for the purposes of the investigation. The court held that the communications were privileged. Central to the court's holding were the facts that the communications concerned matters within the scope of the employees' official duties and that the purpose of the communications was to obtain legal advice for the corporation.

The *Upjohn* ruling is a variation of the "subject matter test," which is used in most states. Under that prevailing subject matter test, the attorney-client privilege attaches only when all of the following apply:

- The communication is made for the purpose of giving or receiving legal advice
- The employee who is communicating with the attorney is doing so at the direction of a superior
- The direction is given by the superior to obtain legal advice for the corporation
- The subject matter of the communication is within the scope of the employee's duties
- The communication was not disseminated beyond individuals who, because of the corporate structure, needed to know its contents

A more restrictive test, which is used by a few states, is the "control group test." Under that test, whether a corporate employee's communication with in-house counsel is privileged depends on the employee's position and on their ability to take action on the corporation's behalf upon the advice of the in-house counsel. Thus, under the control group test, communications are privileged only where they come from or are related to senior management; communications between in-house counsel and lower-tier employees are not privileged in jurisdictions that follow the control group test. In practice, claims of privilege with respect to communications of in-house counsel and their corporate clients may be challenged on the grounds that the communications do not give or convey legal advice but rather deal with general business advice. The fact that an attorney is "cc'd" or otherwise receives a communication, or is present at a meeting at which sensitive discussions occur among officers or directors, will not automatically shield those communications from discovery.

Regardless of which test for corporate privilege may apply, a particular communication usually will not be privileged unless the basic criteria enumerated above are met. As a practical matter, in-house counsel of corporations that may face litigation in the United States should avoid mixing legal advice with general business advice and should take other measures to mark or identify as privileged any documents in which legal advice is given. In-house counsel should train other employees or agents of the corporation to mark or identify as privileged any documents in which legal advice is sought and to ensure against waiver by disclosure to third parties.

On a related note, privilege disputes can arise when corporate employees, directors, or officers who communicate with corporate counsel (whether in-house or retained) on behalf of the company later attempt to claim that the attorney-client privilege applies to their own communications with counsel, even though the corporation has waived the privilege. This situation may be fraught with hazard.

The US Court of Appeals for the Ninth Circuit, in the case of *United States v. Graf*, recently adopted a five-part test – one that also applies in the First, Second, Third, and Tenth Circuits – for determining the nature of the attorney-client relationship between corporate employees and corporate counsel. Under the test, individual corporate officers, directors, or employees seeking to assert a personal claim of attorney-client privilege with respect to communications with corporate counsel must affirmatively show five factors:

- That the employee approached the attorney for the purpose of seeking legal advice
- That, when the employee approached the attorney, the employee made it clear that they were seeking legal advice in an individual capacity
- That the attorney saw fit to communicate with the employee in their individual capacity, knowing a possible conflict could arise
- That the communication was confidential
- That the substance of the communication with counsel did not concern matters within the corporation or its general affairs

An application of this test in the Third Circuit in the case of *United States v. Norris* raises concerns. The Court of Appeals determined that communications between a former officer of a corporation based in the United Kingdom and the corporation's counsel during an internal investigation were not protected by the attorney-client privilege with respect to the officer where the corporation had itself waived the privilege. The government, which claimed the officer had violated antitrust laws, was allowed to elicit the attorney's testimony against the officer, resulting in the officer's conviction and imprisonment for obstruction. The Third Circuit's ruling is designated as "non-precedential" (because not circulated to the full court before filing) but casts doubt on whether a corporate officer can afford to be candid with an attorney representing the corporation in an internal investigation. From both the company's and the employee's viewpoints, the Third Circuit's ruling emphasizes the importance of a lawyer's providing – and an employee's heeding – the so-called "*Upjohn* warning," wherein the lawyer informs the employee, at the start of any interview in service to the corporation for an investigation or legal matter, that the attorney represents only the company and that the communications will not be privileged.

In addition to in-house counsel, consultants to corporations may be considered "functional employees" and thereby may fall within the ambit of the test for attorney-client privilege. Nevertheless, the standard leaves many employees and outside consultants without the benefit of the protection of the attorney-client privilege when they speak with corporate counsel – an issue that counsel should, again, address at the outset of communications with such individuals.

Like the attorney-client privilege, under US federal and state laws, the work product doctrine may be extended to documents and things prepared by in-house counsel. Because in-house counsel may often act in a purely business role as opposed to a legal role, or in a hybrid advisory role that calls for a mixture of business and legal acumen, the question of whether a document was created "in anticipation of litigation" may be close.

In *SodexoMAGIC, LLC v. Drexel University*, a federal district court recently considered a similar problem in the context of the attorney-client privilege, and provided the following framework to help litigants determine whether in-house counsel acted in a legal capacity (for which the privilege would attach to a communication) or a nonlegal capacity (for which no privilege attaches):

- A communication between in-house counsel and their client "for the express purpose of securing legal not business advice," is privileged. For example, a company president's instruction to in-house counsel to "draft this contract as quickly as possible," is a privileged communication.
- Similarly, communications between in-house counsel and their client about draft contracts, and proposed contract language, are privileged.
- However, where in-house counsel (or their nonlawyer subordinates) are acting in a purely "scrivener-like" role, their communications are not privileged. For example, a company officer's instruction to in-house counsel or a paralegal to "write these exact words" in a contract, is not a privileged communication.

Does privilege extend to internal communications between in-house lawyers?

Communications between or among attorneys of a client remain privileged absent a waiver through the inclusion of a third party not retained for purposes of the representation. The mere fact that the communication involves in-house attorneys as opposed to outside should not negate the presence of the privilege where it otherwise applies. For instance, one example where federal and state courts might not recognize the privilege relates to communications that do not involve the provision of legal advice.

Are foreign lawyers recognized for the purposes of privilege?

Courts in the United States, whether state or federal, may recognize communications between foreign lawyers and their clients as privileged. The attorney-client privilege may also be extended to the communications of foreign patent agents in limited circumstances. Again, the burden of proof in applying foreign privilege law, in lieu of the otherwise applicable privilege law, rests with the party asserting foreign law.

The answer to the question of whether the privilege will apply to communications of non-US lawyers and their clients often depends on whose law applies, according to the choice-of-law principles (as discussed under the Type of Privilege section). For example, if the court determines that the substantive privilege law of the foreign nation should apply, and the foreign nation does not recognize the privilege – for example, because the foreign attorney is an in-house counsel and the nation does not extend privilege to communications with in-house counsel – the US court may require disclosure of the communication. The determination of whether the communications between foreign counsel and their clients are privileged may also depend on whether the non-US attorney is a member of any bar association, either in the United States or in the nation where the attorney practices. This distinction may also drive the determination of whether the communications at issue would be protected under the foreign law being invoked, given that in many nations, the privilege is extended only to members of a national bar association.

Disputes arise over whether, and to what extent, communications with US or foreign patent agents are privileged. Although some courts have declined to recognize the privilege on the grounds that a patent agent is neither an attorney nor a member of a bar, other courts have recognized that the prosecution of patent applications constitutes the practice of law and have therefore extended a privilege.

In cases involving communications of foreign patent agents, the court may apply the so-called "touching base" approach to determine whether the communication is privileged. Under this approach, if the communication involves a foreign patent application, then, as a matter of comity, the court looks to the foreign law to determine whether that law provides a privilege; if it does, the privilege applies. However, other courts have applied a traditional balancing test to determine which nation has the "dominant interest" in the communication, considering such interests as the parties to and substance

of the communication and the location where the relationship was centered at the time of the communication. Still other courts have ruled that the privilege may extend to communications with foreign patent agents related to foreign patent activities if the privilege would apply under the law of the foreign country, provided that the foreign law is not contrary to the forum's law.

Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The attorney-client privilege generally extends to communications between the client and agents of the attorney, as long as the communication involves the subject matter about which the attorney was consulted and the attorney retained the agent for the purpose of assisting the attorney in rendering legal advice to the client.

04 - Sharing documents with third parties

In what circumstances (if any) can a document be given to a third party without losing protection?

Under federal law, a disclosure of a privileged communication or work product in a state or federal proceeding or to a federal office or agency is not a waiver if "the disclosure is inadvertent" and if the holder of the privilege or protection "took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." Parties may, by agreement, ensure that the disclosure does not constitute a waiver of privilege or work product protection. The federal court's entry of an order incorporating such an agreement makes that agreement binding on all parties in future state or federal proceedings. No clear standard has yet emerged for determining what constitutes a party's "reasonable" efforts to prevent the disclosure of privileged information under the rule. Courts have found a waiver of privilege based on the determination that the party who disclosed the privileged communications either failed to take sufficient care in reviewing documents for privilege before the disclosure or failed to provide information sufficient to allow the court to assess the reasonableness of efforts to avoid such disclosure.

Because of the differing purposes of attorney-client privilege and work product doctrine, the terms governing the privilege and the conditions constituting waiver differ significantly. Generally, waiver of the attorney-client privilege occurs upon the disclosure of the privileged communication to any third party. In contrast, work product protection is not waived by mere disclosure to any third party. Instead, work product protection is typically waived only where the disclosure would substantially increase the likelihood of an adversary's or potential adversary's obtaining the work product. For this reason, disclosure of work product to neutral third parties, or to persons with a common interest – whether a business interest or a legal one – usually will not waive the protection. Disclosures of work product to the government might result in a waiver; such determinations are, at least in the Second Circuit, made on a case by case basis and may depend on whether the prior disclosures to the government were made subject to an executed nondisclosure agreement. [1]

However, depending on the jurisdiction, disclosure of an attorney-client-privileged communication or document to a third party may not waive the attorney-client privilege (or work product protection, if applicable) where any of the following apply:

- The disclosure was made among co-defendants represented by the same attorney or trial team in the context of actual or threatened litigation, where the communications pertain to common issues and are made to facilitate representation in subsequent litigation (often called the "joint defense privilege")

[1] See, e.g., *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); see also *In re Symbol Techs., Inc. Sec. Litig.*, No. CV 05-3923 (DRH) (AKT), 2016 U.S. Dist. LEXIS 139200, at *19 (E.D.N.Y. Sep. 30, 2016).

- The disclosure was made between or among the lawyers of two or more clients who have a "common interest" in the litigation (often called the "common interest privilege")
- The disclosure was made to a "communicating agent," such as a tax expert, who serves effectively as a translator of technical or specialized information and whose true purpose is to facilitate the communication of legal advice (often called the "translator privilege")
- The disclosure was made to an agent of the attorney who assists in the attorney's representation. Notably, some courts only apply this exception to agents who are "necessary" or "nearly indispensable" to facilitate attorney-client communications. Indeed, courts are divided as to whether communications with a public relations consultant retained by an attorney are privileged because they disagree as to whether a public relations strategy is a reasonably necessary component of the representation

Such exceptions to the waiver rules are often inaccurately termed privileges in their own right. The applications of the exceptions will vary, depending on the particular jurisdiction and the circumstances of the case. Furthermore, these protections tend to be somewhat narrowly construed. For instance, the fact that an attorney has retained a tax expert does not render the communications with that expert legal advice. The US Court of Appeals for the Ninth Circuit has held that the work file of a tax appraiser whom an attorney had hired to prepare a report to value an income tax deduction was not privileged; the tax appraiser was deemed not to be providing legal advice in that context.

Another exception to the general rule that disclosure constitutes a waiver of an attorney-client privileged document may arise when the disclosure was inadvertent. The Federal Rules of Evidence provide for the retention of attorney-client privilege or work product protection notwithstanding "inadvertent disclosure" during discovery, provided that the disclosing party took reasonable measures to prevent inadvertent disclosure and took prompt remedial measures upon discovering the inadvertent disclosure. Under the Federal Rules of Evidence, the parties can enter into an agreement limiting the effect of waiver resulting from disclosure between or among them. While such an agreement ordinarily binds only the parties to the agreement, Rule 502 makes clear that if the parties want to extend that protection from a waiver finding to prevent disclosure to non-parties, such as parties in other proceedings, their agreement must be incorporated into a court order.

In addition to these exceptions to waiver, it is important to note two important circumstances that generally are not recognized as exceptions and that will result in waiver of the attorney-client privilege or work product protection. First, an attempt to selectively disclose certain attorney-client privileged communications or work product – such as those that are favorable to one's case – while withholding related documents as privileged or protected will result in a "subject matter waiver," such that the court will require disclosure of all such communications pertaining to that subject matter. This rule of waiver prevents parties from "cherry picking" favorable privileged documents or work product and thereby presenting a distorted record. However, under the Federal Rules of Evidence, an inadvertent disclosure will not constitute a subject matter waiver; rather, subject matter waiver applies where the waiver is intentional and where the disclosed and undisclosed communications concern the same subject matter and ought in fairness be considered together.

Second, courts have generally declined to recognize "selective waiver," or the ability to disclose privileged communications to a single party or entity, such as the federal government, upon an investigation or inquiry, while claiming to retain the privilege or protection as to the rest of the world. Generally, the turning over of documents to an entity or person will result in a total waiver of the privilege with respect not only to that entity or person but to all future litigants.

The Southern District of Florida's decision in *S.E.C. v. Herrera*, 324 F.R.D. 258 (S.D. Fla. 2017) is instructive, and shows that courts may rule that a party waived a privilege even when it only discloses privileged content to third parties through oral communications. In that case, a party retained an international law firm to conduct an internal investigation, including interviews of more than three

dozen of its employees. The law firm then orally shared notes regarding twelve of its interviews with the SEC. The court ruled that, through its oral disclosures, the law firm had waived all work product protection relating to those twelve interviews and ordered it to disclose its corresponding work product to the civil litigants who moved to compel its production.

05 - Investigations

Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There are generally no differences in the elements that a litigant must satisfy to withhold documents and/or communications under the attorney-client privilege or work product doctrine in civil, criminal, regulatory or investigatory situations. However, with regard to regulatory and investigatory situations, companies must make sure that their legal departments (or outside counsel) conduct any internal investigations or, at the very least, direct the personnel involved in the investigations, including nonlegal employees. Otherwise, the attorney-client privilege and/or work product doctrine may not attach to the communications exchanged during the investigation.

Also, it should be noted that the crime-fraud exception, which provides that communications made in furtherance of a crime are not privileged, is more likely to apply in the context of criminal and investigatory situations.

Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Documents created during internal investigations, including notes of interviews with employees, are generally protected by the attorney-client privilege and work product doctrine. However, communications (including interviews of employees) are only privileged if they are "for the purpose of seeking, obtaining, or providing legal assistance," and the work product doctrine only protects documents and communications that are exchanged in "anticipation of litigation." In that light, courts generally hold that communications exchanged during internal investigations are only privileged if the "primary purpose" of the investigation was to seek or provide legal advice. [2]

Further, the work product doctrine will only apply if the memoranda or other documents were prepared in anticipation of litigation rather than in the ordinary course of business, or for a business-related purpose. [3]

Whether notes of interviews with employees during investigations are privileged also depends on whether the relevant jurisdiction applies the "control group" test – that is, whether the communication is made by "top management" as well as "an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority."[4] In jurisdictions that apply the "control group" test rather than the federal Upjohn standard, notes of interviews of non-control group employees may not be privileged.[5]

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[2] See, e.g., *Pitkin v. Corizon Health, Inc.*, 2017 U.S. Dist. LEXIS 208058, at *9 (D. Or. Dec. 18, 2017); see also *Green v. The Kroger Co.*, No. 4:20-cv-01328, 2022 U.S. Dist. LEXIS 66281, at *7 (S.D. Tex. Apr. 11, 2022).
[3] See, e.g., *Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64, 71 (D.D.C. 2017) (memoranda reflecting communications exchanged in employee interviews were not protected by the work product doctrine because the interviews were initially conducted for a "business purpose" and only later became relevant to potential litigation); see also *Wengui v. Clark Hill*, PLC, 338 F.R.D. 7, 10 (D.D.C. 2021) (holding that an investigation report generated in connection to a cyber-security breach would have been created for business purposes irrespective of litigation and, therefore, was not protected work product).
[4] See, e.g., *Resurrection Healthcare v. GE Health Care,* No. 07 C 5980, 2009 U.S. Dist. LEXIS 20562, at *7 (N.D. Ill. Mar. 16, 2009). In jurisdictions that apply the "control group" test rather than the federal Upjohn standard, notes of interviews of non-control group employees may not be privileged
[5] See id. at *10-11.

06 - Regulatory investigations

Can governmental regulators require a privileged document to be provided to them?

Governmental regulators cannot compel the disclosure of privileged communications or work product, absent proof that those communications or work product were made in furtherance of a crime or fraud. The ethical obligations of attorneys under the American Bar Association Model Rules of Professional Conduct ("**Model Rules**") do not, by their terms, require them to disclose privileged information but do permit the lawyer to disclose privileged information so as "to comply with a court order." In other limited circumstances as provided by the Model Rules, an attorney may divulge privileged information to the relevant authorities, such as when the attorney reasonably believes that such disclosure is necessary to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another (and in furtherance of which the client has used or is using the lawyer's services), and under other limited circumstances.

A more subtle question is whether the government can coerce the waiver of attorney-client privilege or work product doctrine in a governmental investigation of a corporation. In 2008, in the "Principles of Federal Prosecution of Business Organizations," the US Department of Justice adopted measures to ensure the voluntariness of waivers of attorney-client privilege or work product protection in the context of investigations undertaken by the agency. Under these principles, a party's "cooperation credit" or measure of leniency is based on that party's disclosure of "relevant facts" concerning the alleged misconduct, whether or not privileged, and not specifically on the fact that the party agreed to waive a privilege or protection. As well, the principles prohibit prosecutors from requesting waivers of attorney-client–privileged communications pertinent to the investigation or of core or opinion attorney work product except in limited situations: (i) where an advice of counsel defense is asserted; or (ii) where the document at issue is in furtherance of a crime or fraud. Guidance regarding the US Foreign Corrupt Practices Act, issued by the US Department of Justice in November 2012, cited the 2008 principles and noted that the agency does not assess a corporation's cooperation based on whether it waived attorney-client privilege or work product protection as to materials disclosed to the agency.

In 2015 and 2017, the Department of Justice revised its US Attorneys' Manual (now renamed the "Justice Manual") and reaffirmed the principles that corporations need not disclose privileged communications to receive "cooperation credit" and prosecutors may not request that they waive the protections of the privilege except in the narrow circumstances discussed above. By contrast, the Securities and Exchange Commission's Enforcement Manual (last updated in November 2017) permits SEC investigators to request waivers of privilege if they first obtain proper approval within the agency.

07 - Recent issues

What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

In a prior edition of this Guide, we reported two major developments in federal discovery law: (i) the enactment of federal legislation pertaining to the discovery of electronically stored information ("ediscovery" of "ESI"); and (ii) changes governing the privilege afforded to the work of experts. These remain the most recent major developments in US law related to privilege.

Under federal law, a disclosure of a privileged communication or work product is not a waiver in a state or federal proceeding if "the disclosure is inadvertent" and if the holder of the privilege or protection "took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." Parties may, by agreement, ensure that the disclosure does not constitute a waiver of privilege or work product protection. The federal court's entry of an order incorporating such an

agreement makes that agreement binding on all parties in future state or federal proceedings. No clear standard has yet emerged for determining what constitutes a party's "reasonable" efforts to prevent the disclosure of privileged information under the rule. Courts have found a waiver of privilege based on the determination that the party who disclosed the privileged communications either failed to take sufficient care in reviewing documents for privilege before the disclosure or failed to provide information sufficient to allow the court to assess the reasonableness of efforts to avoid such disclosure.

The other major development in US privilege law in recent years was the enactment of changes to Rule 26 of the Federal Rules of Civil Procedure ("**Rule**") to expressly extend work product protection to all drafts of expert reports in any form and to exempt from discovery most communications between the trial counsel for a party and those of its testifying experts whom the Rule requires to submit an expert report. Under this "attorney-expert" privilege, all communications, whether oral, written, or electronic, between trial counsel and the expert are protected unless they relate to the testifying expert's compensation; they identify facts or data that the party's attorney provided and that the expert considered, in forming the opinions expressed; or they identify assumptions that the party's attorney provided to the expert, and upon which the expert relied in forming their opinions. Since the enactment of these changes, courts have grappled with questions left unanswered by the Rule's new language. For instance, district courts have come to different conclusions as to whether an expert's notes (as opposed to their drafts of an expert report) related to a matter are protected. Thus, in In re Application of Republic of Ecuador, expert's notes, task lists, outlines, memoranda, presentations, and draft letters were not protected as draft reports, whereas in *SKF Condition Monitoring, Inc. v. Invensys Sys*, expert's notes and outlines were exempt from discovery. Similarly, there is some uncertainty as to whether communications between attorneys and experts who are not required by the rule to submit an expert report are privileged or discoverable.

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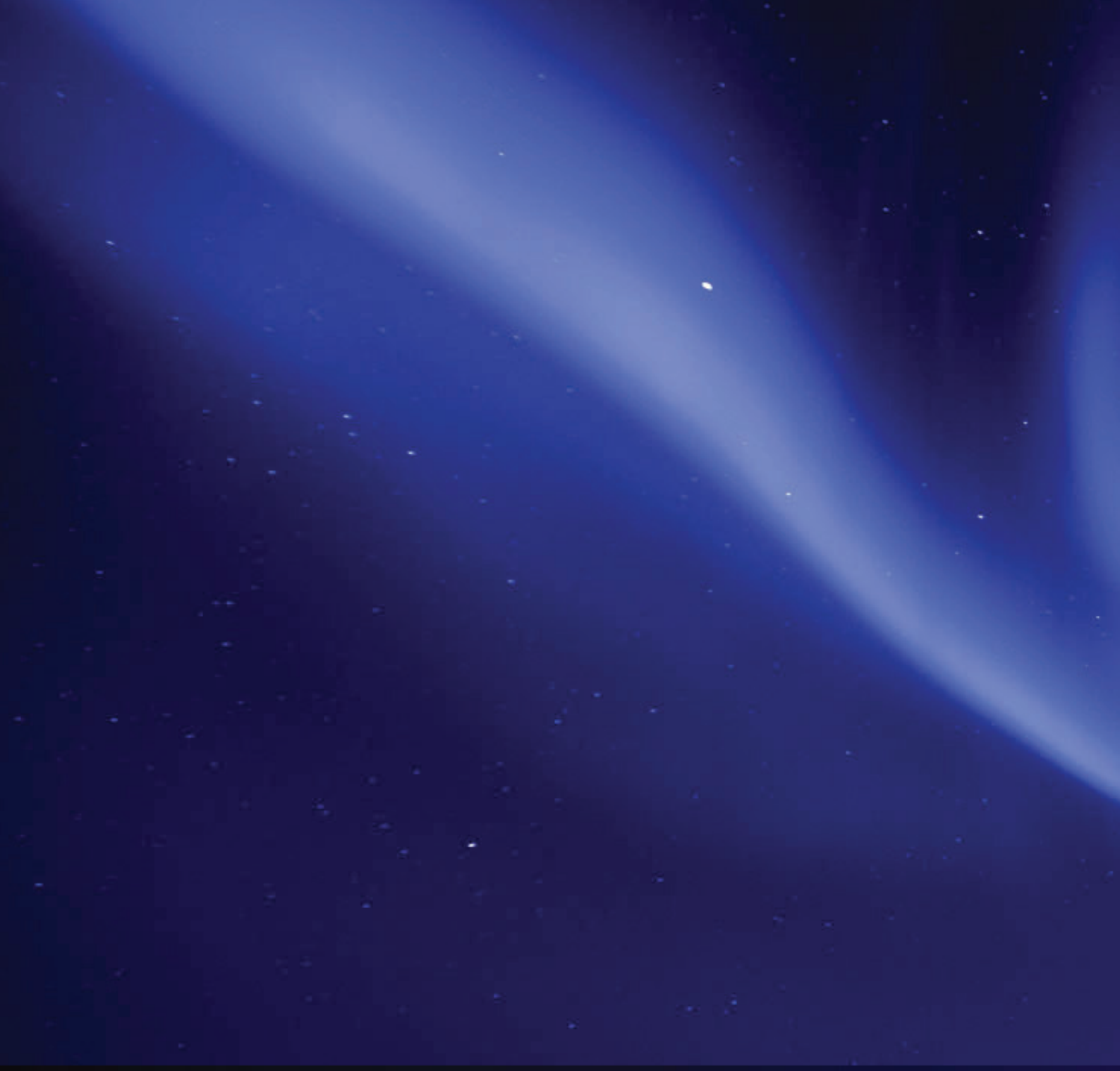

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