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# Global Privilege and Professional Secrecy Guide

5TH EDITION

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# Introduction

Welcome to the fifth edition of Baker McKenzie's Global Privilege and Professional Secrecy Guide - the most comprehensive resource of its kind, and an invaluable tool for our multinational clients navigating the increasingly complex landscape of legal privilege worldwide.

In this edition, we harness the insights of our colleagues across 38 jurisdictions to present the current law on privilege and professional secrecy, reflecting the many recent developments in national legislation and professional standards. We are pleased this year to include new chapters contributed by our teams in Chile, Colombia, Saudi Arabia, Switzerland, Ukraine, and Venezuela, as well as expanded content on the potential legal implications of artificial intelligence.

The law in this field is constantly evolving. However, the past three years have seen particularly dynamic change as courts and legislatures worldwide revisit the balance between confidentiality and transparency, often challenging the foundations that underpinned previous editions of this guide.

Notably, several civil law jurisdictions have moved closer to recognising, piloting, or at least exploring privilege for in-house lawyers. Our guide features updates on significant developments in France, Spain, the Netherlands, Belgium, and beyond.

In the common law world, a landmark English decision recently overturned a century-old precedent, now allowing companies to assert privilege against their shareholders. Elsewhere, debates continue regarding the treatment of dual-purpose communications, with a major judgment handed down in Australia.

The rapid rise of generative AI has given rise to novel concerns: Are AI tool inputs and outputs protected by privilege? While the clearest risk remains the loss of confidentiality through the use of public models, the application of existing privilege laws to new forms of documents and data is far from straightforward. The US courts are amongst the first to start to tackle this issue.

Meanwhile, companies conducting internal investigations encounter a markedly different privilege environment than even a few years ago. Courts, regulators, lawmakers, and professional bodies have tightened the criteria for privilege protection, increased scrutiny around waiver, and issued new guidance on preserving confidentiality in investigative processes. The issue of privilege in documents prepared during corporate responses to crises, particularly in the context of investigations following cyber incidents, is considered in several chapters.

Few issues are more complex for our clients than the question of cross-border privilege. These matters demand not only a thorough understanding of the law and conflict of laws principles, but also practical experience in their application. While this guide cannot address every possible scenario, our team offers a wide range of services to support clients through these challenges. Please do not hesitate to contact us for tailored legal 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 their 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 or company secretary, 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 jurisdiction, 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, Australian Securities Exchange 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 party 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), 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 nonjudicial proceedings. Privilege may also be claimed in relation to the production of documents under a subpoena, a police search warrant, a search by taxation authorities or an inquiry by a statutory body such as Australian Securities and Investment Commission (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 in which privilege does not protect persons from having to provide 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), section 202 of the Proceeds of Crime Act 2002 (Cth) and section 114 of the National Anti-Corruption Commission Act 2022 (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 privilege 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. 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, as mentioned above, privilege has been abrogated by statute in relation to investigations conducted by the National Anti-Corruption Commission (NACC) under the National Anti-Corruption Commission Act 2022 (Cth). This means that, while individuals must comply with compulsory notices issued by the NACC, even if privileged material is involved, this privileged material is generally inadmissible in criminal proceedings against them, preserving limited protections.

A number of statutes expressly abrogate the entitlement to claim privilege against self-incrimination.

There are additional considerations that parties may have to weigh up when it comes to deciding whether 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 its conditional immunity should a condition of its immunity be a requirement to provide full, frank and truthful disclosure and cooperation with the regulator (including by withholding nothing of relevance).

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The application of privilege to generative AI tools — such as ChatGPT, Microsoft 365 Copilot and legal-specific platforms — is an emerging issue in Australian law, with key questions still developing around how privilege applies to both inputs and outputs of these tools. Two main questions arise: Are the communications with the tool privileged, and does inputting privileged material into a tool waive any privilege?

Assuming that the tool is only used for the purposes of a lawyer providing legal advice, confidentiality becomes the main issue, both for privilege arising and in relation to the risk of waiving already privileged material input. AI tools are typically not operated by the client or law firm, so care must be taken to ensure that confidentiality is maintained from the public and the vendor. This is not a new issue, as clients and firms have disclosed privileged material to third-party vendors for some time, such as cloud storage providers.

**Privilege arising**: Assuming that the client/lawyer's purpose in inputting material into the tool is a legal one (such as asking it to draft a letter of demand to be settled by a lawyer), if the communications back and forth with the tool are confidential, privilege should arise. This largely depends on whether the inputted content is used to train the AI model, which, if it is, typically has implications for confidentiality. Further, the contractual terms of the tool used will dictate the confidentiality regime, including whether the vendor has access to the relevant content.

**Waiver**: If a lawyer or client inputs privileged material into an AI tool, whether privilege is preserved depends on the confidentiality issues raised in the previous paragraph.

The Law Council of Australia has cautioned that improper use of generative AI tools may carry ethical, professional and legal risks, particularly where client confidentiality is not assured.

Australian courts are beginning to issue protocols and guidance on AI use in legal practice.

# 08 - Recent issues

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

The question of privilege in respect of documents prepared during corporate responses to crises, particularly in the context of investigations following cyber incidents, has emerged as a key issue in Australia. Recent judicial decisions have reinforced the principle that privilege is not a blanket protection and must be carefully substantiated, particularly where documents are created for more than one purpose.

This principle was highlighted in two recent class actions: *Robertson v. Singtel Optus Pty Ltd [2023] FCA 1392* and *McClure v. Medibank Private Limited* [2025] FCA 167. In both cases, the Applicants contested the Respondents' claims of privilege over forensic investigation reports that had been prepared by Deloitte during an investigation into a data breach. In both cases, the Federal Court found that the investigation reports had been commissioned for multiple purposes — both legal and nonlegal — and, therefore, the reports had not been created for the dominant purpose of legal advice or for use in litigation. As a result, the reports were not privileged and had to be disclosed.[1]

These recent decisions authorities make it clear that Australian courts will closely examine privilege claims over documents prepared as a result of an investigation. Common scenarios include employment and allegations of corrupt conduct. Once the investigation has more than a single purpose, there is a risk that a court may find that the legal purpose did not predominate, which means no privilege.

# 09 - Authors

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[1] *Optus Pty Ltd v. Robertson* [2024] FCAFC 58.

# 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),[2] 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.

[2] 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.

## 08 - Authors

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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 or District Court, each party must (unless otherwise agreed or ordered), within 14 days after close of pleadings, disclose to all other parties 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 briefly describing them in a list of documents. 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 its 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, the courts may impose some limitation. 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 another party's list of documents, 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, 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. 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. It is not necessary that litigation was pending or contemplated.

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 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 relevant requirements, whether original 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).

The Hong Kong Court of Appeal in *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20 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. Section 39A(2) of the Legal Practitioners Ordinance (Cap. 159) provides that solicitor-client privilege exists between a foreign lawyer and their client to the same extent as the privilege exists between a Hong Kong solicitor and their client. This applies to advice on foreign law. Whether legal professional privilege applies to proceedings in jurisdictions outside Hong Kong will be a matter for that foreign jurisdiction.

## 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 majority ruling of the UK Supreme Court in *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1. The court held that legal advice 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.

However, litigation privilege may apply to exchanges between a client and nonlegal professionals where the litigation privilege applies (see above). This was recently confirmed by the Hong Kong

Court of First Instance in *China Medical Technologies, Inc (in liquidation) v. Wu Xiaodong and Others* [2023] HKCFI 1892.

# 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. To maintain 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 it is disclosed. The scope of the disclosure should be sufficiently limited so that a wider blanket waiver is not implied.

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. Both parties need to agree to waive privilege. 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. 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. It 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), the Court of Final Appeal held that transcripts and notes from the liquidators' private examinations and interviews were 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.

In *Orient Finance Holdings (Hong Kong) Ltd. v. China Vered Asset Management (Hong Kong) Ltd. and Another* [2024] HKCFI 649, the Court of First Instance held that an investigation report prepared by an independent consultant was not subject to litigation privilege as the dominant purpose of the report was not for fact-finding in connection with the then anticipated legal proceedings. The question of dominant purpose is to be determined by the purpose at the time the documents were created.

### 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. In *Wong Wai Keung v Commissioner of Police* [2022] HKCFI 374, the Court of First Instance 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. While recognizing that the Hong Kong legislature can legislate to abrogate or curtail legal professional privilege, the Hong Kong courts 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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The Law Society of Hong Kong issued a position paper in January 2024 on the impact of AI on the legal profession. Noting that substantial amounts of legal data are highly confidential and/or protected by legal professional privilege, the Law Society expressed concerns about client data privacy and securing sensitive information when using AI via cloud services. Lawyers have to find innovative ways of protecting data privacy, privilege and confidentiality.

There are no specific cases in Hong Kong that address how the law of privilege or professional secrecy protects inputs by lawyers into generative AI tools and the resulting outputs. Based on general principles, there is a risk that legal professional privilege may be lost when lawyers input legal advice into such tools, particularly where the information is improperly processed or disclosed (for example, where it is sent to the relevant cloud services provider). Lawyers may also breach their duty of confidentiality due to unauthorized disclosure of client information. To mitigate these risks, safeguards should be taken to protect client information. Lawyers should avoid inputting any confidential information into generative AI tools where the information may be improperly processed or disclosed, and they should clearly mark any AI-generated content intended for legal use as privileged.

# 08 - Recent issues

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

Although there have been cases in Hong Kong discussing legal professional privilege, these cases largely reinforce the principles that have been in place for the past 10 or so years. The most recent key case remains *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20. As a result of the Court of Appeal's 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?

In India, the framework for disclosure/discovery in litigation is primarily governed by the Code of Civil Procedure 1908 (CPC) and the Bharatiya Nagrik Suraksha Sanhita 2023 (BNSS) (erstwhile Criminal Procedure Code 1973). These are supplemented by the Bharatiya Sakshya Adhiniyam 2023 (BSA) (erstwhile Indian Evidence Act 1872), which recognizes attorney-client privilege and professional conduct norms under the Bar Council of India Rules, 1975 (BCI Rules) framed under the Advocates Act 1961 (Advocates Act).

Under the CPC, civil courts are empowered (either on their own motion or upon application by a party) to order discovery, inspection, production, impounding or return of documents and other material objects that may be produced as evidence. Similarly, under the BNSS, the court or an officer in charge of a police station may issue a summons to produce documents or any other material in the possession or control of the person to whom the summons is issued. Under the CPC and BNSS, "court" generally refers to civil and criminal courts respectively (excluding tribunals or quasi-judicial bodies unless extended by statute). In contrast, the BSA defines "court" more broadly to include all judges, magistrates and persons (except arbitrators) legally authorized to take evidence, thereby extending certain powers to statutory tribunals and adjudicating bodies.

Broad disclosure mechanisms are permitted under the above fora; however, privileged communications are generally protected under the BSA, particularly those between a client and their advocate/attorney made in the course of and for the purpose of legal advice. This privilege is not absolute and may not apply if the communication was made in furtherance of an illegal purpose or if the client waives the privilege, either expressly or by conduct.

In situations where privilege is claimed over a document or communication, the court has discretion to inspect the material to determine the validity of the claim. Indian law does not provide a detailed, codified discovery process comparable to jurisdictions like the US; instead, disclosure is often driven by judicial orders or party applications, subject to relevance and evidentiary rules.

## 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. Attorney-client privilege is recognized under Indian law. It is primarily governed by the BSA, the Advocates Act and the BCI Rules, which set out the ethical duties of advocates, including the obligation to maintain client confidentiality. An "advocate" in this context refers to a person enrolled under the Advocates Act — functionally similar to an attorney, barrister or solicitor in other legal systems.

Attorney-client privilege applies to exchanges between a client and their advocate/attorney that occur during the course of professional engagement and are intended for legal advice. It primarily covers communications related to the following:

- Legal advice or consultation, whether oral or written;
- Preparations made with a view to legal proceedings, including advice given in anticipation of disputes; and

- Documents and materials created during representation, such as correspondence, case strategies, draft pleadings and related notes.

In *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd.* [2002], the Bombay High Court confirmed that legal advice and documents generated in anticipation of litigation are protected. Earlier, in *Kalikumar Pal v. Rajkumar Pal* [1931], it was emphasized that the protection applies only to communications made under a formal professional relationship and in confidence. Building on these principles, the Supreme Court recently in *Aswinkumar Govindbhai Prajapati v. State of Gujarat & Anr* [2025] reinforced that the legal profession is an essential part of the justice system, and that directly summoning lawyers, especially those only involved in an advisory capacity, risks compromising both professional privilege and the independence of legal counsel.

However, this protection is not without limits, and it does not cover the following:

- Conversations or documents shared before the advocate is formally engaged;
- Situations where communication is for illegal purposes; and
- Cases where the advocate/attorney becomes aware of criminal acts committed during the course of the engagement.

Under the BSA, individuals generally cannot be forced to disclose confidential discussions with their legal adviser. However, an exception exists if the person becomes a witness in court and disclosure is necessary to clarify their testimony.

The client holds the exclusive right to waive privilege. In corporate matters, this authority lies with the organization itself - not with individual employees. Typically, only those in official positions, such as board members and in-house legal counsel, are empowered to make this decision on the company's behalf.

To maintain privilege, businesses often retain external legal counsel early and explicitly state that internal investigations are being conducted for the purpose of legal advice. This approach strengthens the argument that all resulting communications are legally protected.

## 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 generally does not depend on who physically possesses the communication but rather on the nature and purpose of the communication itself. Privilege is attached to confidential communications between a client and an advocate/attorney made in the course of and for the purpose of seeking or providing legal advice. Accordingly, both the attorney's and the client's copies of such communications remain protected, provided privilege is not waived.

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

In the context of attorney-client privilege under Indian law, the status of in-house counsel, in contrast to external advocates/attorneys, has been subject to varying judicial interpretations. The core issue arises from the distinction between an advocate and a full-time salaried employee under the Advocates Act and the BCI Rules, particularly Rule 49. This rule provides that an advocate should not be a full-time salaried employee of any individual or entity while continuing to practice law. Once employed full time, the individual is expected to suspend their right to practice for the duration of such employment.

This has led to questions as to whether in-house counsel, often engaged in non-litigious or advisory roles, can be regarded as "practicing advocates" for the purpose of invoking attorney-client privilege under the BSA.

In *Satish Kumar Sharma v. Bar Council of Himachal Pradesh* [2001], the Supreme Court took the view that full-time legal officers employed by the government may not fall within the statutory definition of a practicing advocate, especially where there is no express exemption under the applicable state bar council rules. Similarly, in *Sushma Suri v. Govt. of NCT of Delhi and Anr.* [1998], the Supreme Court noted that whether an employed legal professional continues to be regarded as an advocate depends on whether their role involves appearing and pleading in court on behalf of their employer.

At the High Court level, there have been decisions indicating a more inclusive approach. For example, in *Municipal Corporation of Greater Bombay v. Vijay Metal Works* [1981], the Bombay High Court suggested that legal advice provided by in-house legal advisers should receive the same protection as that from external counsel, provided the communication relates to legal advice. Likewise, in *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd.* [2002], the court observed that privilege may still apply where the in-house counsel, but for their employment, would otherwise be qualified to give legal advice.

However, it is important to note that these decisions are of persuasive value only, and there is currently no authoritative ruling from the Supreme Court explicitly giving the status of an advocate to an in-house counsel for the purposes of attorney-client privilege.

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

Given the judicial precedents to date, legal privilege is not likely to extend to internal communications between a company and its in-house legal counsel.

This position stems from the Supreme Court's ruling in *Satish Kumar Sharma v. Bar Council of Himachal Pradesh* [2001], which held that in-house lawyers, being full-time salaried employees, do not qualify as practicing advocates under the Advocates Act . As a result, they do not enjoy the protections afforded to advocates/attorneys under the BSA, which governs attorney-client privilege. Accordingly, communications with in-house counsel are not protected by legal privilege in the same way as communications with external counsel.

## Are foreign lawyers recognized for the purposes of privilege?

The treatment of foreign lawyers under Indian law, for the purposes of attorney-client privilege, remains a gray area. While Indian statutes such as the Advocates Act and the BSA appear to limit privilege protections to individuals enrolled as advocates/attorneys with a state bar council in India, there is limited judicial guidance on how privilege applies to communications with foreign-qualified lawyers. The Supreme Court in *Bar Council of India v. A.K. Balaji* [2018] clarified that foreign lawyers are not permitted to practice Indian law or appear before Indian courts, highlighting the distinction between Indian advocates/attorneys and foreign legal professionals. Based on this, it is generally understood that communications with foreign lawyers, particularly where advice concerns Indian legal issues or is rendered to Indian clients, may not attract legal privilege under Indian law.

The Bar Council of India introduced the Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in 2023, amended further in May 2025. These rules only permit foreign lawyers to advise foreign clients on foreign and international law, subject to strict registration and compliance requirements. The amended rules explicitly prohibit foreign lawyers from practicing Indian law, appearing in Indian courts or tribunals, or advising Indian clients. Accordingly, communications with foreign lawyers may only attract privilege where the advice concerns foreign or international law and is privileged under the applicable foreign jurisdiction.

Given that this area remains largely untested in Indian courts, there is some uncertainty as to how privilege claims involving foreign lawyers will be treated, particularly in cross-border or multijurisdictional matters. Companies should therefore structure such engagements carefully to mitigate the risk of waiver or loss of privilege under Indian 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?

Legal privilege under Indian law does not extend to nonlegal professionals such as accountants, tax consultants or forensic experts even where they provide advice on matters that have legal implications.

While the BSA does not explicitly provide privilege to communications with such professionals in practice, if nonlegal professionals are engaged by advocates/attorneys specifically to assist in rendering legal advice or in connection with anticipated litigation, there may be an argument for extending privilege, though this is not definitively settled.

This view finds some support in the Bombay High Court's decision in *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd.* [2002], where the Court upheld privilege over documents prepared in anticipation of litigation. While the ruling did not directly address nonlegal professionals, it emphasized the importance of the context and purpose for which the communication or document was created, suggesting that documents created at the direction of legal counsel for legal advice or litigation strategy may be protected, even if prepared by third-party experts. However, in the absence of clear statutory language or binding precedent, the applicability of privilege in such cases is likely to be assessed on a case-by-case basis.

## 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 protected by attorney-client privilege may be disclosed to a third party only in limited and clearly defined circumstances, without resulting in a waiver of such protection. Whether privilege is waived depends on the facts and circumstances of each case and is typically assessed by the courts on a case-by-case basis.

Privileged communications remain protected unless the party voluntarily questions their advocate/attorney as a witness on matters that would otherwise be considered privileged. Additionally, certain disclosures to third parties, such as to government authorities through seizure or investigation, do not automatically constitute a waiver of privilege. In such instances, courts may still recognize and uphold the privileged nature of the documents, depending on the context and purpose of the disclosure.

Any waiver of privilege should be made by the client, and such waiver should be explicit and complete. The BSA does not permit partial or selective waivers. This principle was upheld by the Supreme Court in *Reliance Industries Limited v. SEBI* [2022], where the court held that selective disclosure amounts to "cherry-picking" and is not permissible under law.

## 05 - Investigations

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

Under Indian law, the concept of attorney-client privilege under the BSA may extend to civil, criminal, regulatory and investigatory contexts, though its application can depend on the specific facts and

circumstances of each matter. Courts may assess the scope of privilege differently based on the nature of the proceeding and the type of communication involved.

In civil and criminal proceedings, courts are generally required to respect privilege attached to confidential legal advice exchanged between a client and an advocate/attorney. Section 132 of the BSA protects communications made during the course of a professional engagement, and courts have recognized the sanctity of such privilege, particularly where legal advice is sought in good faith and not in furtherance of any illegal purposes. Privilege also extends to legal work product prepared in anticipation of litigation, as recognized in *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd.* [2002].

In regulatory or investigatory contexts, privilege may be more complex in practice. Regulatory authorities often expect full cooperation, including the sharing of internal documentation. While companies are generally encouraged to cooperate, they are still entitled to assert privilege over legal communications and work product. If law enforcement or regulatory agencies insist on disclosing privileged materials, companies should expressly inform them of the privileged nature of such content. If the privilege claim is contested, the appropriate remedy would lie before a court of law.

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

The extent to which interview notes and other documents made/discovered during internal investigations are protected by legal privilege under Indian law depends on the purpose and structure of the investigation. While the jurisprudence in India remains relatively nascent in this area, courts have recognized, notably in Larsen & Toubro Ltd. v. Prime Displays (P) Ltd. [2002], that legal advice and work product prepared in anticipation of litigation may be privileged. However, under the Advocates Act, such protection will apply only if the investigation is conducted by and under the instructions of advocates/attorneys and clearly marked as privileged.

However, a distinction should be made between factual transcripts or summaries, which may be treated as discoverable records, and counsel's impressions or legal analysis, which are more likely to be considered privileged work product.

## 06 - Regulatory investigations

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

Yes. Regulatory authorities, such as the Enforcement Directorate, the Securities and Exchange Board of India and the Competition Commission typically require full cooperation during the course of investigations or inspections. It is a standard practice for such authorities to expect the entities under scrutiny to produce documents, respond to queries, and even record statements. Any conduct that may be construed as evasive, noncooperative, or noncompliant, such as refusing to provide information or delaying the process, may attract adverse inferences.

That said, privileged materials, particularly legal advice or work products prepared by external counsel, stand on a different footing. If a regulator or law enforcement authority seeks access to documents that are subject to attorney-client privilege, the company is entitled to inform the authority that such materials are legally protected. If the claim of privilege is disputed, the appropriate course of action would be to seek judicial recourse.

In this regard, the Supreme Court recently in Aswinkumar Govindbhai Prajapati v. State of Gujarat & Anr [2025] held that the legal profession plays a vital role in the administration of justice. It emphasized that lawyers, in addition to enjoying the right to practice their profession under Article 19(1)(g) of the Constitution of India, are also entitled to specific rights and protections by virtue of their role and under Section 132 of the BSA. The court observed that allowing investigating or prosecuting

agencies to directly summon defence counsel or legal advisors involved in a case would seriously undermine the autonomy of the legal provision and would even constitute a direct threat to the independence of the administration of justice.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Under the existing Indian evidence law, the principle of attorney-client privilege casts an obligation upon attorneys to maintain confidentiality with respect to any legal advice provided to or communications exchanged with the client and ensures that such communications would be protected from disclosures in the court of law.

The usage of AI tools by attorneys (including their inputs and resulting outputs) remains uncertain, and related aspects are yet to be tested judicially in courts.

## 08 - Recent issues

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

Indian courts have often upheld the principle of attorney-client privilege, which protects confidential communications exchanged between an advocate/attorney and their client for the purpose of obtaining legal advice. Indian law treats legal privilege as a qualified right. The boundaries also continue to evolve, especially in the context of internal corporate investigations, where courts and regulators are increasingly called upon to balance the confidentiality of legal advice with the demands of regulatory oversight and transparency.

In recent years, regulatory and enforcement bodies, including the Enforcement Directorate, the Securities and Exchange Board of India, and the Serious Fraud Investigation Office have increasingly sought access to communications between attorneys and corporate clients during investigations into financial crimes, compliance breaches, or corporate misconduct. These agencies often argue that certain documents or legal opinions are central to establishing facts, tracing financial transactions, or proving intent. This results in a gray area where privilege is weighed against the public interest in enforcement, especially in white-collar and regulatory matters.

A recent case highlights the ongoing issues around legal privilege. A practicing advocate was summoned by the police to provide information about a client who had filed a bail application. In response, the Supreme Court in *Aswinkumar Govindbhai Prajapati v. State of Gujarat & Anr* [2025] took note of the broader implications and sought the views of key legal bodies, including the Attorney General of India, the Bar Council of India, and the Supreme Court Bar Association. The Court raised two key questions: (i) can a lawyer who is only advising a client be directly summoned by investigators, and (ii) if there are allegations of a lawyer's deeper involvement, should a court first review the matter before allowing such a summons. The Court's approach indicates that a more structured and protective framework for legal professionals may be on the horizon.

The status of communications with in-house legal counsel has been particularly contentious in India. Judicial determinations often depend on the specific context, nature and purpose of communication, making the application of privilege in these scenarios fact-specific and variable.

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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 that 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 that 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 in sections 3 and 4, 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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The Advocate Law and the Advocate Code of Ethics do not currently regulate the use of generative AI tools by lawyers. As a result, there is no explicit legal protection for the inputs provided to or outputs generated by such tools. However, the principles of legal professional privilege and professional secrecy under Indonesian law require advocates to maintain the confidentiality of any information obtained from a client in the course of their professional duties, unless otherwise required by law. Given this overarching obligation, advocates should exercise caution when using generative AI tools, as doing so may risk breaching the duty of confidentiality under the Advocate Law.

# 08 - 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. As such, it is usually comparatively 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 unidentified or broadly defined 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 (such 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 the existence and contents of certain evidence on-site. 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, lawyers may refuse to testify as witnesses in relation to knowledge acquired in the course of their professional duties. There is no attorney-client communication privilege as such.

Aside from privilege in the litigation context, the Antimonopoly Act, which originally came into force on 14 April 1947, 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 insofar as 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 Japanese 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Entering confidential information pertaining to clients into an AI tool that does not guarantee confidentiality is problematic from the perspective of an attorney's duty of confidentiality. In this respect, it may be considered an action that could violate the Attorneys Act, the Basic Rules on the Duties of Practicing Attorneys and the Act on the Protection of Personal Information.

The Japan Federation of Bar Associations intends to issue guidelines for attorneys regarding the use of generative AI tools. While the specific content of the guidelines is yet to be announced, the guidelines will likely suggest specific measures to be taken by attorneys to enable them to use generative AI tools while ensuring they maintain their professional confidentiality obligations.

## 08 - 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

In Malaysia, legal professional privilege could arguably extend to input by lawyers into generative AI tools and the resulting outputs, provided that there is no waiver of privilege. In *Dato' Anthony See Teow Guan v. See Teow Chuan* [2009] 3 MLJ 14, the Federal Court of Malaysia held that "privilege" was not coextensive with "confidentiality"; it is privilege that has to be waived and not confidentiality. Legal professional privilege is absolute and remains so until waived by the privilege holder. Hence, even if client confidentiality is breached in the process of their lawyers producing privileged documents using AI tools, the client's privilege remains intact.

That said, it is unclear whether privilege can be asserted in circumstances where discovery is targeted at the owner of the generative AI tools, which would not be in any position to assert privilege over the matters sought to be discovered.

Given the above, the use of generative AI tools for legal matters should be avoided. In addition to the risk of exposing the inputs and resulting outputs to potential discovery by interested parties, the use of generative AI tools also presents a serious risk of breaching client confidentiality. Even private or enterprise-grade generative AI may put client confidentiality at risk if sensitive information is accessible to unauthorized personnel.

# 08 - 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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# 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 and Accountability ("**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. The Rules further provide 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 arises when the client consciously, voluntarily and in good faith vests a lawyer with the client's confidence for the purpose of rendering legal services such as providing legal advice or representation, and the lawyer, whether expressly or impliedly, agrees to render such services.

**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. Thus, whether the attorney-client communication remains in the lawyer's possession or a copy is held by the client, the same remains protected.

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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Currently, there is no regulation on whether these inputs or outputs are protected by the law of privilege or professional secrecy. It may be argued that inputs (e.g., prompts entered into generative AI tools) and the resulting outputs (as the third party AI tool is "assisting" the attorney) may arguably be considered as the "work product" of a lawyer, which is privileged under Philippine law. However, if public AI tools are used, which can potentially expose the communication to third parties, this may remove such communication from the protection of the privilege.

## 08 - 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 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 are governed by the ROC 2021. However, civil proceedings commenced before 1 April 2022 remain governed by the previous version of the Rules of Court, i.e., the Rules of Court 2014 ("**ROC 2014**"). Accordingly, this section will cover the following:

- 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 ROC 2021**

In the context of discovery/disclosure, the ROC 2021 refers to the "production of documents."

Compared to the previous regime under the ROC 2014, 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. Further, under the ROC 2021, the court may order the parties to file and exchange affidavits of evidence-in-chief (AEICs) for all or some witnesses after the pleadings have been filed and served, but before any production of documents and before the court considers the need for any application. This is also in contrast to the traditional approach under the ROC 2014, where AEICs would typically only be filed after the production of documents.

At a case conference, the court may order that the parties in an action must, within 14 days after the case conference, exchange a list and a copy of all documents in their possession or control that 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 the following:

- 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 ROC 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 that fall within the following categories:

- Documents on which that party relies or will rely
- Documents that 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.

A party may seek further or specific discovery by making an application to the 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 do any of the following:

- 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 in respect of legal advice. Legal advice privilege prevents an advocate or solicitor engaged by a party from doing the following:

- Disclosing any communication made to them in the course and for the purpose of their engagement 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 engagement
- Disclosing any advice given by them to their client in the course and for the purpose of their engagement

This privilege applies regardless of whether litigation is contemplated in respect of communications for purposes of seeking legal advice by the client and by third-party agents of the client who communicate merely as conduits. There have been recent observations from the General Division of the High Court that in determining if information sought to be disclosed is covered by legal advice

privilege, it is more appropriate to apply a contextual approach which focuses on whether the information sought to be disclosed can properly be said to be or reveal confidential legal advice and assistance, rather than a strict approach centered on whether the information is a fact or a communication. 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, regardless whether they were made as an agent of the client and whether they are confidential or otherwise. 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 relation to 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 in section 2 regarding 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 also apply 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 if 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 Legal Profession Act further provides 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 has, 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 simply considering 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 apply 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 nonexhaustive list of factors that were relevant:

- 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" on 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 require disclosure. This is an objective inquiry, as it is the objective role played by the legal advice that is relevant and not the subjective intention of the party 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, though 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.

However, in criminal proceedings, there is dicta by the Singapore High Court stating that when 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 regarding 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 that 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?

In Singapore, the issue of whether privilege covers notes of interviews with employees and other documents produced during investigations remains unclear. 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. In contrast, 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," which 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, it appears that this may have been superseded in light of the observations of the Singapore High Court regarding 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 that, 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, legal privilege is recognized under the Singapore Competition Act, and the regulatory body's investigative powers are curtailed so that privileged communications cannot be seized and need not be produced.

Communications with in-house lawyers and lawyers in private practice, including foreign lawyers, can benefit from the privilege. However, the Competition and Consumer Commission of Singapore 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect input by lawyers into generative AI tools and the resulting output?

The courts in Singapore have not had the opportunity to address the issue of whether input by lawyers into generative AI tools and the resulting output are protected by legal advice privilege or litigation privilege.

As of March 2025, the Ministry of Law has been working on guidelines to guide lawyers in the use of generative AI tools, given the risk of inaccurate responses from such tools, and security and privacy concerns regarding generative AI models that store user information and search history to train their model.

Arguably, pending these guidelines, input by lawyers into generative AI tools and the resulting output may be protected by legal advice privilege or litigation privilege if it is sufficiently connected to the provision of legal advice or made for the predominant purpose of litigation (as the case may be). Further, the confidentiality of such input and resulting output will also be determinative of whether the input and output are protected by privilege.

At present, given the uncertainty regarding whether privileged communications remain privileged after they are conveyed to a generative AI tool and whether privilege can attach to the resulting output, users of AI tools (including lawyers) should exercise caution in relation to the information or documents that are transmitted to any AI tool. Further clarification via legislation or case law will be instructive in this regard.

# 08 - Recent issues

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

The issue of marital privilege was recently considered by the General Division of the High Court of Singapore in a 2023 decision. Under Singapore law, marital privilege is set out in section 124(1) of the Evidence Act. The Court held that as regards the scope of marital privilege under section 124(1), that statutory provision (i) only protected a person from being compelled to disclose communications made to him/her by his/her spouse during marriage, and (ii) did not protect communications made by him/her to his/her spouse during marriage. The Court explained that this was clear from the ordinary meaning of the language in section 124(1) and was well supported by authorities.

In that same 2023 decision, the Court also held that section 124(1) of the Evidence Act was only engaged if the communications were made between spouses as principals. The protection under section 124(1) was not engaged if the communication had been made by a spouse as an agent of a third party. However, for this to be the case, the communicating spouse had to have intended to communicate with the recipient spouse as an agent on behalf of a third party.

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# Taiwan

## 01 - Discovery

### What disclosure/discovery is required in litigation?

The common law pretrial disclosure/discovery procedures, such as interrogatories, depositions and document production, are generally not available under the Taiwan Code of Criminal Procedure and the Code of Civil Procedure. Certain provisions of the Code of Criminal Procedure and the Code of Civil Procedure 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**

Ordinary process

The 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 Procedure, 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, 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.

Evidence disclosure under the Citizen Judges Act

Although the Code of Criminal Procedure does not provide for a general system of evidence disclosure, articles 47 to 58 of the Citizen Judges Act (enacted in 2020, with most provisions taking effect from 1 January 2024) introduce specific provisions governing evidence disclosure in criminal cases involving citizen judges. The evidence disclosure system under Taiwan's Citizen Judges Act is primarily implemented during the preparatory proceedings of the trial stage. Unlike the investigation stage, which is not public and does not require the prosecutor or the defendant to disclose evidence, the trial stage emphasizes procedural fairness and transparency through mutual disclosure obligations.

After indictment, the court will conduct a preparatory proceeding before the first trial date. During this stage, the court may instruct the parties to clarify the issues in dispute and file motions for the investigation of evidence. The prosecutor is required to submit a preparatory brief listing the evidence to be presented, its relevance to the facts to be proven, and the names and expected examination time of witnesses or experts. A copy of this brief must be served to the defense.

The prosecutor must also disclose the case files and physical evidence to the defense, unless such disclosure would (1) be unrelated to the charged facts, (2) jeopardize another investigation, (3) infringe on privacy or trade secrets, or (4) endanger someone's life or safety. The defense may request access to these materials, and the prosecutor must comply within five days or agree on an extension.

In response, the defense must submit its own preparatory brief, stating whether the defendant admits or denies the charges, its views on the admissibility and necessity of the prosecution's evidence, and any evidence it intends to present. The defense must also disclose the identity and expected testimony of its witnesses.

If either party fails to disclose evidence as required, the opposing party may petition the court to order disclosure. The court may then issue a ruling specifying the scope and method of disclosure. If the party still refuses, the court may reject their motion to investigate the undisclosed evidence.

**Civil procedure**

The civil procedure regarding the disclosure of documents is detailed in the articles relating to evidence in the Code of Civil Procedure. Common law pretrial 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 to support its factual allegations.

Pursuant to the Code of Civil Procedure, a party bears the burden of proof with regard to the facts that 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, among 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 have traditionally been 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 on and grant certain rights to lawyers with respect to client confidentiality. There are three key sources of obligations on lawyers.

- Under the Attorneys' Code of Ethics, lawyers must keep the content of the matter for which they are engaged confidential 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 (approximately USD 1,695) may be imposed.
- Under the Code of Criminal Procedure, 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.

Although Taiwan does not formally recognize the common law doctrines of attorney-client privilege or work product protection, the Taiwan Constitutional Court has affirmed that confidential communications between attorneys and their clients are constitutionally protected. In Taiwan Constitutional Court Judgment 112-Hsien-Pan-9 (2023), the Constitutional Court held that the right to confidential and unimpeded communication between defense counsel and their clients, including potential suspects, is a fundamental right protected under the Constitution.

The Constitutional Court emphasized that such protection extends not only to oral and written communications but also to documents and digital records created as a result of those communications. These materials are considered part of the core trust relationship between attorneys

and their clients and must not be subject to search or seizure for the purpose of a criminal investigation. The judgment further clarified that any attempt by the state to obtain such materials through search or seizure would constitute an unconstitutional infringement on both the defendant's right to a fair trial and the attorney's professional autonomy.

Accordingly, the Constitutional Court ordered the legislature to amend the Code of Criminal Procedure within two years to reflect these constitutional protections. Until such amendments are enacted, judges and prosecutors must interpret and apply existing search and seizure provisions in accordance with the constitutional principles set forth in the ruling.

To implement this constitutional mandate, a new provision of the Code of Criminal Procedure has been proposed.

According to the draft of the newly proposed article 134-1, records of confidential communications between an attorney or defense counsel and a defendant or criminal suspect, as well as documents or digital files derived from such communications, will not be subject to seizure for use as evidence. However, this protection does not apply under the following circumstances:

1. The defendant or suspect voluntarily consents to the seizure.
2. The materials constitute evidence of a crime committed by the attorney or defense counsel.
3. There is credible evidence that the attorney or defense counsel has destroyed, fabricated or tampered with evidence, or colluded with co-defendants or witnesses.

This draft provision ensures the right to confidential legal communication for both current defendants and individuals seeking legal advice in anticipation of potential prosecution. It states that such protected materials may not be subject to search or seizure under any procedural mechanism, including general warrants, incidental seizures or seizures conducted in connection with another case, unless a statutory exceptions applies.

Although article 134-1 is still in draft form and its final content remains uncertain, future amendments to the Code of Criminal Procedure are expected to enhance protections for attorney-client communications compared with the current law.

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 join the local bar association of the place where they are employed. Therefore, they must act in accordance with the Attorneys' Code of Ethics and the Attorney Regulation Act. While in-house attorneys 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 attorneys 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 codefendants 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 communications 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 Attorneys' Code of Ethics 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 (CPAs) in Taiwan 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 client's consent 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, they may be detained, or a fine of up to TWD 50,000 (approximately USD 1,695) may be imposed.

Under the Code of Criminal Procedure, CPAs may refuse to testify in a criminal proceeding if their testimony would disclose their client's confidential information, unless the client permits them to

disclose such information. 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.

Proposed amendments to article 134-1 of the Code of Criminal Procedure would further strengthen protections in criminal and investigatory contexts by explicitly prohibiting the seizure of confidential communications and related materials between attorneys and their clients, except under limited statutory exceptions.

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?

Taiwanese law does not formally recognize attorney-client privilege in the common law sense, and, historically, both legislation and case law have been silent on whether such communications are protected from disclosure. In practice, prosecutors have conducted searches of law firms and seized communications between attorneys and clients, and attorneys have not been categorically exempt from such measures.

However, following Taiwan Constitutional Court Judgment 112-Hsien-Pan-9 (2023), confidential communications and related materials between attorneys and their clients, particularly in the context of criminal defense, are now recognized as constitutionally protected. A proposed amendment to article 134-1 of the Code of Criminal Procedure would codify this protection by prohibiting the seizure of such materials, except under narrowly defined exceptions, such as client consent, evidence of attorney misconduct or obstruction of justice. Once enacted, this would significantly limit the ability of governmental regulators or prosecutors to compel the production of privileged legal communications.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Taiwanese law does not recognize a formal doctrine equivalent to the common law concepts of attorney-client privilege or the work product doctrine. While attorneys in Taiwan are bound by statutory and ethical obligations to maintain client confidentiality, these protections do not automatically extend to the use of generative AI tools.

Under article 36 of the Attorney Regulation Act, Attorneys have both the right and the duty to keep confidential any information obtained in the course of their professional duties, unless otherwise provided by law. Article 37 of the Attorney Ethics Rules further requires attorneys to strictly maintain the confidentiality of matters entrusted to them and prohibits disclosure to third parties without the client's informed consent, except in narrowly defined circumstances, such as preventing imminent harm or defending against legal claims.

However, when an attorney inputs client-related information into a generative AI tool, such action may constitute a disclosure to an external entity. This could potentially violate the attorney's confidentiality obligations, especially if the AI provider retains, processes or uses the data for model training or other purposes. In such cases, the attorney may be exposed to disciplinary action or even criminal liability under article 316 of the Criminal Code, which penalizes attorneys for unauthorized disclosure of professional secrets.

Moreover, under article 19 of the Personal Data Protection Act, nongovernmental entities (including law firms) must have a specific purpose and legal basis to collect or process personal data. Unless the attorney has obtained the client's explicit and informed consent or the data has been anonymized to the extent that the individual is no longer identifiable, inputting personal data into an AI system may breach data protection requirements.

As for the outputs generated by AI tools, these are not inherently protected under any legal privilege or secrecy doctrine in Taiwan. Since such outputs are produced by third-party systems and may be based on a mixture of public and private data, they do not qualify as confidential legal advice or protected attorney work product. Therefore, attorneys must exercise independent professional judgment and verify the accuracy and appropriateness of any AI-generated content before relying on it or sharing it with clients or courts.

In conclusion, neither the inputs provided by attorneys to generative AI tools nor the outputs generated by such tools are protected under Taiwanese law as privileged or confidential communications. Attorneys must remain vigilant in safeguarding client information and should avoid using generative AI tools to process sensitive data unless robust confidentiality measures have been implemented and the client has given informed consent.

# 08 - 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 July 31, 2024) 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. The reporting requirements and item details are outlined in the Regulations on Anti-Money Laundering & Countering the Financing of Terrorism Operations Conducted by Attorneys (latest amendment: November 25, 2024).

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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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Given the absence of specific laws or clear precedent, whether attorney-client privilege (under the Thai law context) applies may depend on various factors, including the data protection policies of the relevant generative AI tools. If clients' confidential data that lawyers obtain in their capacity as a lawyer is inputted into generative AI, there is a risk that such action is considered disclosing clients' confidential information and being subject to relevant sanctions/offenses under various applicable laws. Regarding the output, however, the lawyers will still be required to keep such output confidential and still be able to revoke their rights under the laws in not providing such output to any third parties.

## 08 - 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. Previously, courts played a more active role in assisting with evidence collection, such as collecting evidence. However, under the new Law on the Organization of People's Courts, effective from 1 January 2025, this obligation has been removed. The court's involvement in the collection of evidence is only available upon the parties' request and proving that 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 current Penal Code 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The current Vietnamese law is silent on the use of generative AI tools by legal professionals. The law does not impose any specific obligations regarding the protection or restriction of information shared with such platforms. In the absence of a clear regulatory framework, even though the use of generative AI tools, such as ChatGPT, Copilot or LEXcentra, particularly those that are public, cloud-based and hosted outside of Vietnam, still need to follow the general requirements, it may trigger some legal and ethical risks.

From a confidentiality standpoint, inputting sensitive client information, such as facts, documents or legal strategies, into these platforms may be considered disclosing such information to a third party. This is particularly concerning when such platforms are public, cloud-based or hosted on servers located outside of Vietnam, where there are no guarantees of data secrecy or compliance with Vietnamese data protection standards. Such disclosures may expose the information to unauthorized access or unintended dissemination, significantly increasing the risk of data leakage. Accordingly, lawyers would be expected to obtain the client's informed and written consent before inputting any confidential information into these tools.

For outputs generated by AI, it may also carry the risk of being mistaken for lawyer-approved advice, raising questions about the quality of the product and professional responsibility. The AI-generated content is not automatically protected by professional secrecy, especially if the tool is not designed to preserve confidentiality or is hosted on external, nonsecure platforms. Moreover, the legal status of AI-generated content remains uncertain under Vietnamese law.

Given these risks, Vietnamese legal practitioners are advised to avoid using public AI tools for matters involving client-sensitive information, to rely instead on secure internal systems when possible and to implement clear internal policies governing AI use to preserve professional standards and client trust.

## 08 - 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 has announced a number of judgments that could be good points 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

EU law respects legal professional privilege ("**LPP**") between external EU-qualified lawyers and their clients.

EU LPP traditionally applied in proceedings of a criminal or sanctioning nature, conducted by an EU institution or body. This includes EU Commission investigations into competition matters (including investigations carried out by national regulators as agents for the Commission) and competition law proceedings before the European Court of Justice (ECJ). It is highly likely that nowadays LPP also applies to requests for information in the context of EU merger control and proceedings under the Digital Markets Act.

In September 2010, the 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*). 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. Therefore, 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. 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. 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).

For a long time, *Akzo Nobel Chemicals and Akcros Chemicals* was the leading case relating to EU LPP. The scope of EU LPP was rather narrow. It only covered communications with EU-qualified lawyers made for the purpose, and in the interest of, the client's right of defense in competition proceedings. In other words, LPP only covered communication related to the subject matter of an existing or anticipated investigation. Legal advice generally, such as regulatory or commercial legal advice, was not protected.

With its decision in *Orde van Vlaamse Balies v Commission*, the ECJ in December 2022 broadened the scope of LPP, marking a tremendous shift from the restrictive approach in its previous ruling in *Akzo Nobel Chemicals and Akcros Chemicals*. In *Orde van Vlaamse Balies v Commission*, the ECJ found that EU LPP covers not only the activity of defense but also legal advice and even the very existence of legal advice. However, important questions remain open: Is communication with non-EU-qualified lawyers protected? Is EU LPP limited to certain areas of law or certain types of proceedings? Also, the ruling does not deal with the position of in-house lawyers.

## General principles

EU legal professional privilege ("**LPP**") is based solely on case law. The Commission summarized the case law relating to EU 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.).

EU law respects LPP between external EU-qualified lawyers and their clients (regardless of the jurisdiction in which the client lives). In addition, lawyers from the EEA are treated equally to lawyers from the EU. LPP does not extend to other professional advisers such as patent attorneys, accountants, external consultants etc.

The core of EU LPP is 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. This still applies in light of the ruling in *Orde van Vlaamse Balies v Commission* because the notes may not be regarded as legal advice.

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 with the company's knowledge and consent, privilege will most likely be lost. The same applies in the event of deliberate and voluntary transmission to the Commission or publication. Existing documents, which have only been discussed with an external lawyer, are not protected.

As mentioned above, LPP does not extend to in-house communications, as the EU's highest court, the ECJ 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. The case in *Orde van Vlaamse Balies v Commission* did not raise questions as to the position of in-house lawyers. Therefore, the situation has not changed in this respect.

## Main arguments of the ECJ in Akzo/Akcros

In the ruling of *Orde van Vlaamse Balies v Commission* the ECJ clarified that EU legal professional privilege ("**LPP**") applies to all communications with external EU-qualified lawyers that involve legal advice. The ECJ confirmed this understanding in *Akzo Nobel Chemicals and Akcros Chemicals* 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.

### Extension of scope of LPP in *Orde van Vlaamse Balies v Commission*

In the ruling of *Orde van Vlaamse Balies v Commission* the ECJ clarified that LPP applies to all communications with external EU-qualified lawyers that involve legal advice. LPP therefore is no longer limited to advice relating to the exercise of the rights of defense. This means that correspondence with EU-qualified external lawyers that took place before the initiation of an investigations is also protected.

The ECJ also held that LPP covers not only the content but also the very existence of legal advice. As a result, the Commission can no longer review (even in a cursory manner) documents covered by LPP.

The ruling in *Orde van Vlaamse Balies v Commission*, however, does not define external counsel, but only refers to communication with a "lawyer". The question thus remains whether LPP will protect communication with non-EU qualified lawyers. Furthermore, the ruling does not discuss whether LPP is limited to certain areas of law or certain types of proceedings. Yet, the legal basis on which the ECJ relied in its ruling, supports the argument that LPP should apply in a wider context. In previous case law, the ECJ had based the LPP on the client's right of defense. Contrary to that, in *Orde van Vlaamse Balies v Commission*, the ECJ relied on a different legal basis. It stated that it was

> "apparent from the case-law of the ECtHR [= European Court of Human Rights] that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (…). Like that provision, the protection of which covers not only the activity of defence but also legal advice,

> Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential."

This line of argument strongly suggests that EU LPP should not be limited to specific areas of law or types of proceedings. This view is further supported by the ECJ's ruling in *Ordre des avocats du Barreau de Luxembourg v Administration des contributions directes*. Building on the explanations in *Orde van Vlaamse Balies v Commission*, the ECJ states that

> "whatever the area of law to which it relates, legal advice given by a lawyer enjoys the strengthened protection guaranteed by Article 7 of the Charter to communications between lawyers and their clients."

In the Opinion of the Advocate General on this case, Mrs. Kokott had pronounced the view that the principles on privilege for legal advice would apply not only to lawyers

> "but also to tax advisers and other groups of professionals, in so far as these, as independent collaborators in the interests of justice, are treated in the same way as lawyers under the relevant national law and are therefore authorised to give legal advice to clients and represent them in court."

However, the court did not take this up as it was not required for the decision of the case. It thus remains open whether also nonlegal professionals advising on legal issues relating to their field, e.g., accountants or tax consultants, would benefit from EU LPP.

The judgments will impact national authorities' enforcement proceedings when implementing EU law, as article 3(1) of Regulation 1/2003 requires national authorities to apply EU competition law alongside national competition law in antitrust proceedings.

## Does the use of AI by lawyers raise issues of privilege or professional secrecy?

The European Bars Federation issued guidelines in September 2024 on how lawyers should take advantage of the opportunities offered by large language models and generative AI. Guideline 5 deals with maintaining attorney-client privilege. It points to the fact that the use of GenAI carries risks of improper processing or disclosure of client data. Safeguards have to be taken in order to ensure that client information is protected.

Data stored on public AI platforms may not be regarded as entirely private. However, privacy is a cornerstone of confidential communication protected by EU legal professional privilege ("**LPP**"). As a consequence, importing legal advice into an AI model could be considered a waiver of LPP. In addition, improper disclosure of client data violates the lawyer's obligation to maintain professional secrecy. This problem can arise when AI is used to take notes during meetings with legal counsel, most notably if videoconferencing platforms are used. It may be advisable not to use the notetaker application during meetings in which sensitive legal advice is discussed to minimize the risk that notes are inadvertently handled in a way that privilege is waived.

As with other breaches, AI-related confidentiality breaches can lead to severe consequences for lawyers. Moreover, in light of the recently introduced EU AI Act, it is advisable that lawyers disclose the use of AI in handling client information. The EU AI Act does not contain specific regulations for lawyers' use of AI systems. However, AI systems intended to be used by or on behalf of law enforcement authorities are considered high-risk AI systems pursuant to article 6 (2) of the EU AI Act (Annex III, No. 6 of the EU AI Act). For these systems, strict regulations apply. It is conceivable that Annex III will be changed in the future so that AI systems used by lawyers would be included.

### Does the law of privilege or professional secrecy protect generative AI content produced by (or at the prompting of) lawyers?

As EU legal professional privilege ("**LPP**") is solely based on case law and as it is rare that cases dealing with LPP are brought before the ECJ, there are no specific findings on the protection of generative AI content yet. Therefore, one has to apply general principles. A lawyer should review AI-generated content and communication to ensure that it stays within the scope of LPP. In addition, legal advice provided on the basis of AI-generated content should be marked as privileged.

### 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.
- Legal advice should only be shared if absolutely necessary.
- While labels should not be overused, 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 (for instance, those documents could 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.
- Communications discussing legal matters should be kept separate to those discussing commercial/business matters.
- 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 there is still a risk that advice from non-EU lawyers will not benefit from LPP.

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# 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 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 ("**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, attorneys that have obtained their authorization to practice law in another Member State of the European Union and wish to practice under that authorization in Austria ("**Foreign EU Attorneys**") have restricted rights in comparison to Austrian attorneys. Foreign EU Attorneys 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 Foreign EU 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 ("**Code**"). Therefore, attorney privilege is applicable to such Foreign EU Attorneys as well.

The question of whether a foreign lawyer in general has a right to make use of the attorney 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 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 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Yes, the Austrian law of privilege protects inputs by lawyers into generative AI tools and the resulting outputs, provided that there is a contractual agreement in place with the provider of the AI tool that ensures that the provider exclusively acts as a service provider, commits to maintain confidentiality of the input/output and does not use it for any purposes other than to provide the AI tool to the attorney/law firm (i.e., there is no use of the data to train the AI tool).

## 08 - 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 Court of Justice of the European Union (CJEU) in cases such as *Akzo Nobel Chemicals v. Commission*, which is discussed in more detail in the European Union (EU) chapter.

In particular, a recent decision of the Vienna Higher Regional Court (OLG Wien 24Kt4/22a) has sparked new controversy regarding attorney privilege in the context of house searches conducted by the Federal Competition Authority (BWB). The Court held that companies cannot invoke attorney privilege to shield correspondence with their lawyers from seizure; only individuals subject to a recognized duty of confidentiality — such as attorneys themselves — may do so if directly targeted by the search. This interpretation significantly narrows the scope of protection for legal communications.

In contrast, as outlined in the EU chapter, the CJEU allows clients to invoke privilege to protect such correspondence during Commission inspections.

The ruling highlights a disparity: while EU-level inspections offer broader protection for legal correspondence, the same does not apply to searches by the BWB, raising concerns about the potential circumvention of privilege protection.

Despite this jurisprudence, the BWB has, in practice, aligned itself with the EU approach in recent years, allowing companies to invoke attorney privilege to protect correspondence with their legal counsel during house searches. This practice has now been formally reflected in the BWB's updated guidelines on house searches.

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# Belgium

## 01 - Discovery

### What disclosure/discovery is required in litigation?

There is no formal process of mandatory disclosure in Belgian litigation rules. 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, except with the Chairman of the Bar's prior authorization.

For the sake of completeness, the statutory exceptions to this principle of confidentiality, as set out in article 6.2 of the Belgian Code of Ethics, include:

(i) Any communication that constitutes a procedural act or is equivalent thereto;

(ii) Any communication expressly marked non-confidential that reflects a unilateral and unconditional commitment;

(iii) Any communication made without reservation and on a non-confidential basis, at the request of one party, for the purpose of being disclosed to another, provided that the recipient expressly accepts its non-confidential nature;

(iv) Any written communication, expressly qualified as non-confidential, that contains solely a statement of specific facts or a response thereto, and which replaces either a bailiff's writ or a party-to-party communication; and

(v) Any communication, even if initially made on a confidential basis on behalf of one party, that contains specific proposals which are accepted unconditionally on behalf of the other party.

The confidentiality of communication between lawyers is restricted to relations between lawyers and is not related to professional secrecy, except when the information exchanged between lawyers is 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, to the extent that no non-lawyer is copied to the correspondence, 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.

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 (*Belgacom* decision), 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, as far as Belgian proceedings and investigations are concerned, the *Akzo* decision of the European Court of Justice, which denied in-house counsel professional privilege in EU antitrust proceedings (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 and upheld the reasoning of the CoA, which held that any interference with the right to privacy — particularly by competition authorities — would amount to a violation of the confidentiality of in-house legal counsel's opinions and would, as a result, be unlawful.

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).

Recently, the Act of 14 March 2023 amending the Act of 1 March 2000 was adopted, formally codifying the principles established in the *Belgacom* case law. This amendment now extends 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 to include internal correspondence containing the request for legal advice, internal exchanges relating to that request, draft opinions, as well as internal documents prepared in anticipation of the opinion.

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

Privilege does extend to internal communications between in-house lawyers following recent legislative developments.

The Act of 14 March 2023, which amends the Act of 1 March 2000, formally codifies the principles established in the *Belgacom* case law (see previous section). This amendment significantly broadens the scope of confidentiality for in-house legal counsel who are members of the Institute. It now expressly includes (i) internal correspondence containing the request for legal advice, (ii) internal exchanges relating to that request, (iii) draft legal opinions, and (iv) internal documents prepared in anticipation of the opinion.

This means that not only the final legal advice, as it was foreseen in the previous regime, but also the preparatory and surrounding internal communications, are protected by confidentiality when provided by in-house counsel acting in their legal advisory capacity for their employer or principal.

However, 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 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) or to their principal, 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 in civil, criminal, regulatory or investigatory matters is generally 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 Judicial Code). The court cannot compel the lawyer to testify on issues which are protected by professional secrecy.

In contrast, article 458 of 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).

Moreover, when a lawyer relies on confidential information essential to their own defense, it does not constitute a breach of professional secrecy, as established in article 22 of the Code of Ethics for Lawyers.

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 Chairman 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 the decision of the Constitutional Court of 24 September 2020 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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Inputs by lawyers into generative AI are not, per se, legally protected by the law of privilege or professional secrecy. It is and will therefore remain the lawyers' responsibility and liability to ensure that any privileged or secret information is preserved.

Yet, it is established that the protection of privilege or professional secrecy is not guaranteed when a lawyer uses a generative AI tool, especially if the tool does not offer adequate safeguards, such as secure data storage, restricted access and clear limitations on data reuse.

Therefore, the Belgian bar advises that lawyers must not input confidential client information into AI tools unless those tools have been thoroughly vetted for compliance with ethical and legal standards. If the processing of confidential elements is unavoidable, the lawyer must be transparent and obtain the client's explicit consent. Moreover, any client-related information should be anonymized to prevent identification, and lawyers should avoid entering any details that could directly or indirectly reveal the client's identity.

Before using an AI tool, lawyers are also expected to carefully examine its terms of use. This includes understanding how the tool handles data transmission, storage and further processing; where the data operations are located; whether the system is open or closed; the platform's liability terms; and the intellectual property and licensing conditions. These factors are necessary in determining whether the tool can be used without breaching professional secrecy.

The resulting outputs are also not, per se, legally protected. As a result, the same obligations as summarized above will apply. Of course, as soon as the lawyer uses the said resulting output in a communication to a client (or another lawyer), that communication will fall within — and benefit from — the law of privilege or professional secrecy.

# 08 - 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 (approximately USD 293) 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 lawyers' core activities; 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 (Cel voor Financiële Informatieverwerking (CFI)/ Cellule de Traitement des Informations Financières (CTIF)), even when the client had withdrawn the suspicious transaction, following the lawyer's advice. The Constitutional Court held that, in such case, the reporting obligation conflicts with lawyers' duty of professional secrecy 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 lawyers' employees 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.

This decision reaffirmed the fundamental importance of legal professional privilege in the lawyer-client relationship. Nevertheless, the Anti-Money Laundering Act of 18 September 2017 continues to impose certain obligations on lawyers, particularly regarding the maintenance of the ultimate beneficial owners (UBO) register. When a lawyer identifies a discrepancy between the information available on a company's beneficial owners and the data recorded in the UBO register, they are not permitted to report it directly to the treasury administration. Instead, they must notify the chair of their bar, who is responsible for assessing whether the legal conditions for lifting professional secrecy are met. Only if these conditions are satisfied may the Chairman of the bar transmit the relevant information to the authorities.

The Constitutional Court, in its judgment of 16 February 2023 ruled that, this specific procedure - challenged by accountants and tax advisors - the difference in treatment between the lawyers and the accountants and tax advisors is justified by the need to safeguard the rights of the defense and the right to privacy, which are particularly sensitive in the context of legal representation. As such, the Chairman of the bar's intervention is deemed necessary to preserve these fundamental protections in the legal profession.

In its judgment of 19 October 2021, 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. The Supreme Court held that an (oral) conversation between a defendant's lawyer in criminal proceedings and another codefendant, which reveals incriminating information regarding the lawyer's client, is covered by that lawyer's duty of professional secrecy. Therefore, the content of such a conversation may 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 that 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 a client's professional email address, which may, from a technical point of view, be accessed by their 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 that 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 pursuant to Civil Procedure Rule 31 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 operate in the Business and Property Courts under Practice Direction 57AD ("**PD 57AD**"). PD 57AD was introduced to promote a culture change and a move away from standard disclosure, focusing instead on 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 either case, the Civil Procedure Rules are clear that disclosure should be restricted to what is necessary and proportionate 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 important factor 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 that permit parties to withhold documents from inspection. Legal professional privilege is one such exception. Under PD 57AD, inspection of disclosed documents is presumed; however, it is still possible to withhold the 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, 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. It is also possible for the court to order that disclosure in the proceedings takes place to a limited group of people under a "confidentiality club". There may be varying levels within this, for example, "lawyers' eyes only", or (in the case of a multiparty dispute) certain parties to the litigation and not others.

## 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,"[3] "fundamental to the administration of justice"[4] and "jealously guarded by the common law."[5] 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." In *Sports Direct International Plc v. The Financial Reporting Council* [2020] EWCA Civ 177, the Court of Appeal confirmed that an email and its attachment need to be considered separately for the purposes of privilege. It is possible for a legally privileged email to contain a non-privileged attachment. Merely attaching a document to a legally privileged email does not make the document privileged. However, the collation of select documents for the purpose of instructing counsel in the context of litigation may be privileged, as the specific selection of documents could give a clue as to the advice being given.

**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.[6] It does not matter whether the advice sought relates to contentious or noncontentious matters, though if the communication focuses on commercial (as opposed to legal) matters, it is unlikely to satisfy the dominant purpose requirement. Legal advice privilege applies 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 giving legal advice as and when appropriate. Legal advice privilege also extends to what should "prudently and sensibly be done in the relevant legal context."[7]

**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

[3] Often quoted Lord Hoffman comments in *R (Morgan Grenfell Ltd.) v. Special Commissioner for Income Tax* [2003] 1 A.C. 563 (paragraph 7).
[4] Lady Justice Gloster in paragraph 39, *Dechert LLP v. Eurasian Natural Resources Corporation Limited* [2016] EWCA Civ 375.
[5] Mr. Justice Burnett in paragraph 31, *R (on the application of Colin McKenzie) v. Director of the Serious Fraud Office* [2016] EWHC 102 (Admin).
[6] *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35.
[7] See the Court of Appeal's judgment in *Balabel v. Air India* [1988] 1 Ch 317.

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.
- 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.

While the concept of conducting litigation is reasonably broad, litigation privilege will not extend to cover otherwise non-privileged communications just because they are relevant to the litigation. In *Noel Anthony Clarke v. Guardian News & Media Ltd* [2025] EWHC 550 (KB), a claim to litigation privilege failed in respect of a transcript of a non-privileged audio call. The fact that the transcript was prepared for use in the litigation did not change the fact that the conversation was not privileged (and, as such, the transcript could not be privileged).

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 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.

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* cases (*Three Rivers No. 5* and *Three Rivers No. 6*) remain important authorities on legal advice privilege and litigation privilege, respectively.[8]

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 judgment concluded that legal advice privilege only applies to communications between the lawyer and those individuals who are authorized to obtain legal advice on an entity's behalf (these individuals make up the "client" for the privilege analysis). 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 communications from employees (not within the "client" group) are different

[8] *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.

and stated that information gathered from an employee (not within the "client" group) 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 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 "client" for the purposes 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. In practice, this is likely 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, 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, it would have been in favor of doing so. One of the Court of Appeal's observations 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 noted the considerable criticism from the judiciary and leading commentators with respect to the *Three Rivers (No. 5)* judgment on this point.[9] 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, refers to 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. In practice, it may be helpful 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.

Given the broader scope of litigation privilege (which extends to communications with third parties), in *Al Sadeq v. Dechert LLP* [2024] EWCA Civ 28, the Court of Appeal confirmed that the narrow definition of client from Three Rivers (No. 5) does not apply to litigation privilege.

## 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.

[9] *Al Sadeq v. Dechert LLP* [2024] EWCA Civ 28 in paragraph 222.

### 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 be done in a relevant legal context,"[10] they will not attract privilege. As a practical matter, it is wise for in-house lawyers to separate communications that concern business or administration from communications that are providing legal advice. Additionally, in-house lawyers who work on cross-border matters/advise their clients in other jurisdictions should ensure they are aware of the position in those other jurisdictions.

### 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 providing legal advice to the internal client. Communications with lawyers that relate to business or administration with no relevant legal context will not be privileged.

### 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 providing 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 non-legal 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." Therefore, clients continue to face difficulties when it comes to instructing nonlawyer third parties such as accountants - 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 non-legal professionals as it can cover communications with third parties, such as a client's communications 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?

#### Dissemination of privileged communications within the client company

As set out in section 2, legal advice privilege contains a narrow definition of "client", such that the majority of employees in a large organization would not fall within it and would instead be classified as

[10] Paragraph 13, *Z v. Z & Ors* [2016] EWHC 3349 (Fam).

third parties. However, it is well-established that legal advice privilege covers the client's own written record of advice and also any communication passing on, considering or applying that advice internally as confirmed in: *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd ("The Good Luck")* [1991] 2 Lloyd's Rep. 191. This was described as an "uncontroversial proposition" in *Financial Services Compensation Scheme Ltd v. Abbey National Treasury Services Plc* [2007] EWHC 2868 (Ch). This means that privileged advice can be disseminated within an organization without it losing privilege, though best practice would be to ensure that the dissemination is on a "need to know" basis.

More recently, the Court of Appeal acknowledged in Civil Aviation Authority v. R Jet2.com Ltd [2020] EWCA Civ 35 that:

> "legal advice is not given for hypothetical purposes, but to be considered and (insofar as accepted) applied by the client. It is therefore well-established that it covers not only a document from the lawyer containing advice and the client's own written record of advice (whether given in writing or orally), but also any communication (again, whether written or oral) passing on, considering or applying that advice internally.

However, a distinction can be drawn between the circulation within a company of advice received from lawyers and the recommendations made by officers of the company as to the action to be taken, having regard to that advice. The recommendations are corporate actions - and not privileged - whether they follow the advice or disregard it.

**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 more broadly, 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 privilege can be waived 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" that 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 the following:

> The fact that the carve outs recognise 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 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. This is the case whether a limited waiver is implied, or whether it is express (and set out in a written agreement or exchange of correspondence).[11] An express limited waiver is preferable to avoid argument, but the written element is not required for the protection of limited waiver to apply.

[11] See, for example, *Belhaj and another v. Director of Public Prosecutions and others* [2018] EWHC 513 (Admin).

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.

**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; codefendants; 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. Common interest privilege is not a privilege in its own right, but applies to already-privileged material, where the parties share a common interest.

## In what circumstances can a document lose privilege protection?

**Deliberate 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. In so doing, confidentiality is lost, and unless any restrictions are agreed in advance (such as limited waiver, discussed above), privilege will also be lost. There are various strategic reasons why a party may choose to do this.

**Inadvertent disclosure**

Where a privileged document is included in a party's disclosure it cannot be assumed that the production for inspection of that document must have been inadvertent. The test is whether or not there has been an "obvious mistake". 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 (*Eurasian Natural Resources Company v. Dechert 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 making the privileged document available for inspection was an obvious mistake and there are no other circumstances that would make it unjust or inequitable to grant relief. The court is likely to hold a mistake 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 has been made. Conversely, the court may give the receiving party permission to rely on the documents that were said to be disclosed inadvertently if the mistake was not obvious to the reasonable solicitor as confirmed by: *The New Lottery Company and another v. The Gambling Commission* [2025] EWHC 1058 (TCC).

Furthermore, English solicitors' professional rules require them to be alert to mistaken disclosures. In circumstances where they are (or should be) on notice that the disclosure was a mistake, they must bring this to the other side's attention for their confirmation.

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

**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. The leading case in this area remains *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 if there is a reliance on that privileged material in relation to an issue in the case. Current case law has adopted a distinction between a "mere reference" to and "reliance" on the privileged item; this is very fact-specific. "Reliance" on will likely constitute a 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 a 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.

Interestingly, in *Suppipat v. Siam Commercial Bank Public Company Ltd* [2022] EWHC 381 (Comm), the High Court had to consider whether copies of documents lawfully obtained from a third party in Thailand could be deployed in English proceedings where, as a matter of English law, those documents were privileged. It held that the documents could not be used. Just because the documents had been obtained lawfully did not necessarily mean they could be used in litigation in England, particularly in circumstances where they were obtained by a third party rather than the party entitled to assert the privilege and without notice to that party.

A related issue is that of collateral waiver, where a party chooses to waive privilege over a document that it considers helpful to its case. This could result in the court finding that privilege is consequently waived over a wider category of related documents that form part of the same issue or "transaction," so as to avoid cherry-picking material that could lead to an incomplete picture. In *Gorbachev v. Guriev* [2024] EWHC 622 (Comm), the claimant waived privilege over a chronology of events prepared several years earlier, attempting to show that his account of events had remained consistent. The court held that he also had to disclose a later version of the chronology, along with documents that contained, recorded or otherwise evidenced the instructions he gave to his legal team regarding the contents of the original chronology and its updated version. The judge held that disclosing the earlier draft without the later version risked creating a misleading impression.

# 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, litigation privilege is "essentially a creature of adversarial proceedings"[12] 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

[12] 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).

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 sole or 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 when Eurasian Natural Resources Corporation (ENRC) had instigated its own investigation and certainly by the time the Serious Fraud Office (SFO) had written a letter urging ENRC to carefully consider 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 first instance judge's decision, there is no general principle that litigation privilege cannot apply 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 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.

In relation to legal advice privilege and investigations, the recent Court of Appeal case of *Al Sadeq v. Dechert LLP* [2024] EWCA Civ 28 confirms that, where lawyers are engaged for their legal expertise and conduct an investigation in a legal context, documents created by them for the dominant purpose of their investigatory work will be covered by legal advice privilege. The judge said the law firm's work extended "not only to advice on black letter law and its application to particular facts, but also to the practical aspects of legal proceedings and preparations for legal proceedings." However, any documents created as part of the lawyers' purely investigative role (i.e., not requiring legal skills or analysis) were not privileged.

## 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.

A good example of this is 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 may be privileged if they would betray the trend of advice that 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 lawyer's impressions 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 as 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 elements of litigation privilege are present, 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 that 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".

## 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).

In *Sports Direct International Plc v. The Financial Reporting Council*, the Court of Appeal 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 that 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The use of AI and generative AI tools does not change the English legal position in respect of confidentiality, privilege or professional obligations. However, using AI and generative AI tools impacts the analysis of these principles and raises novel issues to be considered, such as how to manage the increased risk of loss of confidentiality and/or privilege due to a significant increase in the volume (and speed of creation) of written material. Use of public or open-source generative AI tools creates greater risks, as any input to such a tool will lose confidentiality, which is a key cornerstone of legal privilege. Use of a closed or proprietary generative AI tool means that access to the tool (and its inputs/outputs) is limited to that organization, which limits confidentiality concerns but does not alleviate the risk of a loss of privilege.

As such, inputs by lawyers into generative AI tools will generally not be covered by privilege under English law, as there is no communication with a lawyer in this scenario. While there are some exceptions to this, including lawyers' working papers, the law in this area is not well settled.

The analysis of outputs by generative AI models leads to the same conclusion, as a generative AI tool is not a lawyer, and therefore work product generated by such a tool cannot be privileged.

## 08 - 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 Privilege Handbook. Certain key cases are highlighted below.

- *Krishna Holdco Ltd v. Gowrie Holdings Ltd* [2025] EWHC 341 (Ch): The High Court upheld a claim to litigation privilege over a valuation report that had been prepared for the potential sale of a company's trading subsidiaries to a shareholder of the company. In doing so, the court looked beyond the immediate transaction and considered why the sale was happening. It was satisfied that the sale did not arise in the course of ordinary commercial negotiations, but rather as a response to a strategic threat that was part of the wider dispute being litigated between the parties. In these circumstances, the dominant purpose of the valuation report was identified as the conduct of litigation and, therefore, the relevant test was satisfied.
- *Al Sadeq v. Dechert LLP* [2024] EWCA Civ 28: Another aspect of this decision (discussed earlier in this chapter) relates to litigation privilege. The court held that litigation privilege can apply where the person claiming the privilege is a non-party to the (actual or contemplated) litigation, i.e., a third party, provided the dominant purpose test is satisfied. However, the question of whether the third party has to have a "sufficient interest" in the (actual or contemplated) proceedings (over and above satisfying the dominant purpose test) was left open because, if it was a requirement, it was plainly satisfied on the facts of this case.
- *Aabar* [2024] EWHC 3046 (Comm): This important decision held that the so-called "Shareholder Rule" is unjustifiable and should no longer be applied in English law. The rule was considered to be a principle of English law that a company could not assert privilege against its own registered shareholders (being shareholders at the time the document was created), unless the relevant documents came into existence for the dominant purpose of actual or threatened proceedings between the company and its shareholders. Although this decision (that the rule does not apply) is subject to an appeal, which is due to be heard in January 2026, this may now fall away due to the Privy Council decision of *Jardine Strategic Limited v. Oasis Investments II Master Fund Ltd and others No 2 (Bermuda)* [2025] UKPC 34. The Lord and Lady Justices confirmed the Shareholder Rule should be abolished, both in Bermuda and in England and Wales.
- *E20 Stadium, London Legacy Development Corp v. A&O* [2022] EWHC 1808 (Comm): This decision considered limited and collateral waiver in the context of a disclosure exercise. Certain documents were disclosed voluntarily in accordance with specific disclosure requests (under the English "Model C" category of disclosure, which involves agreed search terms), and the defendant sought to argue that this amounted to a collateral waiver of further documents. The court disagreed and made the following points: First, it is for the court to determine, objectively, what amounts to the "transaction" in order to determine the scope of the waiver; second, the defendant was seeking to extend the transaction in a way that was not contemplated when the Model C requests were agreed; and third, the defendant had not established any unfairness in relation to the voluntary disclosure. As such, there was no collateral waiver.

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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 the production of documents is thus relatively limited.

In the context of arbitration, under a decree issued on 13 January 2011 amending arbitration law, the arbitral tribunal's authority has been broadened to include the power 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 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 proceeding 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.

On 29 January 2025, Decree No. 2025-77, enacted under articles 40 and 41 of Law 2023-1059, introduced some changes to the professional ethics and disciplinary rules applicable to lawyers. Its article 2 notably extends the possibility for lawyers to disclose privileged materials when necessary for their defense within amicable resolution procedures, including out-of-court settlements.

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," communications 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 members of 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 counsels 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.

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 is subject to recommendations from the Paris Bar Association on 10 December 2019 (Appendix XXIV Vademecum for lawyers conducting internal investigations).

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 their investigation nor provide any documents collected in the course of such investigation to third parties.

However, the practical guide published in March 2023 by the French Anti-Corruption Agency and the National Financial Prosecutor's Office takes a more restrictive view, stating that the final report drafted at the end of an internal investigation is not protected by legal privilege.

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 they have 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.

In its rulings of 11 March 2025, the French Supreme Court clarified that, when a lawyer is suspected of having participated in an offense, it is possible to seize documents from their office or home, even if those documents relate to the rights of the defense and would normally be protected by professional secrecy. However, the existence of plausible grounds for suspecting the lawyer must be clearly stated in the search warrant. If this information is not mentioned, the President of the Bar is deprived of the necessary elements to fulfil their mission of protecting defense rights during the search.

The Court confirmed that, when the lawyer is not under suspicion, no document relating to the exercise of defense rights and covered by professional secrecy may be seized.

The Court also addressed the issue of whether documents protected by professional secrecy but not connected to defense rights — such as legal advice — can be seized. It ruled that such documents are indeed seizable, and it rejected the argument that European human rights provisions provide broader protection in this context. The Court reaffirmed that only documents directly linked to the defense of a client in a legal procedure are protected. This decision is in line with an earlier decision rendered by the French Supreme Court on 24 September 2024 in which the Court used the distinction between documents directly linked to the defense of a client in a legal procedure and legal advice to exclude the latter from the scope of protection of professional secrecy.

Therefore, the Court, drew a clear line between defense-related documents, which cannot be seized under any circumstances, and other documents covered by professional secrecy.

The restriction on the scope of secrecy is a matter of debate and does not align with EU law. Indeed, in a recent decision dated 26 September 2024 (No. C-432/23), the Court of Justice of the European Union considered that legal advice given by a lawyer falls within the scope of the enhanced protection afforded by EU law to exchanges between lawyers and their clients and therefore is protected by professional secrecy.

In another ruling, the Court dealt with whether judges supervising the search could assess the proportionality of the search. It concluded that this evaluation does not fall within the scope of the judge or the Bar President overseeing the search. Instead, such control is exercised later by the investigative chamber if a motion is filed to annul procedural acts. This remains true even when the seizure of documents is being challenged.

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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The use of generative AI tools by lawyers in France must be examined in light of both national rules governing professional secrecy and the emerging European regulatory framework applicable to AI systems. French lawyers are bound by the Règlement Intérieur National (RIN) de la profession d'avocat which impose a strict duty of professional secrecy and independence. These obligations apply to all information and media formats, including digital and immaterial tools, and extend to any activity performed in the context of legal advice or defense. In parallel, the Regulation (EU) 2024/1685 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (AI Act) introduces a binding framework across the EU, classifying certain AI systems used in legal services. Together, these national and European rules form the legal foundation for assessing the admissibility of generative AI use in legal practice.

When a lawyer inputs information into a generative AI tool, professional secrecy will only apply if the platform used meets the following criteria:

- The platform preserves full confidentiality of the data (no reuse, training or third-party access).
- The platform is operated exclusively under the control of the lawyer or the law firm.
- The platform is used for a legal purpose falling within the defense or advisory mission.

Most generative AI tools publicly accessible today — particularly those hosted in the cloud or governed by general terms of use — do not meet these criteria. They often store, analyze or reuse the content submitted. As a result, the data entered by the lawyer is considered to have exited the privileged framework, and the use of the tool may constitute a breach of secrecy.

Even anonymized or abstracted input may present risks if the underlying platform cannot guarantee that no metadata or prompt content is stored or shared.

Moreover, the lawyer must remain in control of their legal reasoning. Where the content is produced by a third-party tool, based on unknown or untraceable parameters, it is not regarded as the product of the lawyer's intellectual activity. In that case, the protection of professional secrecy is compromised.

Therefore, under the current legal framework in France, professional secrecy does not extend to the use of generative AI tools — either for inputs or outputs — unless the following strict conditions are met:

- The tool is exclusively controlled by the lawyer or firm.
- Confidentiality is both legally and technically preserved.
- The output reflects the lawyer's own reasoning and not the autonomous processing of the AI system.

In the absence of these guarantees, the use of such tools falls outside the protective perimeter of professional secrecy. As a result, lawyers are expected to exercise extreme caution and, in most practical cases, avoid using public or external AI platforms for any task involving client-related content.

In July 2024, the National Council of French Bars (Conseil national des barreaux (CNB)) issued its first practical guide on generative AI, outlining ethical and secure use of these tools by lawyers. This was followed by a more comprehensive two-volume update in September 2024: one on AI fundamentals and legal use cases, and another on evaluating AI vendors based on confidentiality,

compliance and security. In June 2025, the CNB released a dedicated "AI Tools Selection Guide," reflecting ongoing professional and institutional feedback and reaffirming its commitment to responsible AI adoption in legal practice.

## 08 - Recent issues

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

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 toward 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 toward 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 in-house counsel's legal privilege was planned to be established by law in 2016, and Law No. 2021-1729 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.

On 30 April 2024, the French National Assembly adopted a bill granting confidentiality to in-house counsel consultations in civil, commercial and administrative matters. The proposed confidentiality would not extend to criminal or tax matters. However, as of June 2025, this bill has not been promulgated yet.

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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.

Furthermore, 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 Civil Procedure Code and the Legal Services 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. As set out above, these documents enjoy greater protection in order to secure the right to an effective defense.

## 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 but in the context of an internal investigation). 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, US), could not invoke this particular constitutional right that only applies to German citizens and entities.

The international law firm and some of the lawyers employed there then raised complaints against Germany before the European Court of Human Rights (ECHR) (1022/19 and 1125/19). They complained that the search of the law firm's Munich office, as well as the securing of documents and data which the lawyers had compiled or created during the internal investigation, had violated their rights under article 8 of the European Convention on Human Rights (Right to respect for private and family life). The ECHR considered the complaints to be manifestly ill-founded. It held that the search for and securing of documents in the present case did not concern documents and data protected by legal professional privilege in the criminal investigation at issue. Rather, it only concerned material regarding a third party obtained by the applicants in the exercise of their profession on behalf of a client not targeted in the criminal investigation and some of which the client had, in any case, permitted to be shared with the authorities. In addition, the criminal investigation proceedings in the US, in which context the applicants had been mandated, had already been concluded at the time of the search in March 2017. In these circumstances, according to the ECHR, the national authorities had a wider margin of appreciation in the context of the assessment of the necessity of the impugned measures.

## 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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

In December 2024, the German Federal Bar Association issued guidelines concerning the use of generative AI by lawyers. The guidelines point to the fact that the use of nonconfidential AI tools entails the risk that lawyers violate their obligation to maintain professional secrecy. When using generative AI tools, lawyers have to ensure that they do not divulge client information. In addition, inputting information into generative AI tools would most likely be regarded as providing the respective information to a third party so that privilege no longer applies (see section 4 above).

The guidelines of the Bar Association also state that, due to their professional duties, the lawyer is obliged to carefully review the outputs of generative AI tools. As a result of the review, the outputs are protected in the same way as legal advice provided by a lawyer without the assistance of AI.

# 08 - Recent issues

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

A constitutional complaint (1 BvR 398/24) is currently pending before the German Federal Constitutional Court in which a lawyer is challenging the order to search their office premises. The search was ordered and carried out as part of a preliminary investigation conducted against the lawyer on the basis of a criminal complaint filed by a former client of the lawyer.

The German Federal Bar Association has published a statement in which it calls for stricter requirements for law firm searches to protect attorney-client privilege. The Bar Association points out that the search of law firm premises regularly entails the risk that protected data of non-accused persons, such as clients, is disclosed to the investigating authorities, which the clients may believe to be safe in the sphere of the professional secrecy holder. This would affect the fundamental rights of clients. The Bar Association emphasizes that the protection of the relationship of trust between lawyer and client is also in the public interest in the effective and orderly administration of justice. These interests, according to the Bar Association, require special consideration when examining the appropriateness of an investigative measure. Therefore, the Bar Association urges the Federal Constitutional Court to specify the requirements for searches of persons subject to professional secrecy and to implement high thresholds for such a search to be permissible.

In the previous edition of this guide, we reported on a draft law on corporate criminal law, 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. The current coalition agreement of the new German Government does not contain any indication of plans or initiatives for enacting a new law relating to this topic.

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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.

Similarly, upon finding infringement of copyright, certain industrial property rights or know-how, the infringing party may be obliged to provide information on parties taking part in the manufacture of and trade in goods or performance of services affected by the infringement, as well as on business relationships established for the use of the infringer.

## 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

Act LXXVIII of 2017 on the Activities of Attorneys ("**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 not 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 of the 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, communications with European lawyers are also covered by legal privilege.

Attorneys registered outside the EEA can only provide legal advice in Hungary on a permanent basis if they are admitted to the lawyer's bar association as a foreign legal adviser (külföldi jogi tanácsadó). Although a foreign legal adviser may only provide legal advice with respect to their domestic law or international law, the requirement for a cooperation agreement with a Hungarian attorney makes it likely that such communications are also privileged.

Additionally, communications with foreign attorneys not registered in Hungary may fall under legal privilege in accordance with 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
- Operators of whistleblowing platforms

However, legal privilege is explicitly limited to communications 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 only exists if the privileged document is in the possession of the client or the attorney. Legal privilege still applies if the client or the attorney was illegally deprived of the possession of such documents,

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 of the 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 falling 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

As a general rule, legal privilege only applies to documents or information in the possession of either the lawyer or the client. Therefore, if a privileged document is uploaded or privileged data is entered into an AI tool operated by a third party, the document or information in the possession of the AI tool operator is no longer privileged. If the AI tool is operated within the law firm, any privileged documents

or data uploaded into the tool remain in the possession of the law firm and therefore remain privileged.

A lawyer may share documents or data falling within the scope of professional secrecy with data storage, archiving, safeguarding and processing service providers, who will also be covered by the same professional secrecy obligations. However, we are of the view that a third-party operator of an AI tool cannot be considered an operator and, therefore, will not be covered by this rule. As a result, a lawyer uploading documents or information covered by professional secrecy to an AI tool operated by a third party may breach its professional secrecy obligations, unless this is approved by the respective client. Furthermore, if the third-party operator of an AI tool does not indeed qualify as a data storage, archiving, safeguarding and processing service provider, they will not be covered by professional secrecy rules (but may still be subject to business secrecy and/or private secrecy rules).

Outputs from AI tools may be covered by professional secrecy to the extent they replicate data or information falling within the scope of professional secrecy. Elements purely generated by AI are unlikely to qualify as facts, information or data, and are therefore unlikely to be covered by professional secrecy.

However, if the output from the AI tool is created in the course of communications between a client and their attorney in connection with the client's defense in public authority proceedings, they may be subject to legal privilege, as legal privilege may cover not only facts, information and data, but also legal assessments, analyses and advice.

## 08 - 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 LXXVIII of 2017 on the Activities of Attorneys ("**Act on Activities of Attorneys**") and became effective on 1 January 2018. The Act on Activities of Attorneys had been introduced as part of a judicial system reform package that included (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. Court practice reflecting this reform is still shaping how the extension of legal privilege to communications with registered in-house counsel will be applied in practice, among other things.

In addition, as of 1 January 2020, the Act on Activities of Attorneys was amended 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 authority's request and after hearing the client. 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 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. The document will not be protected if such a statement is not made. If the statement is made, the document will be sorted out by an investigator in the client's presence, and the document will be handed over to the client. If the investigator contests the client's statement, the Budapest Metropolitan Court will render a decision in a noncontentious administrative procedure.

Effective from 24 July 2023, professional secrecy rules were slightly amended in view of the introduction of the whistleblowing law.

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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 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 lawyer 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 lawyer'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 lawyer, other than communications from external lawyers, may have to be handed over to judicial or regulatory authorities.

In-house lawyer, 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 lawyer 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. 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 lawyer and external lawyer, provided that (i) the communications include certain information (i.e., the case number, external lawyer'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 lawyer and external lawyer if a valid power-of-attorney has been granted to the external lawyer 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 in Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission. However, in this case the European Court of Justice 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, documents may generally be subject to seizure. However, specific protections apply to documents held by attorneys, particularly when such documents are connected to the right of defense. In particular, if an attorney has been formally appointed as defense lawyer in ongoing criminal proceedings, any material held by them and related to the defense strategy benefits from legal privilege and is protected under Italian law. This protection also applies to materials collected through formal defensive investigations pursuant to Article 391-*nonies* of the Italian Code of Criminal Procedure, when the attorney has been granted a special power of attorney to carry out such activities.

When a confidential document – even if physically held by the client – has been prepared by the defense attorney (or an expert appointed by the attorney) in connection with ongoing or anticipated criminal proceedings, it may be protected by legal privilege as part of the right of defense. This includes documents drafted as part of formal defensive investigations under Article 391-*nonies* of the Italian Code of Criminal Procedure, or in preparation for litigation. If the public prosecutor attempts to seize such a document, the attorney may object and later challenge its admissibility, arguing that it constitutes unlawfully obtained evidence gathered in breach of the defendant's right to a fair trial. 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 permitted 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 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?

Under Italian law, there is no specific statutory provision expressly addressing the privilege status of interview notes. However, according to established principles and prevailing case law, notes of interviews with employees or third parties may be protected by legal privilege when they are connected to the right of defense. This includes documents prepared by an external lawyer formally appointed as defense lawyer, either in the context of ongoing criminal proceedings or as part of early-stage defense efforts, including formal defensive investigations conducted pursuant to article 391-*nonies* of the Italian Code of Criminal Procedure.

Conversely, documents prepared by in-house lawyer are generally not protected by legal privilege in criminal matters, as Italian law prohibits in-house lawyers from acting as defense lawyer in criminal

proceedings. As such, interview notes prepared internally by company lawyers cannot benefit from the same protections.

Some commentators have argued that privilege may attach to interview notes even when certain formalities (such as the case number) are missing, provided that the connection to the defense strategy is clear and demonstrable.

## 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The sudden spread of AI systems in the recent global technological and commercial landscape has raised new challenges and questions concerning, among other issues, the protection of personal data. In the legal field, attorneys are using generative AI, which can create new content based on user prompts.

EU Regulation 1689/2024, better known as the AI Act or European Regulation on Artificial Intelligence, entered into force in August 2024 and introduced a regulatory framework that, together with the GDPR, redefines the legal requirements for the use of AI in Europe. While the regulation is directly applicable, several of its provisions are not self-executing. As such, they lack direct effect and require the legislative intervention of member states to be applied before national courts.

On 20 March 2025, the Senate of the Republic approved draft Law No. 1146/2024, concerning "Provisions and delegation of powers to the Government on artificial intelligence," which not only covers designating the competent authorities for notification and market surveillance for AI systems (respectively, Agenzia per l'Italia digitale and Agenzia per la cybersicurezza nazionale), but also intervenes in a number of sectors (including healthcare, employment, intellectual professions, public administration, justice and national security). The draft law will now be reviewed by the Chamber of Deputies for its final approval.

The new legislation will significantly strengthen the guarantees provided by the GDPR. In particular, the new law will provide guidelines for the government to balance opportunities and risks associated with the use of AI systems, on the one hand promoting the use of generative AI, and on the other hand offering solutions for managing the related risks.

Article 13 of the draft law, titled "Provisions on Intellectual Professions," specifically regulates the complex issue of the use of AI in the context of intellectual professions. On this point, the provision states that:

The use of artificial intelligence systems in intellectual professions is solely intended for instrumental and support activities related to the professional activity, with the predominance of the intellectual work that constitutes the subject of the service.

Therefore, for lawyers, the use of AI would be permitted exclusively for instrumental and support tasks, without undermining the central role of critical judgment and discretion that defines the professional's function. Thus, AI can assist the lawyers' work but cannot replace it. The lawyers must always verify the results produced by AI, as they remain responsible for their professional decisions.

In this context, it becomes essential for lawyers to inform the client in advance about the use of AI. Article 13, paragraph 2 of the draft law provides that information regarding the AI systems used by the professional must be communicated to the client in clear, simple and comprehensive language. Finally, it will be crucial for professionals to pay close attention to client security protocols, which must be adequate to address the implications and risks associated with the use of AI, particularly regarding the confidentiality of data processed.

In the absence of specific national rules regarding the protection of professional secrecy in relation to generative AI tools, reference should be made to the fundamental principles of the legal system. Pursuant to article 13 of the Professional Code of Conduct, lawyers are bound by professional secrecy and confidentiality regarding facts and circumstances learned in the course of their professional activities. For this reason, lawyers must ensure that the generative AI systems they use follow adequate security measures and comply with the General Data Protection Regulation (GDPR). This is because generative AI does not merely process the data in its possession to respond, but also acquires the data that the user enters via prompts to improve itself.

## 08 - 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 it includes any and all information provided by a client in any form, whether written (electronic and physical documents, exhibits, letters, emails, photographs, etc.) or oral (telephone conversations, tapes, 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.[13] A Luxembourg Attorney may only disclose confidential client information 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.

[13] 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 labeled as "official" or are to be considered 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 Attorneys and foreign lawyers are only privileged if they are specially marked as such and comply with the rules applicable to each of the jurisdictions concerned (see the Code of Conduct for European Lawyers as an example — 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 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 does not extend to communications between in-house counsel and employees, officers, or directors of the 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 Luxembourg Attorneys. 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 a Luxembourg Attorney and a lawyer from a different European bar association, the rule is that these shall be privileged if the Luxembourg Attorney has

sought the foreign lawyer's prior consent to be bound by the professional secrecy arising 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 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,[14] 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.[15] 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 are obliged 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

[14] Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers.
[15] 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. However, such NDA shall not prevent confidential documents from being seized by public or criminal authorities when it is permitted by law.

It should be noted that 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 their Luxembourg Attorneys' prior authorization.

## 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, Luxembourg Attorneys 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 a Luxembourg Attorney acting as an 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 an 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 their 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 a 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There are currently no official guidelines from the Luxembourg Bar regarding the use of generative AI tools by lawyers, particularly in relation to professional secrecy. However, the National Commission for Data Protection (CNPD) — Luxembourg's independent authority responsible for ensuring compliance with data protection laws — issued general recommendations in February 2025 that apply to lawyers. These include avoiding the input of personal or confidential data into online AI tools, especially those not compliant with European standards such as the General Data Protection Regulation (GDPR). The CNPD also advises against using non-European AI tools, encourages the use of GDPR-compliant systems and stresses the importance of staff awareness and data security.

In the absence of specific national rules, Luxembourg Attorneys must rely on the general principles of professional secrecy under Luxembourg law, apply the CNPD's recommendations as a minimum standard and draw on European and international guidance. Among these, the Union Internationale des Avocats (UIA) directives are particularly relevant. According to the UIA, lawyers must preserve confidentiality when using AI systems by reviewing the terms of use, choosing tools that do not retain or misuse input data, anonymizing identifiable information and avoiding the disclosure of sensitive content. Lawyers must also maintain transparent communication with clients about their use of AI, ensure that case strategy and execution remain under their own professional judgment, and must obtain client consent if their data is to be used for AI training.

Therefore, while professional secrecy is protected under Luxembourg law, this protection can be compromised if lawyers use insecure or noncompliant AI tools. In the current legal landscape, lawyers must adopt a cautious and compliant approach, guided by GDPR principles, CNPD recommendations and international best practices.

# 08 - Recent issues

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

On 26 September 2024, the Court of Justice of the European Union (ECJ) ruled on the issue of attorney-client privilege.

The dispute was between F. SCS and the *Ordre des avocats du barreau de Luxembourg*, and the *Administration des Contributions Directes* (the Luxembourg Inland Revenue the **LTA**).

The LTA received a request for information, based on directive 2011/16, from the Spanish tax authorities. It issued an injunction requiring F. to provide all available documents and information concerning the services it provided to K., a company incorporated under Spanish law.

F. refused, as it was unable to provide any information concerning the client due to professional secrecy. The tax authorities fined F. for failing to comply with the injunction.

The Administrative Court of Luxembourg decided to stay proceedings and to refer a number of questions to the ECJ for a preliminary ruling.

**Preliminary questions**

The first question concerns the applicability of article 7 of the Charter of Fundamental Rights of the European Union ("**Charter**") to legal advice given by a lawyer in company law matters. Does a decision requiring a lawyer to provide all documentation and information relating to their relationship with their client, in connection with such a consultation, constitute an interference with the right to respect for communications between a lawyer and their client, guaranteed by the said article?

The second question concerns the compatibility of an injunction such as that addressed to F. with article 7 and article 52(1) of the Charter.

**The ECJ's position**

**As to the first question referred for a preliminary ruling**

The specific protection afforded to lawyers' professional secrecy by article 7 of the Charter and article 8(1) of the ECHR is justified by the fact that lawyers are entrusted with a fundamental task in a democratic society, namely the defense of litigants. This fundamental task includes the requirement that all persons subject to trial must have the possibility of speaking freely to their lawyer, whose very profession essentially encompasses the task of providing independent legal advice to all those who need it, and the lawyer's duty of loyalty to their client.

It follows that a lawyer's legal advice, whatever area of law it concerns, enjoys the enhanced protection guaranteed by section 7 of the Charter to communications between a lawyer and their client. Therefore, an injunction such as that at issue in the main proceedings constitutes an interference with the right to respect for communications between a lawyer and their client guaranteed by that article.

**As to the second question**

The enhanced protection of communications between a lawyer and their client is applicable irrespective of the area of law in which advice or representation is provided to the client.

Article 7 of the Charter guarantees the secrecy of legal advice given by a lawyer as to its existence and content. Persons who consult a lawyer can reasonably expect their communications to remain private and confidential and, apart from in exceptional situations, trust that their lawyer will not

disclose to anyone, without their agreement, that they have consulted them. The rights enshrined in section 7 of the Charter must be considered in relation to their function in society. The Charter admits limitations to exercising these rights, provided that these limitations respect the essential content of the said rights.

Luxembourg law prohibits lawyers from refusing access to information entrusted to them in exercising their profession, insofar as it concerns facts of which they have become aware in the course of providing advice or representation in tax matters, and except in the case of questions to which the answer would expose their clients to the risk of criminal prosecution.

The consequence of such a prohibition is that none of the content of exchanges between a lawyer and their client in tax matters can be kept secret from the tax authorities. It renders the protection guaranteed by article 7 devoid of substance.

The injunction at issue concerns an entire file that does not relate to tax matters. It broadens the scope of the infringement of the substance of the right protected by section 7 of the Charter.

The ECJ ruled that such national legislation, and its application in the present case by means of the contested injunction, infringed the essential content of the right guaranteed by section 7 of the Charter, due to the extent of the breach of attorney-client privilege that the LTA authorized in respect of communications between the attorney and their client.

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# 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 sufficient 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 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 disclosure if they have a compelling reason to do so; the confidentiality of information or legal privilege 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 strict 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 or disclose 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 - 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), for which a template is available via the Netherlands Bar Association website. Non-Dutch in-house lawyers should also be registered at their local bar, be adhered to professional rules and 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 the context of EU competition law, in-house lawyers cannot rely on the right of legal professional privilege because it is assumed that they lack sufficient independence in relation to their employers.

### 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 their home jurisdiction as well.

In 2022, the Dutch Supreme Court clarified 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.

As mentioned above, Dutch in-house lawyers registered at the Netherlands bar must demonstrate their independence by signing the professional statute for which a template is available via the Netherlands Bar Association website. Simply put, foreign in-house lawyers, whether visiting or not, should also 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 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?

Not in principle, but an exception exists for nonlegal professionals who are instructed to assist an attorney under that attorney's right of legal privilege. Nonlegal professionals, e.g., staff and secretaries, who are employed by a lawyer or nonlegal professionals who provide services or information for the benefit of a lawyer, e.g., accountants and third-party experts, enjoy a so-called '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. Hence, it is customary for the nonlegal professional to consult with the lawyer in the case of disclosure requests and use their derivative right of legal professional privilege in the same manner as the lawyer.

## 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.

## 05 - Investigations

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

No, the right to legal privilege is 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 are part of a lawyer's instruction to provide legal advice and 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is no Dutch case law and little legal literature that covers this topic, so whether information entered into generative AI tools is protected by privilege remains somewhat of an uncharted territory. In general, the right to legal professional privilege is the personal right of the lawyer, meaning that if the lawyer takes the position that information is covered by their right to legal privilege, this position must be respected, unless this position is evidently incorrect. If privileged information becomes publicly available, however (e.g., through the use of generative AI tools), the confidential nature of that information is lost, meaning the lawyer could lose their right to invoke the right of legal privilege with respect to that information. Therefore, and considering the fact that lawyers are bound by an obligation of secrecy, lawyers should be very careful when using generative AI tools.

## 08 - Recent issues

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

In 2025, the Dutch Supreme Court ruled that when a lawyer submits privileged documents and exhibits in tax proceedings, this does not result in a waiver of legal privilege in subsequent criminal proceedings concerning those same materials. However, submitting such documents in a tax case may lead to the judge referencing or quoting from them in the court's judgment. Once the judgment is published, it is possible that the privileged content becomes publicly accessible. In such cases, the confidential nature of the information is lost, and the lawyer can no longer invoke legal privilege over it. The Supreme Court emphasized that the fact certain information was initially privileged does not restrict the court's discretion in deciding what to include in its judgment.

In addition to the above, several other judgments (including from the Supreme Court) were rendered regarding the scope of legal privilege in the context of criminal investigations conducted by the Dutch Public Prosecution Service (Openbaar Ministerie). For example, the Supreme Court clarified various

guidelines that the Prosecution Service must follow when, in the context of a criminal investigation against an individual or legal entity, the Prosecution Service has requested or seized documents or information, particularly in situations where it is unclear in advance whether, and to what extent, the requested or disclosed information is protected by legal privilege. 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.[16] 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.

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[16] HR 24 May 2022, ECLI:NL:HR:2022:760.

# Poland

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Under Polish law, there are no disclosure or discovery procedures similar to those found in common law jurisdictions In general, each party is obliged to provide evidence that supports its claims on its own. Nevertheless, this rule is subject to exceptions.

In civil proceedings, the court may order a party to the proceedings or a third party, ex officio or upon a party's request, to present a document that constitutes proof of a fact relevant for the outcome of a case, unless that document contains classified information. The requested party may also refuse to disclose the document if it has the right to refuse to testify as a witness as to the facts covered by the requested document (i.e., by disclosing the requested document, the requested party or its relative would incur criminal responsibility, disgrace or serious and immediate damage to property, or it would result in a violation of professional secrecy). Additionally, the requested party may refuse to comply with the order if it holds a document on behalf of a third party that could object to the submission of such document due to the reasons specified above. However, a party cannot refuse to submit a document if the holder of that document or a third party is obliged to disclose it with respect to at least one of the parties, or if a document was issued in the interest of the party requesting that evidence be taken.

Under the Polish Code of Civil Procedure, the court may order to secure specific evidence either upon request before instituting proceedings or ex officio during the course of proceedings, when there is a risk that obtaining evidence may become impossible or excessively difficult, or when it is necessary to determine the current state of affairs for other reasons. The decision to secure evidence may impose an obligation to preserve or submit documents relevant for the outcome of the case.

In criminal proceedings, the general rule states that the accused is under no obligation to prove their innocence or submit evidence incriminating them. Notwithstanding the above, the court, prosecutor and, in urgent cases, the police or another authorized body may order any person to surrender any objects that may serve as evidence, including documents. Additionally, a public prosecutor, the police or another authority may conduct a search and seize the documents found during the search if they are relevant.

## 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 Poland, there are two main professions whose primary function is to provide legal assistance: advocates and attorneys-at-law. The distinction between these two professions is now practically historic. Both advocates and attorneys-at-law 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 they receive 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 handling a case. The same obligation of confidentiality is provided for by the Act of 6 July 1982 on attorneys-at-law.

Both advocates and attorneys at law 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. This 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. Additionally, the obligation of confidentiality is limited by the rules on tax schemes provided for in the Tax Ordinance Act of 29 August 1997.

Where circumstances indicate that transactions may be in connection with money laundering or terrorist financing activities, advocates, attorneys-at-law 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, attorneys-at-law 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:

- Buying and selling real property or enterprises
- Managing client money, securities or other assets
- Opening or managing accounts
- Organizing contributions necessary for creating, operating or managing companies
- Creating, operating or managing enterprises in other organizational structures

The obligation of confidentiality is also embodied in the Advocate's Code of Ethics and in the Attorney-at-law's Code of Ethics. The Advocate's Code of Ethics and the Attorney-at-law's Code of Ethics expressly stipulate that the obligation of confidentiality is not limited in time. In the case of attorneys-at-law, the code of ethics provides that the obligation of confidentiality continues to apply even after the legal relationship under which the attorney-at-law 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 coworkers, staff and all the people employed by them to observe the duty of professional privilege in the course of their professional activities.
- 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 attorney-at-law 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 Attorney-at-law's Code of Ethics.

# 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.

Under the Attorney-at-law's Code of Ethics, privilege covers all documents created by the attorney-at-law as well as correspondence between the attorney-at-law and the client and persons involved in handling the case — created for purposes related to providing legal assistance.

None of the codes states whether the copies held by the client are also protected. Currently, Poland has not developed solutions that allow to refuse to disclose a document on the grounds that it was produced by lawyers while providing legal assistance or was produced in connection with or for the purpose of litigation (similar to the common law concept of attorney work product).

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

In principle, Polish law does not make any distinction as to the standard of legal privilege applicable to in-house and external lawyers (provided that they hold the title of an advocate or an attorney-at-law; in-house lawyers who do not hold either of those titles cannot rely on attorney-client privilege). Notwithstanding the above, there are views in the case law suggesting that the standard of protection is lower in the case of attorneys-at-law, especially if they work as in-house lawyers under an employment contract. In particular, the Constitutional Tribunal stated in its judgment of 22 November 2004 (case No. SK 64/03) that, since attorneys-at-law were traditionally employed by the companies they advised, they did not handle information requiring as much protection as information pertaining to criminal or family cases handled by advocates. However, the said judgment was rendered before attorneys-at-law were allowed to handle family cases and criminal cases. Currently, the view that legal privilege should be limited with regard to attorneys-at-law serving as in-house lawyers is strongly criticized by the doctrine.

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

Currently, there are no regulations or case law specifically regarding the protection of internal communication between in-house lawyers. Functionally, the internal communications between in-house lawyers should be privileged to ensure the protection is effective. However, as described above, the privilege applicable to in-house lawyers may be considered limited in some circumstances.

## 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 the provision of legal assistance by foreign lawyers in the Republic of Poland, are subject to the statutory obligation of confidentiality and can rely on attorney-client privilege to the same extent as Polish 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?

There are specific provisions that regulate this matter. For example, under the Act 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 leading a case. Persons employed by tax consultants are also subject to this obligation insofar as they carry out professional duties.

Similar rules apply to patent attorneys. Under the Act of 11 April 2001 on patent attorneys, a patent attorney is obliged to keep all information obtained in connection with performing their professional duties confidential. A patent attorney cannot be released from the obligation of professional secrecy with respect to facts learned while providing assistance in matters of industrial property.

The above-described general rules may be limited in specific circumstances. For instance, tax consultant-client privilege and patent attorney-client privilege are limited by the Act of 16 November 2000 on the prevention of money laundering and terrorist financing (described in section 2) or by the precise rules on tax schemes provided in Tax Ordinance Act of 29 August 1997. Another example concerns the possibility of questioning a tax consultant as a witness in criminal, civil or administrative proceedings. As a rule, a tax consultant may not be questioned as a witness with regard to information protected by the tax consultant-client privilege. This principle is subject to limitations set out in specific acts. Analogical rules are set out for patent attorneys and the protection of their privilege.

Restructuring advisers and insolvency practitioners are likewise bound by the duty of professional confidentiality. However, this obligation arises primarily from the nature of their profession and from codes of ethics, rather than directly from statutory law, as is the case with attorneys-at-law, advocates, tax consultants and patent attorneys. Similarly to other legal professionals, restructuring advisers and insolvency practitioners may not be questioned as witnesses with regard to information protected by privilege. In specific situations, the court may waive the obligation 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?

There is no express provision that addresses this issue. As described in section 3, Poland has not developed the doctrine of attorney work product. Therefore, any document given to a third party is generally not protected by the privilege.

## 05 - Investigations

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

In civil and administrative proceedings, under the Code of Civil Procedure and Code of Administrative Procedure, advocates and attorneys-at-law may refuse to give testimony or produce a document requested by a court or public authorities if doing so would expose them to infringing the obligation of confidentiality. If an attorney-at-law or an advocate decides to answer the question even though the information is protected under attorney-client privilege, the evidence from the testimony will be valid, but the attorney-at-law or advocate will face disciplinary liability.

In criminal proceedings, under the Code of Criminal Procedure, advocates and attorneys-at-law may be examined as to facts that are only subject to legal professional privilege when this is absolutely necessary in the interests of justice and the facts cannot be established by using any other measures of inquiry. These premises are interpreted narrowly. The same rule applies to documents that fall within the scope of the protection afforded by legal professional privilege.

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

According to the Advocate's Code of Ethics, 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.

Under the Attorney-at-law's Code of Ethics, privilege covers all documents created by the attorney-at-law as well as correspondence between the attorney-at-law and the client and persons involved in handling the case — created for purposes related to providing legal assistance.

Therefore, if notes of interviews were created by the advocate or attorney-at-law for the purposes of their work, they will be protected by privilege, especially if they are held by the advocate or attorney-at-law. Nevertheless, as described in section 3, privilege may not cover notes of interviews with employees and other documents if they were fully created by in-house lawyers.

## 06 - Regulatory investigations

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

Under Polish law, governmental regulators may conduct investigations during which they may order to present all the documents and materials that are necessary to prepare for and conduct an investigation. Nevertheless, according to the specific legal regulations, during such investigations, governmental regulators have to comply with the regulations concerning legally protected confidentiality, including attorney-client privilege. In specific cases, governmental regulators may request and obtain a court ruling on the waiver of secrecy, such as attorney-client privilege.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is no express provision that directly addresses this issue. Current rules do not sufficiently address contemporary risks and technological developments, particularly those concerning AI tools and the transmission of data through email, messaging platforms or cloud-based solutions. There is no relevant case law on that matter either. As a result, while there may be grounds for interpreting the relevant provisions of the Attorney-at-law's Code of Ethics and the Advocate's Code of Ethics to the effect that inputs by lawyers into generative AI tools and the resulting outputs are protected by legal privilege (see below), until such views are confirmed by case law, it should be assumed that information provided to and received from the AI tools is not protected.

The Attorney-at-law's Code of Ethics states that privilege covers all documents created by the attorney-at-law as well as correspondence between the attorney-at-law and the client and persons involved in handling the case — created for purposes related to the provision of legal assistances. Therefore it seems that such inputs and outputs could be protected by the privilege. Nevertheless it may be questioned whether the output prepared by the AI tool is a document created by the attorney-at-law. If not, then such output would not be protected under current rules.

The Advocate's Code of Ethics states that:

- 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.

Accordingly, it appears that, pursuant to the Advocate's Code of Ethics, inputs containing the aforementioned data received from the client are protected. However, outputs are not covered by privilege unless they are incorporated into the advocate's official case files. A key issue to be examined in this context is whether outputs generated by AI tools and stored on the AI tool's server may be regarded as part of the advocate's files. At present, such an interpretation would likely constitute an overextension of the existing legal framework.

Due to the lack of regulations on the matter, the National Bar Council of Attorneys-at-Law and the Polish Bar Council focus on education and publish recommendations and guidelines concerning the use of AI tools in legal practice.

The guidelines on the protection of legal privilege emphasize the necessity of obtaining client consent when employing AI tools in sensitive matters. They also recommend implementing safeguards such as anonymization, encryption, or the use of on-premise AI models. Legal professionals are further advised to assess the technical capabilities of AI tools and their potential interaction with the law firm's internal systems and documentation. This assessment should be based on the contractual terms with the AI tool provider and any certifications supplied by the vendor.

## 08 - Recent issues

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

There are two issues worth discussing regarding privilege in Poland.

First, as of 1 January 2025, the Polish Ministry of Digital Affairs has introduced a new Electronic Delivery System. Currently, all advocates and attorneys-at-law are required to maintain a designated address for the electronic delivery of documents. In the coming years, the system will mandate that courts, advocates and attorneys-at-law transmit documents and pleadings — enumerated in the procedural codes — exclusively through this platform. These changes are expected to take effect in 2029.

At present, the bar councils, the Ministry of Justice and the Ministry of Digital Affairs are engaged in discussions concerning the forthcoming changes and potential risks. One of the key areas of focus is legal privilege. The aforementioned bodies are working on internal regulations aimed at enhancing the cybersecurity framework of the system.

Second, the Polish Bar Council is actively lobbying for the strengthening of privilege-related provisions. Specifically, it seeks to ensure that advocates and attorneys-at-law may refuse to testify regarding any information obtained in the course of their professional engagement with clients. The Polish Bar Council has reported instances in which attempts were made to compel advocates to provide a testimony on matters protected by privilege. These cases specifically involved criminal proceedings, in which attorney-client privilege is afforded heightened protection. Namely, prosecutors sought to interrogate defense advocates about matters they had learned while acting as defense counsel for the accused, claiming that the statutory conditions for lifting legal professional privilege were met.

In response, the Polish Bar Council has issued guidelines advising advocates on how to proceed in such situations. These include (i) promptly notifying the Polish Bar Council and (ii) attending hearings or interrogations accompanied by another advocate, who can help ensure that the advocate's rights and the principle of privilege are upheld.

Moreover, the Polish Bar Council has submitted a legislative proposal to the Parliament and the Council of Ministers, seeking to amend the relevant laws accordingly.

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# Saudi Arabia

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Historically, there has not been a system of compulsory discovery in Saudi courts. The discovery rules that were in place until recently stipulated that a party may request documents from the opposing party, but the latter is not obligated to produce them. Thus, in general, the practice has been that each party proceeds with the documents that it has in its possession. The exception is if a party submitted documents to the court, then it must provide a copy to the other party. The court has discretion to demand, sua sponte or upon the request of a litigant, the production of a document from a third party, but the court has not often exercised this discretion.

The Law of Commercial Courts was approved by Royal Decree No. M93, dated 15/8/1441H (corresponding to 7 April 2020G), which went into effect in June 2020. The law's implementing regulations, which interpret and clarify the law, were also issued in June 2020. This law appears to modify the documentary discovery system that has been in practice for decades in Saudi Arabia. Article 46 of the law states that either party may request delivery of or access to case-related documents from the other party in accordance with the following conditions: (i) the documents are defined individually or by type; (ii) the documents pertain to the commercial relationship or lead to proving the true nature thereof; and (iii) the documents are not confidential.

However, there is no experience yet in how aggressively the commercial courts will implement Article 46 in compelling the disclosure of documents in a proceeding. The uncertainty revolves around the scope of documents that the court will subsume under this article. In our view, the Saudi commercial courts are unlikely to interpret Article 46 broadly. We anticipate that any document that directly affects the rights and obligations of the parties in the relationship would be discoverable, particularly if such documents were signed by both parties. Thus, agreements and any amendments thereof, minutes relating to meetings between the litigants, letters between the litigants containing understandings or agreements, and other related documents, might be subject to disclosure. However, internal notes, reports, memos, emails, interviews, legal advice and material created in the course of an internal investigation are unlikely to be discoverable. This is not because they are privileged (i.e., arise out of a special, confidential relationship), but because the court would not compel a party to disclose them.

Given the historical practice in Saudi courts against documentary discovery, it is very unlikely that the courts would allow the parties to engage in "fishing expeditions" for documents. We anticipate that the courts would be reluctant to grant discovery requests that are not specific, well-defined and that do not directly affect a fundamental issue in dispute.

## 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?

Saudi law does not recognize the concept of legal privilege (i.e., the right to withhold evidence

from an adversary or the court), largely because historically, there has not been an obligation to make disclosure in litigation. Therefore, evidence in the possession of a party, which under the rules of other jurisdictions may qualify as privileged, would be admissible in a Saudi court.

Attorney-client privilege, on the other hand, is mainly governed by the Rules of Professional Conduct for Lawyers, which were approved by the Minister of Justice. These rules regulate the responsibilities of lawyers towards their clients, colleagues, judicial authorities and society. They aim to bolster the

legal protection of lawyers, their clients and other concerned parties, while promoting transparency and accountability in professional practices.

## 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 are no rules in Saudi Arabia that grant legal privilege to, for example, documents or communications submitted in the course of negotiations, documents or materials created in anticipation of an impending litigation, or attorney-client communications or legal advice. However, given the limited nature of discovery under the Saudi system, these documents are unlikely to be subject to mandatory discovery.

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

The concept of privilege is not recognized in Saudi Arabia regardless of whether the documents involve in-house lawyers or external lawyers.

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

Please see response to previous question.

### Are foreign lawyers recognized for the purposes of privilege?

Please see response to previous questions.

### 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 is no privilege that extends to nonlegal professionals under Saudi law.

## 04 - Sharing documents with third parties

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

Please see responses to previous questions.

## 05 - Investigations

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

No. However, there are special rules governing the disclosure and dissemination of government documents.

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

The concept of privilege is not recognized in Saudi Arabia.

## 06 - Regulatory investigations

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

The concept of privilege is not recognized in Saudi Arabia.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is no law of privilege in Saudi Arabia.

## 08 - Recent issues

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

N/A

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# South Africa

## 01 - Discovery

### What disclosure/discovery is required in litigation?

In South Africa's adversarial legal system, the discovery process stands as a major exception to the general principle that parties are not entitled to pretrial disclosure of an opponent's evidence. This procedure ensures that all parties can adequately prepare for trial by entitling them to be informed of all documentary evidence, including electronic records, relevant to the matter.

After the close of pleadings, any party may request discovery from the other parties. The party required to make discovery must, within 20 court days, deliver a sworn discovery affidavit. This affidavit must list all documents in the party's possession that relate to the matter in question, separating them into documents it intends to produce and those it contends are subject to a valid objection to production, such as privileged documents. The opposing party is then entitled to inspect and make copies of all non-privileged documents.

The test for relevance in discovery is broad. A document must be discovered if it "can directly or indirectly advance the case of the party requiring discovery or damage the case of the party making discovery" (*Swissborough Diamond Mines v. Government of the Republic of South Africa*). This obliges a party to discover documents that may be detrimental to its own case or beneficial to its opponent.

While documents protected by legal privilege are exempt from inspection, they must still be listed in the discovery affidavit. These protected documents include witness statements prepared for the proceedings, communications between attorney and client, and communications between attorney and advocate. These materials are protected by litigation privilege, as confirmed in *Mason v. Mason NO*, which held that such materials are exempt from disclosure if prepared in anticipation of litigation. A significant recent issue is the need for e-discovery modernization. The Rules Board for Courts of Law issued a request for comment on 27 May 2024, highlighting that the current rules are deficient for handling electronically stored information, leading to the loss of valuable metadata and increased costs.

## 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, South African law robustly recognizes legal professional privilege as a fundamental, substantive right essential for the proper functioning of the justice system. The privilege belongs to the client, not the lawyer, and fosters full and frank communication by protecting confidential disclosures made for legal advice or litigation from being compelled.

South African law recognizes two primary forms of privilege. The first, legal advice privilege, protects confidential communications between a client and their legal adviser. For this privilege to apply, several strict requirements must be met: The communication must be with a legal adviser acting in a professional capacity; it must be made in confidence; its purpose must be for seeking or providing legal advice, which includes advice on what should prudently be done in the relevant legal context; and the client or their representative must claim the privilege.

The second form, litigation privilege, has a broader scope, protecting communications that come into existence for the dominant purpose of pending or contemplated litigation. It covers communications with third parties, such as expert witnesses, and protects items like instructions and interim reports

*(Mason v. Mason NO)*. The Supreme Court of Appeal definitively adopted the dominant purpose test in *Ibex RSA Holdco Ltd v. Tiso Blackstar Group (Pty) Ltd*.

Additionally, the law protects communications made in a genuine attempt to settle a dispute under "without prejudice" privilege. Such communications cannot be disclosed in court without both parties' consent, thereby encouraging open settlement negotiations *(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?

A copy held by the client is also fully protected. The privilege attaches to the communication itself and belongs to the client, not the lawyer, so its protected status is not dependent on its location.

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

Yes, in-house lawyers are treated the same as external lawyers, and the privilege extends to their internal communications. The legal foundation for this rests on principles established in cases like *Mohamed v. President of South Africa and Others*, which confirmed that legal professional privilege applies to salaried in-house legal advisers. However, this protection is subject to strict requirements. The in-house lawyer must be acting in their professional capacity as a legal adviser, not in a commercial or executive role. Furthermore, the communication must be made in confidence for the dominant purpose of seeking or providing legal advice to the employer, which is the client. When these conditions are met, confidential communications between two or more in-house lawyers collaborating on legal advice for their employer are protected.

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

Legal professional privilege extends to interpreters, articled clerks, secretaries and other employees of a law firm (as established in *S v. Mushimba and Others*). Legal privilege also applies to internal communications, whether with internal stakeholders or external legal counsel, provided such communications are made for the purpose of obtaining or providing legal advice or in anticipation of litigation, and are legal rather than commercial in nature.

### Are foreign lawyers recognized for the purposes of privilege?

Yes. While there is no direct case law, South African law, consistent with its common law focus, recognizes privilege for communications with foreign lawyers. This is provided the communication meets the standard requirements of being made in a professional capacity, in confidence and for the purpose of legal advice or litigation.

### 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. Legal professional privilege in South Africa is strictly confined to the relationship between a client and a professional legal adviser (*Trust Sentrum (Kaapstad) (Edms) Bpk v. Zevenburg*). It has been explicitly held that privilege does not extend to accountants, even when advising on tax law (*Jeeva v. Receiver of Revenue, Port Elizabeth*).

## 04 - Sharing documents with third parties

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

The general rule is that disclosing a privileged document to a third party waives the privilege, because confidentiality is its cornerstone (*Bank of Lisbon and South Africa Ltd v. Tandrien Beleggings (Pty) Ltd and Others*). The test for waiver is objective and depends on whether the conduct is inconsistent with maintaining confidentiality. Inadvertent disclosure may not constitute a waiver if reasonable steps were taken to maintain confidentiality, but the decision in *Ibex RSA Holdco Ltd v. Tiso Blackstar Group (Pty) Ltd* established that deliberately publishing summaries of privileged documents waives privilege over the entire document.

However, a document can be shared with a third party without losing protection in specific circumstances. Litigation privilege is designed to cover communications with third parties, such as expert witnesses, where the dominant purpose is for use in pending or contemplated litigation (*General Accident, Fire and Life Assurance Corporation Ltd v. Goldberg*). Common interest privilege preserves the protection when a document is shared with a third party that has a sufficient common legal interest in the matter, such as codefendants or companies in the same group (*Anglo American South Africa Limited v. Kabwe and 12 Others*). A document may also be disclosed for a limited and specific purpose under strict terms of confidentiality (e.g., to an auditor) without a general waiver, though, if confidentiality is ultimately breached, privilege cannot be used to suppress publication (*South African Airways Soc v. BDFM Publishers (Pty) Ltd and Others*).

Finally, disclosure to a necessary agent of the lawyer or client, such as an interpreter, will generally not waive privilege.

## 05 - Investigations

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

The fundamental legal principles governing legal professional privilege remain the same across civil, criminal, regulatory and investigatory contexts. The requirements for legal advice and litigation privilege apply equally in all situations.

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

Yes, provided they meet the necessary requirements. For such documents to be privileged, their creation must satisfy the dominant purpose test — that is, they must have been created for the company (the client) to obtain legal advice or to prepare for contemplated litigation (*Ibex RSA Holdco Ltd and Another v. Tiso Blackstar Group (Pty) Ltd and Others*). Notes from employee interviews conducted by lawyers to gather facts for legal advice are privileged, so long as the interview is not a general fact-finding exercise for business purposes. Documents produced by lawyers during the investigation, such as chronologies and draft reports, are generally protected as they reflect the lawyer's strategy.

Following the *Ibex* decision, internal investigations must be carefully structured to ensure that the dominant purpose is legal advice or litigation preparation, not business compliance. It is best practice for lawyers conducting employee interviews to clarify that they represent the company, the interview is for providing legal advice to the company, the communication is privileged, and the privilege belongs to the company.

## 06 - Regulatory investigations

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

As a fundamental substantive right, legal privilege generally protects documents from compulsory production to governmental regulators. However, this protection is not absolute and can be limited by statute or common law exceptions.

Several statutes provide for such limitations. The Promotion of Access to Information Act contains a "public interest override" in section 46 that can compel disclosure of a privileged record held by a public body if it would reveal evidence of a substantial contravention of the law or a serious public safety risk, and the public interest in the disclosure clearly outweighs the harm of the breach. The Tax Administration Act provides a procedural mechanism in section 42A where an independent legal practitioner adjudicates disputes over privilege claims made in response to a request from the South African Revenue Service. Similarly, while the Competition Act grants the Competition Commission broad investigative powers, including "dawn raids," these are subject to valid claims of legal privilege.

The primary common law exception is the crime-fraud exception, which holds that privilege does not apply to communications made to further a criminal or fraudulent scheme. Recent developments, such as the "failure to prevent corruption" offense under the Prevention and Combating of Corrupt Activities Act and a new National Prosecuting Authority policy on resolving corruption matters, may also impact privilege considerations during regulatory interactions.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Under South African law, legal professional privilege is unlikely to protect confidential client information that a lawyer inputs into a publicly available generative AI tool. The foundation of privilege is confidentiality, which is destroyed by disclosing information to a third party. Inputting data into a public AI system constitutes a disclosure to the AI provider, whose terms of service often permit them to use the data for model training, thereby destroying any reasonable expectation of confidentiality.

The output generated by an AI tool is also not automatically privileged. It cannot be protected by legal advice privilege because an AI system is not a qualified legal adviser. The argument for protection under litigation privilege (as work product) is weak, as the legal status of AI-generated works is uncertain, particularly since South African copyright law requires a human author. Privilege would likely only attach once a lawyer has applied their professional skill and judgment to verify and adopt the text, transforming it into their own work product.

The analysis is different for secure, private enterprise-grade AI tools that contractually guarantee data confidentiality. In this scenario, one could argue that privilege is not waived, but this position remains untested in South African courts. Practitioners are, in all circumstances, bound by their duties of confidentiality under the Legal Practice Act and data protection obligations under the Protection of Personal Information Act. Furthermore, South African courts have shown zero tolerance for AI-generated fictitious citations, establishing that practitioners are fully responsible for the accuracy of their work product and cannot blame technology for errors (*Mavundla v. MEC: Department of Co-Operative Government and Traditional Affairs; Northbound Processing (Pty) Ltd v. South African Diamond and Precious Metals Regulator*).

# 08 - Recent issues

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

Recent issues have revolved around courts clarifying foundational principles in response to modern commercial and technological challenges. The most significant development came from the Supreme Court of Appeal (SCA) in *Ibex RSA Holdco Ltd and Another v. Tiso Blackstar Group (Pty) Ltd and Others*, colloquially known as the Steinhoff case. This case concerned a forensic report by PwC into accounting irregularities at Steinhoff. The SCA formally adopted the "dominant purpose" test for litigation privilege, holding that a document is only privileged if its primary purpose was for legal advice or litigation. The court found that the PwC report was not privileged because its dominant purpose was to finalize financial statements. The case also highlighted implied waiver, as the SCA held that Steinhoff's publication of an 11-page overview of the report waived privilege over the entire document.

Other pressing issues include the urgent need for e-discovery modernization, as highlighted by a Request for Comment from the Rules Board for Courts of Law on 27 May 2024. Cybersecurity breaches also pose new challenges, with 2024 statistics indicating that 42% of large law firms experienced data breaches, creating risks that forensic reports may lose privilege if shared for business rather than legal purposes. Finally, enhanced regulatory enforcement, such as the Financial Sector Conduct Authority's 2024 Regulation Plan and the strengthening of the Competition Commission's powers (*Sasol Gas v. Competition Commission*), continues to test the boundaries of privilege in investigatory contexts.

# 09 - Authors

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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 ("**Advokats**") 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, 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.

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.

There is a limited legal privilege available to lawyers who are neither Advokats nor associates of an Advokats 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.

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 activity (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 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 Advokats and their associates.

However, the provisions of the Swedish 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 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 ("**Advokats**") 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Currently, there is no explicit provision in the Swedish Code of Judicial Procedure regarding the use of generative AI-models and the impact on the legal privilege for lawyers who are members of the Swedish Bar Association ("**Advokats**"). Case law has yet to address this issue in the context of Chapter 36, Article 5 of the Swedish Code of Judicial Procedure. The closest relevant precedent from the Supreme Court concerns the prohibition against seizure under Chapter 27, Article 2 under the same Code, which has been found to include electronically stored information.

However, with respect to professional secrecy, the Professional Code of Conduct for Advokats still applies, which provides for observing secrecy and discretion concerning clients' affairs. It is therefore important that Advokats can ensure that their use of generative AI-models are not in conflict with these obligations.

The Swedish Bar Association has issued general advice on the use of generative AI-models which emphasizes the importance of using common sense, exercising caution and taking appropriate measures to protect client information as well as to maintain professional duties. Advokats should therefore carefully review the terms of use and other relevant information to determine if the model meets adequate security requirements so that obligations of discretion and secrecy are being upheld.

Unless it is fully established that the model meets the necessary requirements for the obligations to be upheld, Advokats should refrain from entering sensitive information or other client-related information when using a generative AI models. Otherwise, there is a profound risk that the client information will be leaked to third parties, as both inputs and outputs could potentially be used for further development of the AI model.

## 08 - Recent issues

No issues have arisen in relation to privilege recently.

## 09 - Authors

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# Switzerland

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Swiss civil procedure does not recognize broad pretrial discovery as practiced in common law jurisdictions. Instead, the Swiss Code of Civil Procedure (CPC) focuses on the court's powers to order the production of evidence whenever the parties plead relevant facts controversially and the parties' duty to cooperate in the taking of evidence by the court.

Each party must plead the facts and evidence necessary to support their claims or defenses. This is set forth in article 55(1) of the CPC, which states that each party must allege the facts it relies on and propose the corresponding evidence.

That said, there is no general obligation to disclose all relevant documents; however, under article 160 of the CPC, each party may request that the court order the other party or a third party to produce specific documents. The request must identify the document with sufficient precision, such that it can be easily identified, and demonstrate its relevance to the case. The court has broad discretion to deny the request if the document is not identified with precision, not deemed relevant, or if its production would violate legal privilege or confidentiality protections (e.g., business secret under article 162 of the Swiss Criminal Code ("**CrimC**") and attorney-client privilege under article 321 of the CrimC). In particular, fishing expeditions or overly broad requests are not permitted.

## 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, Swiss law provides strong protection for legal privilege for external lawyers (and to a more limited extent to in-house counsel; see section 3).

The legal privilege for external lawyers is based on the duty of confidentiality the agent owes to their principal under the law of mandates (cf. article 398 of the Swiss Code of Obligations) and embedded in the professional rules governing the conduct of attorneys admitted to practice in Switzerland, as codified in the Swiss Federal Act on Attorneys (FMLA). It is further reinforced by Swiss criminal law and given effect through several privileges to withhold information in procedural laws.

Specifically, article 13 of the FMLA requires attorneys admitted to practice in Switzerland to maintain confidentiality regarding all information entrusted to them by their clients.

Further, under article 321 of the Swiss Criminal Code, attorneys are obliged to keep secret any and all information that their clients admit to them **and** that they learn in connection with their mandate. A deliberate breach of this professional secrecy obligation is subject to a monetary penalty or a custodial sentence of up to three years.

Swiss procedural laws covering civil, criminal and administrative proceedings also protect legal privilege. For example, article 160 of the Swiss Code of Civil Procedure (CPC) or article 264 of the Swiss Criminal Procedure Code ("**CrimPC**") allow parties (and third parties) to refuse to produce correspondence with an attorney, provided it concerns the attorney's typical professional activity (i.e., legal advice and representation). On the same basis, both the attorney and the client may refuse to testify about such communications (cf. article 160 of the CPC and article 171 of the CrimPC).

## 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 covers all information that a client entrusts to their lawyer for the purpose of carrying out the mandate. This includes both direct and indirect communications, as well as physical or electronic documents provided to the lawyer. Importantly, privilege also covers any information or documents that the lawyer obtains from third parties in connection with their mandate.

Accordingly, attorney-client privilege protection is broad under Swiss law. It extends to all activities that are considered part of a lawyer's typical duties. This includes providing legal advice, representing clients in court proceedings, drafting contracts, assisting in transactions and conducting internal investigations, including collecting facts and interviewing relevant information holders. However, internal investigations related to financial institutions' exposure to violations of laws and regulations governing their anti-money laundering obligations are not always covered — for example, if an external counsel performs an investigative activity that a financial institution would be required to perform itself under the applicable money laundering laws and regulations, legal privilege does not apply. Legal privilege protection extends to correspondence (including emails) between the client and the lawyer, along with personal notes, legal clarifications, meeting notes, strategy papers, reports, presentations, contract drafts and so on. Finally, privilege also covers all attorney work product and information that external counsel learn from third parties.

While the scope of the legal privilege is broad, there are two important limitations. First, legal privilege does not extend to preexisting documents; that is, documents that existed prior to the instruction of counsel and that the client provides to counsel. Such documents are entrusted to the attorney but are not protected by legal privilege for the obvious reason that it is not possible to hide evidence with one's counsel. Second, legal privilege protection does not apply in situations where the external counsel is the subject of a criminal investigation.

Protected information remains confidential irrespective of its location. The lawyer, the client and third parties have the right to refuse the disclosure of protected documents, irrespective of their location.

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

Since 1 January 2025, parties and third parties in civil proceedings have the right to refuse to testify and disclose documents related to the activities of their in-house legal services, subject to certain conditions (cf. article 167a of the Swiss Code of Civil Procedure). Specifically, this new privilege applies if the company is registered in a commercial register, the in-house legal department is led by a licensed lawyer (i.e., the lawyer is admitted to practice as a lawyer in Switzerland or meets the professional requirements to practice as an attorney in their country of origin) and the activities are within the scope of the attorney's typical professional duties. Privilege also extends to nonlegal professionals working in the legal department.

Legal privilege for in-house lawyers applies in civil proceedings but not in administrative or criminal proceedings.

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

Yes, privilege extends to internal communications between in-house lawyers under the conditions mentioned above. Documents that existed before the legal department was involved, i.e., preexisting documents, are not covered by privilege. As mentioned above, the legal privilege for in-house lawyers only applies in civil proceedings.

### Are foreign lawyers recognized for the purposes of privilege?

Foreign attorneys are recognized for the purposes of privilege to the extent that article 321 of the Swiss Criminal Code applies to both Swiss and foreign attorneys; that is, both Swiss and foreign lawyers are prohibited from disclosing confidential information irrespective of their qualification to practice in Switzerland. Conversely, the professional rules governing attorneys' conduct only apply to attorneys admitted to practice in Switzerland. This includes attorneys from an EU or EFTA member state or the UK who are admitted to practice in their home country. Importantly, in the context of criminal proceedings, this does not include attorneys admitted exclusively to practice in the US.

This limitation is relevant because the provisions in Swiss criminal and administrative procedural laws, which give effect to the legal privilege by way of privileges to refuse testimony or produce documents, generally refer to the concept of attorneys admitted to practice in Switzerland. Therefore, it is advisable for foreign non-EU or non-UK attorneys acting on behalf of Swiss clients to be instructed indirectly through an attorney admitted to practice in Switzerland. This is certainly true where the comprehensive protection of correspondence and attorney work product in Swiss criminal or administrative proceedings is at issue. For instance, where a Swiss company instructs US counsel to conduct an internal investigation in a situation where the company may be subject not only to prosecution in the US but also in Switzerland, care should be taken to ensure privilege is protected in both jurisdictions.

In civil proceedings, foreign lawyers who are not from the EU or UK are generally regarded as falling within the scope of privileges that allow them to refuse to give testimony or produce documents.

### 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 also extends to nonlegal professionals that qualify as auxiliaries of the attorney. An auxiliary is a person who works under the direction and supervision of the attorney and assists in providing legal advice or representation. This certainly extends to nonlegal staff of law firms and can also extend to vendors that the law firm enlists to support, such as eDiscovery vendors or other service providers.

## 04 - Sharing documents with third parties

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

Swiss legal privilege is preserved if privileged information is not generally known, i.e., accessible to an indiscriminately large number of third parties, and if the owner of the privileged information, i.e., the client, has not lost their interest in the confidentiality of the information, which, according to case law, must be assumed with restraint.

It is established, that the voluntary disclosure of confidential information to selected third parties does not have the consequence of this information being deemed to be generally known, which would result in the loss of privilege protection. In addition, such disclosure should not necessarily be construed as an expression of intent to waive privilege protection.

Accordingly, the voluntary disclosure of privileged information, such as information included in an internal investigation report, to a third party, such as a regulator, does not result in a waiver of privilege. That said, such disclosure does not necessarily prevent the third party from being obliged to disclose the information or, in the case of a government authority, to grant legal assistance to another government authority, such as a criminal prosecutor.

Accordingly, although sharing a document with a third party does not result in the loss of privilege, such sharing must still be done with care, considering that the third party may be forced into involuntary disclosure by government authorities or other third parties.

## 05 - Investigations

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

With respect to the scope of legal privilege, there are no differences between how privilege operates in different proceedings (see sections 2 and 3). The same applies in relation to the client's right to invoke legal privilege in different situations. The one difference that applies relates to the extent to which Swiss legal privilege extends to communications with and work product of non-Swiss counsel. As mentioned in section 3, in criminal proceedings, contrary to civil proceedings, privilege does not extend to non-EU and non-UK foreign lawyers. The same applies to administrative proceedings, including regulatory proceedings involving, for instance, the Swiss Financial Market Supervisory Authority.

That said, in the case of dawn raids, privileged documents must be handed over to the authorities; however, the immediate sealing of the same can be requested, thereby preventing the authorities from accessing the documents. If a government authority insists on getting access to documents in relation to which privilege is claimed, the government authority must file a request to unseal the documents in court. The issue of whether a document is privileged is then litigated, with appeals available up to the Federal Supreme Court.

Finally, legal privilege does not apply where an external counsel performs an investigative activity that a financial institution would be required to perform under the applicable money laundering laws and regulations (see section 3).

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

Yes, notes of interviews can be covered by privilege.

## 06 - Regulatory investigations

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

Legal privilege not only applies to civil proceedings, but also to criminal, administrative and regulatory proceedings. Accordingly, parties have the right to refuse to produce privileged documents to government regulators. With respect to the requirement to provide privileged documents in the context of dawn raids, we refer to section 5.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The interplay between the use of AI tools and the survival of legal privilege protection has not been explored in detail; importantly, there is no detailed guidance available from relevant professional bodies, authorities or the courts. Therefore, general principles apply. In our view, if AI tools are used as a supporting tool for legal analyses or document creation, the input and output should remain protected by legal privilege, provided that the input and output data are not disclosed to the AI provider or third parties and the processing is carried out under the lawyer's control. In contrast, disclosing input or output data in connection with the use of cloud-based AI services (e.g., ChatGPT

or Copilot) without a contractual guarantee of confidentiality from the service provider could be seen as a disclosure to a large number of third parties, which could eventually lead to a loss of protection.

## 08 - Recent issues

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

N/A.

## 09 - Authors

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# Ukraine

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Ukrainian law, unlike the law of common law jurisdictions, does not provide for a formal disclosure or discovery procedure in litigation.

The procedural rules in civil, commercial and administrative litigation require the parties to provide all evidence relied upon together with the first submission on merits, that is, a statement of claim for the claimant, a statement of defense for the respondent and written explanations for the third party.

If the party cannot procure evidence by itself, the court may order a person who possesses relevant evidence to submit such evidence to the court for examination. The court may also demand and obtain evidence prior to the claim submission as a measure of securing 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?

Professional legal services in Ukraine may be provided by lawyers (legal counsels) and attorneys (advocates). While the practice of lawyers is subject to minimal regulation, the practice of attorneys is governed by a special law called the Law of Ukraine "On the Bar and Legal Practice" ("**Law**") and a professional code of conduct called the "Rules of Attorney Ethics" ("**Rules**").

Pursuant to the Law, attorneys, as well as their assistants, trainees and other employees, are bound by attorney-client privilege. Attorney-client privilege is both a right of the attorney in relations with third parties and a duty owed to the client.

As defined by the Law and specified by the Rules, the following information is protected by attorney-client privilege:

- The fact of a person's request for legal assistance
- Any information that became known to an attorney (or an attorney's assistant, trainee or employee) in connection with providing professional legal assistance or in relation to a request for such assistance
- The content of any communication, correspondence or other interaction between an attorney and a client or a person requesting legal assistance
- The content of any advice, consultations, explanations, documents, data, materials, items or information prepared, collected or received by an attorney, or provided to a client in the course of providing professional legal assistance or other types of legal practice

Any of the above information or documents may cease to be protected by attorney-client privilege with the written consent of a client or a person who requested legal assistance.

## 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?

According to Ukrainian law, the concept of attorney-client privilege protects the information and documents received by or prepared by an attorney in connection with providing professional legal assistance and, thus, the documents that are in the attorney's possession.

The copies of documents held by the client are not protected by attorney-client privilege.

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

Under Ukrainian law, attorney-client privilege applies exclusively to attorneys (lawyers admitted to the Ukrainian Bar), while other legal professionals (i.e., in-house lawyers, external legal counsel, etc.) are not bound by attorney-client privilege.

An in-house lawyer who is an attorney admitted to the Ukrainian Bar may only be treated as an attorney in respect of privilege if such attorney provides legal assistance to the company based on a legal services agreement (but not based on an employment agreement).

At the same time, both in-house lawyers and external legal counsels (not admitted to the Ukrainian Bar) may be bound by nondisclosure agreements (NDAs) and other confidentiality obligations. However, these do not provide the same level of protection as attorney-client privilege.

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

Considering that, according to Ukrainian law, attorney-client privilege only applies to attorneys, any legal communications and documents prepared by in-house lawyers are not privileged.

### Are foreign lawyers recognized for the purposes of privilege?

In order to practice law in Ukraine, a foreign attorney should be formally admitted to the Ukrainian Bar. Subject to compliance with this requirement, a foreign attorney shall have the same rights and guarantees as a local attorney, including attorney-client 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?

Under Ukrainian law, the concept of attorney-client privilege does not include nonlegal professionals. At the same time, attorney-client privilege extends to any person employed by an attorney, attorney bureau or attorney organization, regardless of a role.

Also, some confidentiality obligations are provided by the special laws regulating the professional activities of certain nonlegal professionals, e.g., auditors, appraisers, forensic experts, etc.

## 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, an attorney may only disclose information or documents that are protected by attorney-client privilege with the client's written consent. In such a case, the disclosed information ceases to be protected by attorney-client privilege; however, an attorney may still retain it as privileged.

At the same time, the Law of Ukraine "On the Bar and Legal Practice" ("**Law**") also provides for the circumstances in which the information or documents that areprotected by attorney-client privilege may be disclosed without losing protection.

Thus, according to the Law, if a client brings a claim against the attorney in connection with the attorney's professional activities, such attorney shall be released from the obligation to maintain the attorney-client privilege to the extent necessary to protect their rights and interests. In such a case, the information disclosed by the attorney to the body considering the client's claim remains privileged, and the obligation to preserve its confidentiality lies with the respective body.

Also, if an attorney discloses privileged information or documents to certain nonlegal professionals (e.g., auditors, appraisers, forensic experts, etc.) with the client's consent, such information shall be protected by the confidentiality obligations enshrined in the specific laws regulating the activities of such professionals.

## 05 - Investigations

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

Under Ukrainian law, attorney-client privilege is a fundamental guarantee of attorney practice that applies regardless of the situation. This rule is reflected in the following statutory provisions:

- An attorney may not be questioned as a witness (in criminal, civil, commercial and administrative proceedings) regarding information protected by attorney-client privilege.
- An attorney may not be required to disclose information covered by attorney-client privilege.
- It is prohibited to interfere with the private communication between an attorney and a client.

At the same time, some additional guarantees with regard to attorney-client privilege are established in criminal proceedings, in particular the following:

- It is prohibited to examine, disclose, request or seize documents related to the attorney's professional activities.
- It is prohibited to grant temporary access to correspondence or other forms of communication between a defense attorney and a client or any person representing a client in relation to the provision of legal assistance.
- An attorney may not be engaged in confidential cooperation during investigative actions if such cooperation is related to, or may result in, the disclosure of privileged information.
- To ensure the protection of attorney-client privilege during a search or inspection of an attorney's residence, other premises owned by the attorney or premises where the attorney practices law, as well as during temporary access to certain items and documents, a representative of the regional bar council must be present.

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

Documents produced during internal investigations, including notes of interviews with employees, can be covered by attorney-client privilege, provided that such documents are received by an attorney in the course of providing professional legal assistance to the client and remain in the attorney's possession.

## 06 - Regulatory investigations

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

As a general rule, an attorney may not be required to provide information or documents protected by attorney-client privilege. However, a privileged document may be provided to the governmental regulators under the following conditions:

- With the client's permission

  As defined by the Rules of Attorney Ethics, subject to the client's permission, an attorney may (but is not obliged to) disclose information that is protected by attorney-client privilege. At the same time, even if the client or a person who sought professional legal assistance consented to the disclosure, an attorney should bear no liability for refusing to disclose privileged information to any persons, bodies and institutions.

- Under the requirements of anti-money laundering legislation

  Pursuant to the Law of Ukraine "On the Bar and Legal Practice," an attorney's submission of information required by the Law of Ukraine "On Prevention and Counteraction to Legalization (Laundering) of the Proceeds of Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction" ("**Anti-Money Laundering Law**") shall not constitute a breach of attorney-client privilege. At the same time, the provisions of the Anti-Money Laundering Law exempt attorneys from the obligation to report their suspicions to the designated competent authority if they provide legal services related to the defense of a client, representation of the client's interests before courts or in pretrial dispute resolution proceedings or legal advice related to the client's defense and representation.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The legislation regulating attorney practice in Ukraine does not deal with the issue of attorneys using AI tools. While using AI tools, persons bound by attorney-client privilege (attorneys, attorneys' assistants, trainees and other employees) should be guided by the general principles of confidentiality enshrined in the Law of Ukraine "On the Bar and Legal Practice" and the Rules of Attorney Ethics ("**Rules**").

Thus, according to the Rules, an attorney is obliged to ensure proper conditions for the storage of documents and information protected by attorney-client privilege, as well as to ensure that the assistants, trainees and other employees are aware of the confidentiality obligations.

In light of these provisions, to avoid the risk of disclosure of privileged information, persons bound by attorney-client privilege should use AI tools in compliance with the principle of confidentiality, i.e., without inputting client data.

## 08 - Recent issues

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

No issues have arisen in relation to privilege recently.

# 09 - Authors

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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) – 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.

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 DIFC 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.

Another financial free zone, the Abu Dhabi Global Market (ADGM) has been established in the Emirate of Abu Dhabi. The ADGM operates with a degree of legislative autonomy and directly applies English common 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?

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, such as the following:

- 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 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 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 DIFC, the duty is set out in the Mandatory Code of Conduct of Legal Practitioners in the DIFC courts, which applies to all practitioners registered and licensed to appear before 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 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 when the following is applicable:

- 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, a duty of confidentiality exists and applies uniformly across civil, criminal, regulatory or investigatory contexts, without distinction in its operation.

Cabinet Decision No. 9 of 2025, which approves the Code of Ethics for the Legal Profession and Legal Consultation Profession, reinforces the duty of confidentiality by stating that any information obtained from a client or third party must not be disclosed except with the client's express written consent, where such disclosure is necessary for the proceedings and directly related to one's professional responsibilities, or where mandated by applicable laws. This includes circumstances involving criminal, regulatory, or investigatory proceedings, aligning with the broader legal framework under Federal Decree-Law No. 20 of 2018 and its amendments.

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), the courts are likely to refer to the legal principles of privilege under the law of England and Wales when addressing such distinctions, although they may adapt these principles to align with the DIFC's statutory framework.

### 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Currently, the law of privilege or professional secrecy in the UAE does not explicitly address the protection of inputs by lawyers into generative AI tools and the resulting outputs. While legal professional privilege and confidentiality obligations apply to traditional communications between lawyers and clients, the application of these principles to AI-generated content is still an evolving area. Notwithstanding the lack of explicit legal privilege protections pertaining to AI, The AI Ethics Principles & Guidelines produced in the UAE emphasize that AI systems should respect privacy and ensure that personal data is protected, which aligns with the need to safeguard client information when lawyers use AI tools. Furthermore, the UAE has stringent data protection laws that require careful handling of personal data.

## 08 - Recent issues

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

In 2022, Federal Law No. 23 of 1991 regulating the legal profession was repealed and replaced by Decree-Law No. 34 of 2022 on the regulation of the Advocacy and Legal Consultancy Professions. However, there have been no amendments to Ministerial Decision No. 666 of 2015 on the Rules of Professional Conduct and Ethics of the Legal Profession in the 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 any provisions pertaining to legal privilege.

The Dubai International Financial Centre (DIFC) Code of Conduct of Legal Practitioners in the DIFC courts has not been amended post 2019.

On 22 October 2024, the Dubai Court of Cassation, in Case No. 486/2024, recognized the principle of without prejudice privilege, a cornerstone of common law dispute resolution, marking a fundamental departure from the traditional approach and toward international norms. Despite this development, UAE onshore courts do not adhere to a system of binding judicial precedent, and therefore would not be bound by this decision. Notwithstanding this, this judgment could be used by parties in the future to persuade the UAE courts that settlement negotiations should not be treated as admissions.

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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. This possibility, however, is applied restrictively by Spanish courts, which requires, as a general rule, that the information requested be specified in the request and limited, not being permitted generic or broad requests.
- 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 oppose by invoking 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:

- 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 this 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 and more particularly when: (i) the wrong caused is not greater than the wrong that it intends to avoid; (ii) the situation of necessity has not been deliberately caused by the person concerned; and (iii) 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.

## 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.

However, the Spanish National Commission on Markets and Competition (Comisión Nacional del Mercados y la Competencia or CNMC) has recently rejected the application of professional secrecy to communications from in-house counsels, considering that in-house counsels lack the required independence and based on the abovementioned *Akzo* ruling. This precedent has created a domestic legal debate on the extension of professional secrecy to in-house lawyers, which is still unresolved.

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

According to article 39 EGAE, 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. However, as said, the recent ruling of the CNMC has disputed the application of the professional secrecy to in-house lawyers' communications.

### 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) stating 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 of the General Statute on the Spanish Legal Profession (Estatuto General de la Abogacía Española or EGAE), lawyers can 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 in relation 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 can be used in court if they were seized during a search, unless it can 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 if 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 government authorities with 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, government authorities must respect the constitutional right to a fair defense without self-incrimination in relation to 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 by applying a proportionality judgment.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There are currently no regulations or case law addressing whether professional secrecy protects lawyers' inputs into generative AI tools and their outputs.

However, disclosure of information covered by professional secrecy due to the use of nonconfidential AI tools by a lawyer could result in the lawyer's disciplinary liability (see Section 2 in fine).

## 08 - 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. In this sense, contrary to article 39 of the General Statute on the Spanish Legal Profession (Estatuto General de la Abogacía Española, EGAE), the Spanish Competition Authorities have rejected the application of legal privilege to communications from in-house counsels based on the case law of the European Court of Justice (specifically the *Akzo* ruling dated 14 September 2010).

On the other hand, 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 this regard, Spanish courts have declared 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.

## 09 - Authors

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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 some mechanisms that allow for a wider production of evidence, sometimes before a judicial complaint is filed.

**Preliminary measures**: Procedural Codes 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). In that case, 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 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 laws and regulations governing the practice of law in Argentina and by 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 him or herself (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 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, irrespective of any civil liability).

## 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 complies 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. But this may be controversial as foreign lawyers cannot practice law in Argentina unless they are duly registered within the Bar Association.

### 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is no express legislation or settled case law in this regard. This must be analyzed on a case-by-case basis, especially considering the terms and conditions applicable to the generative AI tool and the privacy expectations that the attorney may obtain from it. If the generative AI tool does not properly ensure that the inputs and outputs will be kept confidential, the attorney may be required to abstain from inputting or outputting confidential information in the generative AI tool. If such confidentiality is ensured by the generative AI tool, there may be grounds to conclude that professional secrecy (secreto profesional) also extends to inputs into and outputs of the generative AI tool.

## 08 - Recent issues

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

No relevant issues have been publicly discussed in relation to privilege in the jurisdiction.

## 09 - Authors

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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. 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, and it is a principle rooted in the duty of confidentiality imposed on lawyers (Federal Law 8.906/94).

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.

From a civil procedure perspective, the Brazilian Civil Procedure Code determines that parties are not required to testify about facts that are protected by professional confidentiality (article 388). From a criminal procedure perspective, the Brazilian Criminal Code determines that the breach of a professional secrecy without good cause is considered a crime (article 154). Thus, besides the attorney-client privilege's rules, the Brazilian legal system also protects professional secrecy in general.

### 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 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.

The case law[17] is in the sense that, unless there are reasons to believe that the attorney is involved in a criminal activity with their client, the attorney may not be compelled to disclose information. The following methods are recommended to preserve the privilege: (i) label sensitive documents as 'confidential information', include language; (ii) claiming privilege and ensure that the responsible lawyer is always copied in all communications; (iii) limit communications on sensitive legal issues, instructing the recipient not to forward to third parties; (iv) ensure that the lawyer is a member of the Brazilian bar; and (v) ensure that the communication with the lawyer involves only legal issues, and not purely business or commercial issues.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is no specific rule and/or case law covering how generative AI tools impact attorney-client privilege in Brazil. Recently, the Federal Council of the Brazilian Bar Association issued a recommendation (001/2024) that (a) explicitly warns that the use of generative AI tools shall not compromise confidentiality/attorney-client privilege and (b) advised that lawyers must avoid inputting sensitive client data into AI systems without an explicit guarantee of data protection and

[17] The case law is as follows:
The protection set forth in article 7, II, of Law No. 8,906/1994 does not serve to shield lawyers from criminal prosecution for offenses committed personally. It is a guarantee aimed at the exercise of legal practice and protects the constitutional role performed by the lawyer in relation to their clients, whether criminally accused or not, but it must not be used as a shield for crimes committed by the lawyer themselves (Superior Court of Justice, AgRg nos EDcl no AREsp 2047390/PR, Reporting Justice Antonio Saldanha Palheiro, ruled on 25 March 2025).

confidentiality. This recommendation also encourages lawyers to get consent from their clients about the use of the AI, including the nature of the technology, the processing of personal data, etc.

The principles and scope of attorney-client privilege (section 3) continue to be applied in the AI environment, which means that recordings of communications made by third parties (like Zoom/Teams meeting recordings) and other AI communications may destroy the privilege. If the meeting is about a sensitive matter, we recommend labeling the corresponding invite and limiting the number of participants (a lawyer must attend the meeting). Also, we recommend getting the client's consent to use AI tools and not inputting sensitive information into these systems.

## 08 - Recent issues

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

- 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.

- On 20 February 2024, Minister Dias Toffoli of the Supreme Federal Court ruled in favor of the Brazilian Bar Association, ordering the removal of communications illegally obtained between a client and lawyer. The Brazilian Bar Association emphasized that attorney-client confidentiality is essential for trust in the justice system and the decision, based on such principle, removed from the court dockets of a specific investigation case the communication held between client/attorney. (INQ 4940 / DF, Reporting Justice Dias Toffoli, judged on 19 February 2024).

- On 14 November 2024, the Federal Council of the Brazilian Bar Association issued a recommendation (001/2024) that (a) explicitly warns that the use of generative AI tools shall not compromise confidentiality/attorney-client privilege and (b) advised that lawyers must avoid inputting sensitive client data into AI systems without an explicit guarantee of data protection and confidentiality.

- On March 2025, the Superior Court of Justice decided the following in a criminal procedure:

  "telephone confidentiality, as an extension of the right to privacy and the exercise of the legal profession, is not absolute. There are exceptional cases in which the public interest prevails over the guarantee provided in Article 7, II, of the Brazilian Bar Association Statute, particularly in cases such as the present one, involving the wiretapping of a lawyer who holds public office and uses it to commit criminal acts." (AgRg in RHC No. 110.287/MG, Reporting Justice Antonio Saldanha Palheiro, published on 18 March 2025).

# 09 - Authors

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# Chile

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Chilean law does not provide for a discovery process to exchange information in civil or commercial litigation. Evidence production is almost entirely a burden of the party interested in proving the facts of its case. However, there are exceptional instances in which the tribunal may use its investigatory powers to require additional proof (article 159 of the Code of Civil Procedure). This general rule is a consequence of article 1698 of the Civil Code, which mandates that "The burden of proving the obligations or their extinction lies with the party who alleges them."

The absence of a discovery process, as regulated in common law jurisdictions, does not affect the fact that Chilean law establishes several cases in which the law requires input from the other party for document production. However, the required level of disclosure is low, due to minimal sanctions for noncompliance.

The institution that most resembles discovery is the possibility for a party to request the exhibition of documents from the other party (article 349 of the Code of Civil Procedure). A tribunal may only grant the request if the requesting party shows that the documents (i) are in possession of the other party, (ii) have direct relationship with the discussion and (iii) are not "secret or confidential." The requested party has the right to oppose this request.

Preliminary measures are another institution that functions as a way of producing documents in litigation. These measures are intended to prepare for an upcoming trial and allow a party to require the future defendant to exhibit several documents or objects. Most relevantly, this includes the exhibition of the physical "object of the action" of instruments or documents "that due to their nature can be of interest to various people," and the exhibition of accounting records of the future defendant's business in which the future claimant is involved (article 273 of the Code of Civil Procedure). These provisions are relevant, for instance, when the object of the action is a physical document that gives rise to an obligation (e.g., a credit title) and when evidence must be produced prior to presenting the claim. Regarding accounting records, Chilean law prohibits a general exhibition of accounting books, and the review must be in the place in which they are located, in the presence of the owner and limited to the entries strictly related to the controversy (articles 42 and 43 of the Commercial Code).

When a tribunal grants a request for exhibition of documents or a preliminary measure, the requested party has two options: (a) produce the documents or (b) breach the order. If a party does not comply with an order for the production of documents, Chilean law allows penalties to be imposed (article 274 of the Code of Civil Procedure) and the breaching party loses the right to use them (article 277 of the Code of Civil Procedure). However, these sanctions are generally useless. Penalties are rarely imposed, and losing the right to use the documents does not matter since they are usually only useful to the opposing party and contrary to the requested party's position. Unlike other jurisdictions, Chile neither penalizes lawyers for failing to disclose nor has a rule allowing the tribunal to presume that undisclosed evidence is contrary to a party's interests.

Other measures are also relevant to produce documents, albeit not as a way of producing evidence. A relevant example is the case of preparatory measures for executive performance trial preparation. This procedure allows a party that has an "executive title" to obtain — with minimal discussion — the enforcement of payment by the debtor through the liquidation of the opposing party's assets and other enforcement measures. Preparatory measures allow a party that has an incomplete executive title to produce a complete one, by ordering the debtor to acknowledge its signature on a document or by confession of its debt (article 435 of the Code of Civil Procedure).

## 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?

Chile recognizes comprehensive protection for legal communications and documents through two interrelated institutions: attorney-client privilege (secreto profesional) and the duty of confidentiality (deber de confidencialidad). As established by the Chilean Supreme Court, both have been recognized by law in articles 231 and 247 of the Criminal Code and are part of the constitutional right to due process and the right to non-violation of private communications (Supreme Court ruling dated 28 November 2012, Case No. 2423-2012). Both institutions operate at different levels and have various applications in Chilean law.

Attorney-client privilege is a legal obligation that requires a lawyer not to reveal the client's confidential information that has been communicated to the lawyer to fulfill their legal services. Attorney-client privilege mainly operates as a procedural immunity that enables lawyers to refuse to disclose information obtained in their professional capacity when required by state authorities. This privilege is explicitly recognized in Chilean procedural law, allowing attorneys to refuse to testify about "facts communicated to them confidentially in connection with their profession" (article 360, No. 1 of the Code of Civil Procedure and article 303 of the Code of Criminal Procedure). Privilege is considered a right and a duty of the lawyer.

The duty of confidentiality encompasses a broader obligation, covering "all information relating to the client's affairs that the lawyer has learned in the exercise of their profession" (article 7 of the Professional Ethics Code of 2011). This duty extends beyond mere communications of fact and requires the lawyer to abstain from revealing in any manner any and all client-related information, whether received from the client or obtained through professional services. A less comprehensive concept of the same duty can also be found in the Professional Ethics Code of 1948, covering only information explicitly communicated to the lawyer in confidence due to their profession (article 11 of the Professional Ethics Code of 1948).

It is important to note that the universal and general enforceability of the Professional Ethics Code of 2011 is unclear. From a formal point of view, only the Professional Ethics Code of 1948 is legally enforceable to all lawyers under Law Decree 3.621 of 1981 and can be sanctioned under Law 4.409 of 1928. The Professional Ethics Code of 2011 only formally applies to the affiliates of the Chilean Bar Association (Colegio de Abogados AG) that adopted it. However, in a 2012 ruling, the Supreme Court recognized that the Professional Ethics Code of 2011's provisions apply to all lawyers, regardless of their affiliation. This was acknowledged despite the fact that the Professional Ethics Code of 2011 is not legally binding, which the court considered in its decision. In any event, a violation of both the Professional Ethics Code of 1948 and Professional Ethics Code of 2011 can constitute a criminal offense under articles 231 (for all lawyers) and 247 (for public servants) of the Criminal Code, which sanction lawyers that maliciously damage their clients' interests by disclosing secret (i.e., confidential) information.

Although Chilean law does not explicitly regulate the work product doctrine as it is regulated in other jurisdictions, Chilean law does contain provisions that protect documents and work products. The Code of Civil Procedure allows a party to obtain a judicial order for the other party to exhibit documents, but limits said exhibition to non-privileged information (article 349 of the Code of Civil Procedure). The Code of Criminal Procedure specifically protects materials seized from lawyers' offices, requiring judicial oversight and limiting access to documents covered by professional secrecy (articles 220, 222 and 223 of the Code of Criminal Procedure). Articles 231 and 247 of the Chilean Criminal Code can also apply to sanction the disclosure of documents and work product.

Despite the strong protection of attorney-client privilege, it is considered that a lawyer must breach their duty in order to avoid the commission of a criminal offense. This is confirmed by criminal law, in which procedural protection does not apply when the lawyer is also being investigated for the commission of a crime or when they served to commit the crime.

## 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 Chilean law and ethical developments, both attorney-client communications and documents are considered privileged regardless of whether they remain in the lawyer's possession or are held by the client. The protection is not limited by the physical location of the documents but rather is defined by the nature of the information and its connection to the professional relationship.

Although not regulated under the Professional Ethics Code of 1948, this is expressly addressed by the Professional Ethics Code of 2011, which establishes that privilege extends to documents and other instruments that contain confidential information, regardless of whether they are in the lawyer's or the client's possession (article 64 of the Professional Ethics Code of 2011). The Chilean Code of Criminal Procedure reinforces this protection in article 220, which safeguards the communications of a person under criminal investigation with their lawyer, including notes taken of those communications and any circumstance to which privilege could be naturally be extended.

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

The treatment of in-house lawyers regarding privilege remains an unresolved doctrinal question in Chile. Regardless, discussions are generally oriented toward extending protection and privilege to in-house lawyers.

As noted by one author, there is uncertainty about whether in-house lawyers (often called "fiscales" in Chilean companies) are subject to confidentiality duties and privilege protection given their dual character as both lawyers and company employees. The Chilean Bar Association has publicly stated that the Professional Ethics Code of 2011 makes no distinction between the establishment of duties and the rights that arise from the professional relationship with the client, as long as this relationship it encompasses legal services. A labor contract between a company and a lawyer would be only one of many mechanisms to establish a professional relationship that generates confidentiality duties and privilege protection.

The doctrine has also proposed a different, functional approach: In-house lawyers should enjoy the same privilege protections as external lawyers when acting in their professional legal capacity. Privilege would apply to the extent that documentation and/or information in their possession refers to matters of their professional activity as lawyers. Information relating to corporate aspects that are known to others at the same organizational level would not be covered by privilege.

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

The specific application of privilege to corporate legal departments remains underdeveloped in Chilean law. The Chilean ethics framework provides some guidance on this issue. According to article 11 of the Professional Ethics Code of 2011, the reference to lawyers' ethical obligations toward clients extends to law firms. In this regard, internal communications of lawyers working in the same firm or legal department would also be covered by privilege, as they collectively serve the same client.

In criminal matters, there is a clearer rule protecting communications inside an in-house department, as article 220 of the Code of Criminal Procedure establishes that the protection of documents and

objects from seizure "extends to the offices or establishments in which [people that have the right to abstain from declaring] conduct their profession or activity." This would extend privilege, in general, to communications and documents inside the office in which a privileged party performs their legal activities in favor of a client.

## Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers are not considered lawyers in Chile unless they comply with specific requirements and are vested by the Chilean Supreme Court. As such, ethical duties and legal provisions that establish attorney-client privilege in Chile do not apply to foreign lawyers.

Foreign lawyers can validate their title in Chile. Under Chilean law, foreign lawyers can be vested as such by the Chilean Supreme Court (articles 520 and 521 of the Organic Code of Courts) after formal requirements have been met (articles 523 and 526 of the Organic Code of 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?

Conceptually, legal privilege applies exclusively to lawyers in their relations with their clients. However, statutory provisions that establish the right to abstain from declaring against a client based on attorney-client privilege usually also extend to other persons that must keep a secret due to their function or profession. In criminal proceedings, this extends to people that "have the duty to keep the secret that has been entrusted to them," specifically including doctors and "confesors" (article 303 of the Code of Criminal Procedure). This is also the case in regulatory matters regarding antitrust and anticompetition law (article 39(n) of Law Decree 211). In both contexts, the protection extends to preventing these persons' documents and objects from being seized (article 220 of the Code of Criminal Procedure and article 39(n) of Law Decree 211). A difference can be found in the interception of telephonic communications, which is limited to attorney-client communications in criminal investigations but is extended to persons that, due to their profession or legal function, "have the duty to keep the secret that has been entrusted to them" in antitrust investigations.

A broad interpretation of these rules may extend this protection to tax accountants, as the Chilean Ethics Code of Accountants establishes a duty of confidentiality (articles 46 to 49 of the Ethics Code of Accountants of 2022 and article 140 of the IFAC Code of Ethics for Professional Accountants of 2012). This may also be the case for engineers that work as tax consultants, who also have confidentiality duties under the Ethics Code of Engineers of 2012 (article D.2 of the Ethics Code of Engineers of 2012). However, the protection of accountants' and engineers' right to privilege is not as well established as legal privilege: Both ethics codes are only applicable to the affiliates of the Chilean Association of Accountants and the Chilean Association of Engineers, and the extent of the protection expressly excludes cases in which the professionals are required to disclose information requested by a competent tribunal (article D.6 of the Ethics Code of Engineers of 2012) or when there is a legal duty to reveal information (article 140.7 of the IFAC Code of Ethics for Professional Accountants 2012).

In any case, the duty to protect secrets can be extended to others in the same situation if they are considered to have a professional obligation to keep secrets. For example, this is the case for Law 19.733 on the practice of journalism, which establishes the right to secrecy regarding sources of information.

In civil matters, there is no equal protection for accountants and tax consultants, or any other professional that is not explicitly considered by law. The law only establishes procedural immunity for ecclesiastics, legal professionals, doctors and midwives (article 360, No. 1 of the Code of Civil Procedure).

## 04 - Sharing documents with third parties

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

The Chilean framework strictly regulates attorney-client privilege between the client and the lawyer. The fundamental function of privilege is enabling the client to trust their lawyers, assuring them that the information that the lawyer needs to know to perform legal services will not be disclosed and, most importantly, used against them.

However, as explained before, Chilean law recognizes that some nonlawyers are also entitled to privilege protection in specific contexts. In criminal matters, people that "have the duty to keep the secret that has been entrusted to them", specifically including doctors and "confesors", can abstain from declaring (article 303 of the Code of Criminal Procedure). In civil matters, this procedural immunity is only granted to ecclesiastics, legal professionals, doctors and midwives (article 360, No. 1 of the Code of Civil Procedure).

Although Chilean law does not expressly extend privilege to third parties, it may still be protected when the client, acting by themselves or directly instructing their lawyers, shares it with a person that is also protected by privilege under these provisions. However, this protection is different from attorney-client privilege — as it is not between a client and their lawyer — and would only extend to the specific protection established by these provisions. Any form of general privilege regarding these individuals is beyond the scope of attorney-client privilege under Chilean law.

## 05 - Investigations

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

In Chile, the operation of attorney-client privilege does indeed vary across different legal contexts, though the fundamental principle of protecting confidential information remains consistent. In general, criminal proceedings and investigations enjoy broader and explicit protection that is not as clearly present in civil or regulatory proceedings.

In civil litigation, privilege operates through article 360, No. 1 of the Code of Civil Procedure, which allows attorneys to refuse to testify about "facts that have been communicated to them confidentially in connection with their profession." This protection extends to document production, as article 349 of the Code of Criminal Procedure protects "secret or confidential documents" from being disclosed in a request for exhibition of documents.

Criminal proceedings offer the most comprehensive framework for privilege protection. The Code of Criminal Procedure establishes multiple layers of protection, including witness testimony (article 303 of the Code of Criminal Procedure), protection of documents and objects from seizure (article 220 of the Code of Criminal Procedure) and communication interceptions (articles 222 and 223 of the Code of Criminal Procedure).

In regulatory contexts, privilege generally operates through cross-references to existing rules in civil and criminal regulations. For example, in competition law matters, the National Economic Prosecutor's investigative powers are explicitly limited by reference to criminal procedural protections, including attorney-client privilege (article 39(n) of Law Decree 211). Similarly, testimony before the Competition Tribunal follows civil procedural rules (articles 22 and 29 of Law Decree 211) that maintain the procedural immunity granted by the Code of Civil Procedure.

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

There is no specific development in Chilean law for notes of interviews produced during investigations. Generally, only criminal investigations have clear and explicit regulation, protecting documents and objects that contain privileged information from being seized (article 220 of the Code of Criminal Procedure).

This protection extends to physical communications between the investigated individual and their lawyers (also including people that "have the duty to keep the secret that has been entrusted to them," specifically including doctors and "confesors"). This includes the notes that they have taken of said communications, objects and any other circumstance that can naturally be included in the right to abstain from presenting testimony.

In this regard, notes of interviews with employees may be covered by privilege in criminal investigations if they can be considered part of the right or faculty to abstain from presenting testimony, for instance, when the employee has performed legal services for their employer. This may also be the case in regulatory matters if they are expressly regulated by reference to criminal law, as is the case with antitrust or anticompetition investigations under Law Decree 211.

## 06 - Regulatory investigations

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

Although there is no specific mention in Chilean law, general rules of privilege apply. Fundamentally, Chilean authors consider privilege as a form of protection from the state, to balance the necessity for certain information to be public against the necessity to create the conditions for a client to trust their lawyers. Governmental regulators are also part of the state, and thus lawyers can object to a requirement of a privileged document.

The Professional Ethics Code of 2011 explicitly regulates this situation. Article 60 establishes that, if a lawyer is required by law or a "competent authority" to inform or declare regarding an issue subject to confidentiality, the lawyer has a duty to ensure that attorney-client privilege is respected. To this end, lawyers must interpret the law in favor of confidentiality; they must limit themselves to affirming privilege and abstain from justifying it when it would breach said privilege, and take reasonable actions to challenge any decision made by the authority that orders them to disclose privileged matters.

The Professional Ethics Code of 1948 does not explicitly address this matter and only refers to the lawyers' "right" to privilege before judges (article 10).

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Even though the implications of AI tools for confidentiality are being widely discussed worldwide, no law or ethical regulation in Chile refers to attorney-client privilege in the context of AI. To date, no doctrine or case law developments have been made so far.

Despite the lack of relevant developments in this area, both the Professional Ethics Code of 2011 and the work product doctrine are generally in favor of interpreting confidentiality in the manner that is most favorable to comply with lawyers' duty of confidentiality and is explicitly prescribed by article 60(a) of the Professional Ethics Code of 2011. In this regard, general rules may apply to protect the

information that lawyers use as input for AI tools, and their output can be considered work product that is also protected by privilege under Chilean law.

In any event, Chilean law and ethics regulations still need to adapt to the ever-growing use of AI tools in the knowledge-work sector. The recently presented law project — which is still in the early stages of legislative discussion (legislative bulletin No. 17112-19 of 3 September 2024) — is the only legislative project related to AI currently in Congress and, beyond being extremely limited, does not cover the issue of confidentiality or privilege of documents used or produced when using AI tools.

## 08 - Recent issues

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

Recent events in Chile have brought attorney-client privilege into sharp focus, particularly regarding the boundaries between professional secrecy and the public's right to information about potential activities that are contrary to public interest.

A notable controversy emerged in 2024 when the Chilean Bar Association formally challenged investigative newspaper CIPER for publishing internal communications from mining company Quiborax. These emails, obtained through a 2022 leak by the hacker group Guacamaya, included correspondence from the company's in-house legal counsel and allegedly revealed plans to circumvent environmental protections at the Salar de Surire, a protected natural monument.

The Chilean Bar Association argued that all communications between lawyers and their clients or employers fall under privilege, regardless of whether the lawyer works independently or as an employee. It asserted that this privilege "stands as a limit to the legal possibilities of informing the public in the exercise of press freedom." In response, CIPER defended its publication, maintaining that when attorney-client communications reveal potential violations of the law affecting the public interest, journalistic duty to inform society must prevail.

This debate has gained particular significance as it coincides with another high-profile case involving Attorney Luis Hermosilla, whose WhatsApp messages are currently in prosecutors' hands. A recorded meeting was leaked in 2023 in which Hermosilla and other lawyers discussed illegal activities performed by their clients and themselves. This led to a criminal investigation of Hermosilla that has unveiled a wide range of potentially illicit activities of Hermosilla himself and his clients. Through 2024 to early 2025, Hermosilla's WhatsApp messages have shown several potentially illegal activities that have affected public servants, former clients and even Supreme Court judges. Regarding this case, CIPER affirmed that the leak that made Hermosilla's activities public knowledge would not have been possible under the Chilean Bar Association's position.

The broader discussion centers on whether communications that may reveal illegal activities should remain protected by attorney-client privilege, with some arguing that accepting absolute privilege would severely limit press freedom and enable impunity for wrongdoing planned or discussed in attorney-client conversations. These cases highlight an ongoing tension in Chile between protecting the confidentiality essential to effective legal representation and ensuring transparency when privileged communications may evidence violations of public trust, environmental regulations or even illicit activities.

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# Colombia

## 01 - Discovery

### What disclosure/discovery is required in litigation?

The parties have several options for requesting the disclosure of information. Firstly, they may do so directly within the lawsuit regarding documents in the possession of the counterparty.[18] Secondly, a request for exhibition as evidence can be submitted. According to article 265 of the General Procedural Code, the parties may request documents — or even items — that are deemed useful to substantiate their case in the proceeding. If the judge grants the discovery/exhibition request, the party in possession of the documents will be required to produce them.[19]

## 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?

Colombian legislation acknowledges the principle of professional secrecy, which is constitutionally grounded[20] and involves the obligation not to disclose any information, communications, documents or confidential data accessed by a professional in the course of their profession or activity.[21]

Professional secrecy is a right for clients and an obligation for law professionals. The Lawyers Disciplinary Code specifies that disclosing or using a client's secrets constitutes a breach of the lawyers' duty to act with loyalty to their clients. This obligation does not apply when the client has provided prior written authorization to disclose the information or when the lawyer discloses it to prevent the commission of a crime.[22]

Professional secrecy is intrinsically linked to fundamental rights. Particularly, it safeguards the client's rights to privacy and defense.[23] The Constitutional Court has ruled that professions requiring a personal charter, like the legal profession, are subject to stricter confidentiality standards.[24] These standards seek to ensure that communications and documents exchanged between lawyers and clients, as well as documents prepared by lawyers, are protected by professional secrecy.[25]

According to the Constitutional Court, professional secrecy is breached when confidential information is divulged to individuals who are not obligated to maintain its confidentiality.[26] However, sharing such information with persons who are also bound by the responsibility to keep it reserved does not

[18] General Procedural Code, articles 82 and 96.
[19] General Procedural Code, article 265.
[20] Constitution. article 74, "Every person has the right to access to public documents, except as provided by law. Professional secrecy is inviolable." (free translation).
[21] Constitutional Court. Decision No. T-073A of 22 February 1996. Justice writing for the Court Vladimiro Naranjo Mesa. Also in: Constitutional Court. Decision No. C-538 of 23 October 1997. Justice writing for the Court Eduardo Cifuentes Muñoz.
[22] Lawyer Disciplinary Code, article 34(f).
[23] Constitutional Court. Decision No. 301 of 25 April 2012. Justice writing for the Court Jorge Ignacio Pretelt Chaljub.
[24] Constitutional Court. Decision No. 301 of 25 April 2012. Justice writing for the Court Jorge Ignacio Pretelt Chaljub.
[25] Constitutional Court. Decision No. 301 of 25 April 2012. Justice writing for the Court Jorge Ignacio Pretelt Chaljub.
[26] Cfr. Constitutional Court. Decision No. C-301 of 25 April 2012. Justice writing for the Court Jorge Ignacio Pretelt Chaljub.

constitute a violation. Furthermore, the Constitutional Court has clarified that "divulge" means revealing information to individuals who do not have a duty to preserve its confidentiality.[27]

Furthermore, the Constitutional Court has determined that the obligation to maintain professional confidentiality does not necessarily entail an absolute prohibition on sharing information with third parties that have a legitimate interest in accessing it.[28] In such instances, the duty to uphold the confidential nature of the information extends to those third parties.[29]

Additionally, the confidentiality of information cannot be upheld against judicial or administrative authorities that have the constitutional or legal authority to access such information to perform their duties. These authorities must maintain the confidentiality of the information they obtain.[30] In a judicial context, failure to comply may result in adverse inferences against the noncomplying party.[31]

## 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 privileged and protected when it remains in the lawyer's possession, and when a copy held by the client also protected.

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

Colombian law does not distinguish between in-house lawyers or external lawyers regarding professional secrecy. In fact, the Lawyers Disciplinary Code imposes the obligation to maintain professional secrecy on all lawyers no matter their role or position[32]. Professional secrecy protects communications and documents from in-house lawyers when they are directly and specifically related to legal activities. This includes, for example, providing legal advice or drafting documents with legal purposes, such as judicial briefs or communications where the in-house lawyer discusses the company's legal strategy. Activities outside the legal context, such as administrative tasks, are not covered by professional secrecy.

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

Privilege may extend to internal communications between employees and in-house lawyers. The content of these communications must be related to the lawyers' legal activities (such as discussions of specific contracts or legal opinions) for them to be considered protected by professional secrecy.[33]

### Are foreign lawyers recognized for the purposes of privilege?

Colombian legislation does not specifically regulate this matter. However, given that professional secrecy is a general obligation for all lawyers in Colombia, it is reasonable to assume that foreign

[27] Constitutional Court. Decision No. T-073A of 22 February 1996. Justice writing for the Court Vladimiro Naranjo Mesa.
[28] Constitutional Court. Decision No. T-073A of 22 February 1996. Justice writing for the Court Vladimiro Naranjo Mesa.
[29] Constitutional Court. Decision No. T-073A of 22 February 1996. Justice writing for the Court Vladimiro Naranjo Mesa.
[30] Law 1755 of 2015, article 27.
[31] General Procedural Code, article 267.
[32] Lawyers Disciplinary Code, article 34(f).
[33] Superintendence of Industry and Commerce. Decision issued in the hearing dated 20 August 2019 in the proceeding with docket No. 17-407921. Quoted in: Supreme Court of Justice, Civil Cassation Chamber. Decision dated 13 November 2019. Justice writing for the Court Luis Alonso Rico Puerta. Docket file No. 11001-22-03-000-2019-01784-01 (STC15550-2019).

certified lawyers are also bound by this duty. This interpretation is supported by the principle that client confidentiality is a fundamental right.

### 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 applies in other professions, where professionals need to access information related to personal, public and business lives of individuals.[34] In such cases, confidentiality has great importance.[35] The assessment of professional secrecy must be conducted on a case-by-case basis, as it is essential to determine the confidentiality required to perform professional activities. For instance, the Constitutional Court holds that accountants must safeguard the confidentiality of information acquired through the activities or private transactions of their clients. Conversely, statutory auditors are obligated to report any irregularities they may encounter in their capacity as auditors.[36]

## 04 - Sharing documents with third parties

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

In Colombia, the disclosure of documents by lawyers can only occur with the express authorization of the client or when it would prevent the commission of a crime.[37]

If the lawyer shares documents with third parties without the client's authorization or without the purpose of preventing a crime, the lawyer would be violating the client's professional secrecy.

## 05 - Investigations

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

Professional secrecy and its exceptions apply to all lawyers, regardless of their area of practice. The Colombian Antitrust Authority -the Superintendence of Industry and Commerce (SIC) — has held, in a couple of cases, that communications and documents prepared by in-house counsel are not protected by attorney-client privilege.[38]

The SIC is an administrative authority that has very broad investigative powers, including the possibility to conduct dawn raids without judicial warrant, request access to documents and information during the investigations, and impose fines for failure to cooperate.

In 2016, the SIC initiated an investigation against parties for alleged failure to cooperate during a dawn raid. The investigation targeted employees of the company under investigation, as well as three external lawyers who were present during the raid. Ultimately, the SIC closed the case without imposing any sanctions on the external counsel.

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[34] Colombian Constitutional Court. Decision No. 301 of 25 April 2012. Justice Jorge Ignacio Pretelt Chaljub.
[35] Colombian Constitutional Court. Decision No. 200 of 14 March 2012. Justice Jorge Ignacio Pretelt Chaljub. Also in: Colombian Constitutional Court. Decision No. 301 of 25 April 2012. Justice Jorge Ignacio Pretelt Chaljub.
[36] Colombian Constitutional Court. Decision No. 200 of 14 March 2012. Justice Jorge Ignacio Pretelt Chaljub.
[37] Lawyer Disciplinary Code, article 34(f). Also in: Colombian Constitutional Court. Decision No. 301 of 25 April 2012. Justice Jorge Ignacio Pretelt Chaljub.
[38] Superintendence of Industry and Commerce. Decision issued in the hearing dated 20 August 2019 in the proceeding with docket No. 17-407921. Also in: Superintendence of Industry and Commerce. Resolution 7675 of 27 February 2017; Superintendence of Industry and Commerce. Resolution 34255 of 14 June 2017; Superintendence of Industry and Commerce. Resolution 51905 of 3 October 2019.

In a 2017 decision involving a dominance case in the telecommunications sector, the SIC admitted as evidence in the investigation a document prepared by the in-house legal team. The SIC reasoned that in-house counsel, being employees rather than independent legal advisors, do not benefit from the protections of legal professional privilege.

In a 2019 decision imposing a fine for failure to cooperate during a dawn raid, the SIC admitted as evidence WhatsApp messages exchanged between employees of the company, where they relayed information received from external counsel. The SIC decided that these exchanges between employees of the company, albeit including external counsel, were not covered by privilege.

The SIC has upheld that it has the powers to copy all information in corporate servers and devices (and even in personal devices used for commercial purposes). If, upon review, any information is deemed to be covered by privilege, the SIC would exclude it as evidence.

However, there is a debate on whether the SIC can access the information — and even copy it — as such access can be considered a breach of privilege and should not be within the SIC's powers.

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

To address this question, we assume the following:

1. The individual conducting the interviews or producing documents during the investigation is a lawyer.

2. The lawyer conducting the interviews or producing documents is acting in the capacity of a legal advisor and providing legal counsel.

Under these assumptions, the information would generally be protected by professional secrecy. However, this protection may not apply in the following circumstances: i) the lawyer becomes aware of information related to the commission of a crime;[39] ii) a judicial or administrative authority formally requests the information under an exception to the non-disclosure of reserved information –for example, information protected by professional secrecy[40]-; and iii) the client has expressly authorized the disclosure of the information.[41]

## 06 - Regulatory investigations

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

As a general rule, documents or information protected by professional secrecy should not be disclosed.[42] However, this protection is not absolute. The reserved nature of information, because of the professional secrecy, cannot be enforceable against judicial or administrative authorities that are constitutionally or legally empowered to request it in the exercise of their duties. In such cases, the authorities are obliged to preserve the confidentiality of the information and documents they access in the course of their official functions.[43]

[39] Lawyers Disciplinary Code, article 34(f).
[40] Law 1755 of 2015, article 27. Superintendence of Industry and Commerce. Decision issued in the hearing dated 20 August 2019 in the proceeding with docket No. 17-407921. Also in: Superintendence of Industry and Commerce. Resolution 7675 of 27 February 2017; Superintendence of Industry and Commerce. Resolution 34255 of 14 June 2017; Superintendence of Industry and Commerce. Resolution 51905 of 3 October 2019.
[41] Lawyers Disciplinary Code, article 34(f).
[42] Law 1455 of 2015, article 24(7).
[43] Law 1755 of 2015, article 27. Superintendence of Industry and Commerce. Decision issued in the hearing dated 20 August 2019 in the proceeding with docket No. 17-407921. Also in: Superintendence of Industry and

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

There is currently no specific legal guidance addressing this issue. However, since privilege stems from the confidential relationship between an attorney and their client, the use of AI tools should not imply *per se* a loss of protection.

However, if inputs or outputs are entered into nonconfidential or publicly accessible AI platforms, the lawyer may risk breaching the professional secrecy of the client. Lawyers are advised not to input client information or personal data into such tools unless the platform ensures confidentiality and complies with applicable privilege standards.

## 08 - Recent issues

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

As mentioned above, there is an ongoing debate on the powers of the Superintendence of Industry and Commerce (SIC) regarding collection and use of documents covered by privilege in antitrust investigations. The SIC has consistently held that communications involving in-house counsel are not protected by legal privilege.

In a 2019 Supreme Court of Justice decision (STC15550-2019), the Supreme Court of Justice ruled on a tutela action filed by a company, subject to a judicial inspection conducted by the SIC as part of a sanctioning procedure, within its jurisdictional functions. The company sought to exclude communications with its in-house lawyers, arguing that they were protected by professional secrecy.

The Court upheld the SIC's position, affirming that professional secrecy was not violated, as not all communications involving in-house counsel are protected — only those directly related to their legal advisory functions. During investigations and dawn raids, the SIC collects all information stored on servers and devices, even if it is covered by privilege. Upon review, if the SIC considers it covered, it will exclude it from the investigation evidence docket. However, it is unclear whether this review, or even the sole act of collecting the information, should be considered an unlawful breach of privilege.

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# Venezuela

## 01 - Discovery

### What disclosure/discovery is required in litigation?

Under Venezuelan laws, disclosure/discovery is not required in litigation.

## 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, privilege is specifically defined under articles 25 and 26 of the Ethics Code for the Venezuelan Lawyer, published in Official Gazette No. 33.357 of 25 November 1985 ("**Ethics Code**").

Article 25 determines that lawyers must keep the most rigorous professional secrecy. This secrecy must cover their files and papers, even after the lawyer has ceased to provide their services to the client or defendant. The lawyer may refuse to testify against the client or defendant and refrain from answering any questions that involve disclosing the secret or violating the confidences they have made.

Furthermore, article 26 establishes that the duty to maintain professional secrecy must also include everything that was revealed to or discovered by the lawyer when the client requested their opinion, advice and sponsorship, and, in general, everything that the lawyer comes to know by reason of their profession.

Under the Ethics Code, lawyers must not intervene in matters that may lead them to disclose the secret or to use the confidences they have received in exercising their profession for their own benefit or that of their clients, whether represented or defended, unless they obtain the confidant's prior, express and written consent.

The obligation to keep professional secrecy also includes matters that lawyers knows by working in common or in association with other lawyers or through employees or dependents of their own or of other professionals.

The lawyers may not communicate what comes to their knowledge because of their profession to third parties. Everything that a lawyer discusses with the opposing party's representative is covered by professional secrecy.

Lastly, privilege is also protected under the Constitution of Venezuela, published in Official Gazette No. 5.453 Extraordinary of 24 March 2000 ("**Constitution**"). Notably, article 60 of the Constitution provides that every person has the right to the protection of their honor, private life, intimacy, self-image, confidentiality and reputation.

## 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, the confidentiality obligation is bidirectional. The client also has a duty to protect attorney-client privilege regarding the communications sent by the lawyer. Moreover, under the Venezuelan Criminal Code, published in Official Gazette No. 5.768 Extraordinary of 13 April 2005 ("**Venezuelan Criminal Code**"), anyone that, by reason of their status, functions, profession, art or trade, has knowledge of a

secret whose disclosure may cause any harm, discloses it without just cause, shall be punished with five to 30 days' imprisonment.

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

Although there is no express provision that establishes how in-house lawyers shall be treated regarding privilege, the interpretation of the Ethics Code for the Venezuelan Lawyer, published in Official Gazette No. 33.357 of 25 November 1985 ("**Ethics Code**") leads to the conclusion that the rules on privilege apply equally to both in-house and external lawyers as practitioners of the legal profession.

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

Yes, since under article 26 of the Ethics Code, the obligation to keep professional secrecy also includes matters that the lawyer knows by working in common or in association with other lawyers or through employees or dependents of their own or of other professionals. Hence, internal communications between in-house lawyers are subject to privilege.

### Are foreign lawyers recognized for the purposes of privilege?

There is no explicit distinction between Venezuelan or 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?

Yes, any person that has access to this kind of information due to their professional activity must respect privilege. This is based on article 190 of the Venezuelan Criminal Code and subsidiarily pursuant to article 48 of the Constitution of Venezuela, published in extraordinary Official Gazette No. 5.453 of 24 March 2000, which provides for the constitutional right to secrecy and inviolability of private communications.

## 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 third party's participation or knowledge of confidential information is necessary, it is common practice that a confidentiality agreement is entered into to ensure the security of that information.

Also, governmental regulators are entitled to require that privileged documents be provided to them (through judicial/administrative orders). This scenario is generally included in the aforementioned confidentiality agreements.

## 05 - Investigations

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

In general, privilege operates in the same manner regardless of the field. However, there are certain exceptions under which a lawyer can breach privilege, such as (i) preventing a crime or (ii) denouncing it as a measure to defend themselves from a lawsuit/accusation made by their client. These are matters directly related to criminal law, in accordance with articles 27 and 28 of the Ethics Code for the Venezuelan Lawyer, published in Official Gazette No. 33.357 of 25 November 1985 ("**Ethics Code**").

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

Yes, documents produced during investigations are covered by privilege under the aforementioned provisions of the Constitution of Venezuela, published in extraordinary Official Gazette No. 5.453 of 24 March 2000; the Ethics Code; and the Venezuelan Criminal Code, published in extraordinary Official Gazette No. 5.768 of 13 April 2005.

## 06 - Regulatory investigations

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

Yes, governmental regulators are entitled to require that privileged documents be provided to them (e.g., police departments and the Attorney General's Office). Nonetheless, according to article 204 of the Venezuelan Code of Criminal Procedure, published in Official Gazette No. 6.644 of 17 September 2021, documents should be requested through a judicial order and as long as the documents are directly related to the investigated facts.

## 07 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

No. Under Venezuelan laws, AI is yet to be regulated. Currently, a project for an AI law is being discussed by the National Assembly; however, its content is yet to be published. In this sense, there is no law regulating the privilege of inputs into generative AI tools.

## 08 - Recent issues

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

There are no current/recent issues or relevant cases concerning privilege in Venezuela.

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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.

In April 2025, the Ontario Superior Court of Justice and the Attorney General of Ontario published the Civil Rules Review Working Group's Phase 2 Consultation Report, which aims to streamline civil litigation in Ontario. The report provides for potential reforms to Ontario's Rules of Civil Procedure which may affect the process in which disputes over privileged documents are resolved. However, the proposed changes are not final.

# 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). In other words, privilege may be waived by implication if otherwise

privileged communication is put in issue in support of the client's position during litigation. However, implied waiver does not apply to privileged communications with marginal relevance to the underlying proceedings.

## 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 in section 2, 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.

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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Canadian courts have not yet considered applying the law of privilege or professional secrecy to inputs by lawyers into generative AI tools and the resulting outputs. The current best practices suggest that lawyers should disclose generative AI use to clients and should not input privileged information into generative AI tools.

The Canadian Bar Association published guidelines relating to AI use. The guidelines urge lawyers to consider disclosing to clients if they intend to use generative AI and to provide explanations about how this technology will be used. Disclosure should include information about any benefits and risks related to AI use, including risks related to loss of privilege.

Recently, the Law Society of Ontario (LSO) published a white paper that provides guidance on the use of generative AI. The LSO suggests the following best practices:

- Lawyers should not input confidential or privileged information into generative AI tools without ensuring that adequate security measures are in place.
- Lawyers should ensure that they understand the privacy and data security settings of the AI tool and its limitations.
- Even where a lawyer anonymizes input data, there may be residual risks, as AI may be able to piece together information from the anonymized facts.

Law societies in other Canadian provinces have also published guidance on AI use, including in Alberta, British Columbia, Manitoba and Saskatchewan.

# 08 - Recent issues

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

### Advisory privilege

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 Canada Revenue Agency (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 realignment 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 sometimes be 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.

### Informer privilege

In *Canadian Broadcasting Corp. v. Named Person*, the Supreme Court of Canada affirmed that informer privilege applies whenever it is established that the police have received information under an implicit or explicit promise of confidentiality. Informer privilege protects the identity of those who give information related to criminal matters in confidence, whether in public or in court. The privilege applies to any information that might lead to identification of the informer, including but not limited to the informer's name. This type of privilege is "near absolute," meaning that courts cannot weigh the

maintenance or scope of the privilege on a case-by-case basis once informer status is established. Informer privilege may apply to civil, administrative and criminal proceedings.

**Privilege when communicating to the agent of a client**

The Tax Court of Canada confirmed in *Stack v. The King* that solicitor-client privilege protects communications between a lawyer and the client's agent for the purpose of giving or receiving legal advice. For example, memoranda from legal counsel to an accountant advising that counsel's client could be protected by solicitor-client privilege. The party asserting privilege has the burden of proving that the documents constitute privileged communication.

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# 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 pretrial 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. For a court to order the disclosure of documents and/or information by a litigating party to civil and commercial proceedings (and/or a third party), the following conditions must be met:

- The documents cannot be obtained from a party to the litigation directly from a public source (e.g., a public registry), and are only in possession of the counterparty.
- 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 that 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 provides 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 damage or 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 legal 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 only applies to the lawyer. It is commonly a matter of agreement between the parties that any information that the lawyer provides to the client in the strict exercise of their profession 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, personal and data privacy and the inviolability of communications.

There is a general obligation for third parties to assist the courts in finding out the truth of the disputed facts, 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 a felony. 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 such 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 criteria is used, 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 nondisclosure agreement with their employer (i.e., client) that contains confidentiality clauses protecting any information the employer has provided to the in-house lawyer.

### 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 professionals (such as doctors, psychologists, 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 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 timeframe and only the owners of such information, their representatives and authorized Public Officers may have access to it. Confidential information includes banking, fiduciary, industrial, intellectual property, 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 relief 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 - Artificial intelligence

### Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

Mexican law does not specifically address lawyer-client privilege concerning generative AI tools. Such matters fall under general legal provisions for preserving client confidentiality as mandated by civil and criminal laws, the Federal Law of Professions, and the General Law of Transparency and Access to Public Information.

When using nonconfidential AI tools, lawyers must uphold their duty of care, especially with clients' personal identification data. Only clients can waive privilege.

If a lawyer discloses privileged information via AI, they may be liable for damages or even face criminal charges.

## 08 - 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, psychologists, 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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# 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 typically 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 generally 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; and
- 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 been 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*, adopted a five-part test — one that the First, Second, Third, and Tenth Circuits also have adopted — 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 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.[44]

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

[44] 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).

common issues and are made to facilitate representation in subsequent litigation (often called the "joint defense privilege")

- 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.[45]

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.[46]

Notes of interviews should be distinguished from verbatim transcripts or recordings of interviews, which are less likely to be protected under the work product doctrine. 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

[45] 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).
[46] 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).

the basis of any final decision by those with actual authority."[47] 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.[48]

# 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 other law or 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 Department. These principles, which were updated as recently as March 2023, confirmed that "waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative."[49] Rather, 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.

The Department of Justice likewise updated 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 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

The use of AI and similar evolving technologies by lawyers in the United States implicates significant and complex privilege issues. As noted above, the attorney-client privilege protects confidential

[47] 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).
[48] See id. at *10-11.
[49] U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.710 (Attorney-Client and Work Product Protections).

communications between a client and their attorney made for the purpose of securing legal advice. While various US states may have nuanced differences in their respective approach to the attorney-client privilege may vary in its nuances across US states, all recognize that the attorney-client privilege may be waived by disclosure to third parties. Applied to AI, in general, entering the contents of privileged attorney-client communications into public generative AI models could be deemed a failure to keep the communications confidential by disclosing them to a third party, resulting in a waiver of the privilege protection. Public AI models often "learn" from user inputs. Information contained in a user's input/prompt gets incorporated into the AI model's potentially public records and can even appear in another user's output/response. These technical features and details may result in an inadvertent third-party disclosure which can constitute a waiver of the privilege. Even private, vendor-hosted AI models can pose risks if they are programmed to learn from user inputs, as courts might decline to protect communications whose contents could be disclosed, for example, to other firm clients or the vendor's AI trainer.

Lawyers can, however, mitigate the risk of privilege waiver by ensuring AI models maintain strict confidentiality (*i.e.*, by building those models in a closed, internal environment behind a firewall and implementing other appropriate controls such as not programming the model to learn from user inputs). That said, the law in this area continues to develop, and lawyers should proceed cautiously.

The other privilege protection in the United States, the work product doctrine, provides protection to written or oral information prepared in preparation for litigation or for trial. The laws governing the work product doctrine also vary among the states, but in general the doctrine's protections would appear to apply to content, e.g., memos, prepared by attorneys using generative AI in the same fashion as content created without the use of AI, provided the AI model has the same strict confidentiality safeguards mentioned above. As illustrated in a recent case, the work product doctrine may protect certain inputs, prompts and outputs into AI tools and models.[50] Lawyers should take limited comfort from this early decision in light of uncertainty in the application of the work product doctrine, litigating parties' ability to overcome the doctrine's protections for fact work product, the many open legal questions that remain unanswered, and the continued evolution of AI technology.

The use of generative AI tools similarly raises ethical concerns for lawyers who are obligated to maintain client confidentiality. In the United States, the American Bar Association (ABA) provides guidance to attorneys about the attorney-client privilege. In particular, on July 29, 2024, the ABA released its Formal Opinion 512 on the use of generative AI in legal practice, emphasizing the importance of maintaining confidentiality and obtaining informed consent when using these tools. ABA Model Rule 1.6 (Confidentiality) addresses key points regarding the attorney-client privilege. It mandates vigilance in protecting client information, including when using AI tools. Rule 1.4 (Communication) may require client consultation about AI use in their matters, particularly when confidentiality concerns exist. As the US federal government, US state governments and various bar associations continue to grapple with the ethical and practical implications of rapid advances in AI technology on legal privileges, readers are urged to closely monitor these developments.

## 08 - Recent issues

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

Consistent with the above, courts have recently been grappling with attorneys' use of AI generative tools and whether prompts and outputs from those tools can be protected as privileged. The cases to date have underscored the need to evaluate these issues on a case-by-case basis, and for attorneys to proceed with caution when using these resources. For example, in *Tremblay v. Openai, Inc.*, No. 23-cv-03223-AMO, 2024 U.S. Dist. LEXIS 141362 (N.D. Cal. Aug. 8, 2024), the federal district judge

[50] See *Tremblay v. Openai, Inc.*, No. 23-cv-03223-AMO, 2024 U.S. Dist. LEXIS 141362 (N.D. Cal. Aug. 8, 2024).

for the U.S. District Court for the Northern District of California disagreed with the federal magistrate, and instead held that account information, prompts, and outputs that counsel for plaintiff used and received from ChatGPT as a part of their pre-suit investigation of possible copyright infringement claims constituted opinion work product because the ChatGPT prompts were queries crafted by counsel and contained counsel's mental impressions and opinions about how to interrogate ChatGPT, in an effort to vindicate the plaintiffs' copyrights against the alleged infringements. Even where the plaintiff had produced certain prompts and outputs as a part of the litigation, the court concluded that there had been no subject matter waiver because opinion work product, unlike fact work product, is discoverable by waiver only where mental impressions are at issue in a case and the need for the material is compelling. Because the plaintiff had failed to meet this heightened waiver standard, the court ruled that they were protected from discovery.

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