

Legal Privilege & Professional Secrecy 2021

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Miller & Chevalier Chartered

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Legal Privilege & Professional Secrecy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew T Reinhard and Dawn E Murphy-Johnson of Miller & Chevalier Chartered, for their continued assistance with this volume.



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DOMESTIC LEGISLATION

Attorney–client communications doctrine

- 1 Identify and describe your jurisdiction's laws, regulations, professional rules and doctrines that protect communications between an attorney and a client from disclosure.

In the Netherlands, confidentiality, and thus the protection of client-attorney communications, has its basis in the Counsel Act and the Rules of Professional Conduct 2018. Article 10a, paragraph 1(e) of the Counsel Act provides that the attorney is a confidential adviser who must maintain confidentiality within legal limits. Article 11a of the Counsel Act provides that the attorney must maintain confidentiality concerning all information that is entrusted to him or her in his or her professional capacity. This obligation of confidentiality also applies to the law firm's staff members, as well as to other persons who are involved in the professional conduct, and continues to exist after termination of the professional activity of the attorney.

Rule 3 of the Rules of Professional Conduct 2018 also stipulates that the attorney is obliged to maintain confidentiality concerning all information about his or her clients and the cases concerned, regardless of how this information was shared or who shared this information. The only consideration is whether or not the information was entrusted with the attorney by virtue of practising his or her profession. Further, the attorney has his or her own responsibility about maintaining confidentiality, even if the client should discharge the attorney of the obligation to do so.

Violation of the obligation to maintain confidentiality may lead to disciplinary sanctions (article 46 of the Counsel Act), and the attorney who intentionally violates this obligation is also liable to prosecution (article 272 of the Dutch Criminal Code).

In connection with the obligation of confidentiality, in most circumstances, an attorney in the Netherlands has the right not to give information and not to testify regarding information in cases in which he or she acts as an attorney. The aforementioned information includes client-attorney communications.

The most relevant Dutch legislation protecting client-attorney communications from disclosure is to be found in:

- article 165 of the Code of Civil Procedure;
- articles 218; 96a, paragraph 3; 96c, paragraph 1; 98; 104, paragraph 2; 105, paragraph 3; 110, paragraph 3; 125i and 125l of the Code of Criminal Procedure;
- article 8:33 of the General Administrative Law Act; and
- article 53a of the State Taxes Act.

Under article 165 of the Code of Civil Procedure, a person called as a witness is obliged to appear and give evidence. However, if that person is required by virtue of their profession to maintain confidentiality, he or she may refuse to testify concerning information received in his or her professional capacity.

Article 218 of the Code of Criminal Procedure gives the attorney the right to refrain from giving evidence and from answering questions concerning information that he or she received in his or her professional capacity.

Articles 96a, paragraph 3(b), and 105, paragraph 3 of the Code of Criminal Procedure offer, regarding article 218 of the Code of Criminal Procedure, protection when the investigating authorities or the investigating judge give an order to hand over documents, including client-attorney communications. These provisions determine that the attorney need not comply with such an order.

Article 96c, paragraph 1 and article 110 of the Code of Criminal Procedure provide that a law firm cannot be searched by a prosecutor, only by an investigating judge.

Article 98 of the Code of Criminal Procedure provides that communications and other documents falling within the scope of client-attorney confidentiality can only be seized at the attorney's office with his or her permission. Further, it is provided that a law firm can only be searched if the search is conducted without violation of the professional legal privilege and is limited to certain documents: corpora et instrumenta delicti. The same protection of the client-attorney confidentiality applies to searching a place for copying data saved on a data carrier there (article 125i in conjunction with article 98, and article 125l of the Code of Criminal Procedure).

In-house and outside counsel

- 2 Describe any relevant differences in your jurisdiction between the status of private practitioners and in-house counsel, in terms of protections for attorney–client communications.

Article 5(9), paragraph g of the Legal Profession By-law provides that attorneys can work in employment with a company or organisation and only practise law on behalf of that company or organisation.

In-house counsel are qualified practising lawyers admitted to the Netherlands Bar. They are required, by rules under the Netherlands Bar (article 5(12) of the Legal Profession By-law), to sign contracts with their employers and clients guaranteeing their independence.

Dutch in-house lawyers have always been considered to fall under standard legislation concerning attorney–client privilege.

The judgment of the European Court of Justice (ECJ) in *Akzo Nobel Chemicals Ltd and Akros Chemical Ltd v European Commission* (ECJ 14 September 2010, ECLI:EU:C:2010:512) created temporary uncertainty in the Netherlands about whether or not in-house counsel could invoke attorney–client privilege. According to the ECJ, an in-house attorney's economic dependence on, and close ties with, the employer means that in-house attorneys do not enjoy the same level of professional independence as outside attorneys and that based on those characteristics in-house counsel's legal privilege was limited to exchanges with external attorneys. However, in 2013, the Dutch Supreme Court took away this uncertainty by considering that the aforementioned ECJ

judgment applies to EU competition law and not necessarily to (competition) law outside this scope. The Supreme Court further considered that in the Netherlands the independent law practice of in-house counsel is regulated under the rules of the Netherlands Bar, and therefore saw no reason to deny professional legal privilege to in-house counsel solely on the ground that in-house counsel work in employment (see Supreme Court of the Netherlands, 15 March 2013, ECLI:NL:HR:2013:BY6101).

Following this judgment of the Dutch Supreme Court, in-house counsel can invoke professional legal privilege in the same situations that outside attorneys can invoke privilege. Professional legal privilege does not apply to company lawyers who are not admitted to the Netherlands Bar.

Work-product doctrine

- 3 | Identify and describe your jurisdiction's laws, regulations, professional rules and doctrines that provide protection from disclosure of tangible material created in anticipation of litigation.

The Netherlands does not have a separate concept of litigation privilege or a work-product doctrine where protection from disclosure is concerned. Documents created in anticipation of litigation fall within the scope of legal privilege because an attorney and his or her client have a right to prepare for proceedings in confidence. Legal privilege extends to all the information that is shared with the attorney in his or her professional capacity.

Recent case law

- 4 | Identify and summarise recent landmark decisions involving attorney-client communications and work-product.

The most important landmark decisions are not very recent. In *Notaris Maas* ('Civil law notary Maas'; Supreme Court of the Netherlands, 1 March 1985, ECLI:NL:HR:1985:AC9066), the Supreme Court considered that professional legal privilege can only be invoked if the information concerned was shared with the professional because of the client's need to gain professional advice and support. The legal privilege extends to all information that is entrusted, without distinction as to the degree of confidentiality; information is either confidential or it is not. If the client discharges the attorney of the obligation to maintain confidentiality, the attorney nevertheless has his or her own duty to observe secrecy. In subsequent judgments, the Supreme Court reaffirmed the scope of the professional legal privilege as set out in the *Notaris Maas* case (see Supreme Court of the Netherlands, 29 June 2004, ECLI:NL:HR:2004:A05070, 24 January 2006, ECLI:NL:PHR:2006:AU4666 and 3 April 2020, ECLI:NL:HR:2020:600).

The Supreme Court further established that exceptional circumstances can lead to the search for truth prevailing over the professional legal privilege. These exceptional circumstances may, for example, appear in situations where an attorney is being suspected of a serious criminal offence, or when there is a real risk of a serious crime (of violence) taking place that could be prevented by disclosure of the confidential information. In these cases, the breach of legal privilege must not go beyond what is strictly necessary to reveal the truth, and information that can be obtained otherwise should be left aside. Care should also be taken to ensure that the interests of other clients of the attorney are not disproportionately affected (see Supreme Court of the Netherlands, 22 November 1991, ECLI:NL:HR:1991:ZC0422 and Supreme Court of the Netherlands, 30 November 1999, ECLI:NL:HR:2002:A05297).

ATTORNEY-CLIENT COMMUNICATIONS

Elements

- 5 | Describe the elements necessary to confer protection over attorney-client communications.

In principle, all communications between an attorney and a client are protected by legal privilege, if the attorney acts in his or her professional capacity. It does not make a difference whether the communication is from client to attorney or from attorney to client. It also does not make a difference where the communications are kept or where they can be found.

In 2015, the debate regarding whether or not factual material (as opposed to legal advice) falls within the scope of legal privilege received a new lease of life as a result of the District Court of The Hague's interlocutory judgment of 14 January 2015, ECLI:NL:RBDHA:2015:248. The Court stated that the law firm's governance report about a housing corporation, which only contained factual findings and no legal findings, qualifications or conclusions, was not a confidential, internal and advisory document about the corporation's position in legal proceedings, and consequently did not fall within the scope of legal privilege. The Court decided that the report had to be passed to the defendants in the civil law procedure, being the members of the housing corporation's supervisory board. A relevant consideration of the Court concerning this decision was that the report had been given to the supervisory board members in draft form at an earlier stage and that the report entailed the reservation that it could be shared with the relevant authorities. The Netherlands Bar criticised this decision, stating that professional legal privilege also applies to facts when factual research is done within the scope of legal assistance and advice.

In the Supreme Court decision of 25 November 2016 (ECLI:NL:HR:2016:2686), it was decided that documents that had been drafted by an imprisoned suspect and not yet been shared with his attorney, may, under certain circumstances, fall under the client-attorney confidentiality. However, it is significant whether these notes, considering their nature and content, can be considered as containing information that is normally shared between a client and his or her attorney, and whether it is likely that the information is, in this specific matter, destined to be shared by the client with his attorney. By these criteria, a handwritten note that said 'preparation interrogation', and a note that began with 'Rotterdam camera's/trash cans' and a note that started with 'investigation to take place' and 'forensic, digital & witness statements' were considered to fall under the client-attorney confidentiality. Other notes, containing lists of activities and meetings of the suspect, written from the suspect's point of view and resembling a diary, were not considered privileged.

Exclusions

- 6 | Describe any settings in which the protections for attorney-client communications are not recognised.

Only information the attorney receives or shares with the client in his or her professional capacity as an attorney falls within the scope of legal privilege, for the information thus falls within the scope of receiving or giving legal advice, support or representation. Information shared outside of the professional capacity of the attorney does not fall within the scope of legal privilege.

Article 98 of the Code of Criminal Procedure provides for a legal exception to professional legal privilege: documents that are the object of, or have contributed to the commission of a criminal offence (*corpora et instrumenta delicti*) do not fall within the scope of legal privilege. The Supreme Court ruled that the question of whether or not documents qualify as *corpora* or *instrumenta delicti* cannot be answered in

a general way but specifically depends on the nature of the documents and the nature of the offence that supposedly has been committed, as well as on the actual behaviour that the suspect is suspected of (5 January 2016, ECLI:NL:HR:2016:8). The Supreme Court further ruled that the judge who has to decide on the applicability of the client-attorney confidentiality must observe the necessary cautiousness (28 June 2016, ECLI:NL:HR:2016:1324).

In case law that has existed since 1991, the Supreme Court further established that exceptional circumstances can lead to the search for truth prevailing over the professional legal privilege. These exceptional circumstances may, for example, appear in situations where an attorney is being suspected of a serious criminal offence or when there is a real risk of a serious crime (of violence) taking place that could be prevented by disclosure of the confidential information. (See, eg, Supreme Court of the Netherlands, 22 November 1991, ECLI:NL:HR:1991:ZC0422 and Supreme Court of the Netherlands, 5 July 2011, ECLI:NL:HR:2011:BP6141.)

Moreover, since the entry into force of the Dutch Money Laundering and Financing of Terrorism Prevention Act in 2008 (based on Directive 2005/60/EC), service providers, including attorneys, are obliged to notify authorities when unusual financial transactions are encountered. Attorneys only fall under the scope of this law when they give advice or assistance on:

- buying or selling real estate;
- administering financing or valuables;
- incorporating or managing companies;
- buying, selling or acquiring companies; and
- activities of a fiscal nature.

Who holds the protection

7 | In your jurisdiction, do the protections for attorney-client communications belong to the client, or is secrecy a duty incumbent on the attorney?

Secrecy is a duty incumbent on the attorney and it is the attorney who decides whether or not legal privilege applies. Even if the client relinquishes the confidentiality of the information, the attorney has an independent duty to weigh whether or not he or she should preserve the confidentiality of the information.

Consequently, if an attorney should hire an expert in a certain case, to render advice to the attorney regarding his or her specific field of expertise, it is the attorney and not the expert who should decide whether or not the right to legal privilege applies to documents and communications that the expert has possession of in connection with this assignment.

It is good procedure that attorney-client documents found during a search or seizure either at a law firm or at the location of the client or a third party, are sealed by the investigating judge (or, if it is not necessary for the investigating judge to be present, by the Public Prosecutor) and then sent to the investigating judge's offices, to enable the attorney in question to view (for the first time, or otherwise) the documents at the judge's chambers and share his or her point of view concerning the privileged nature of the documents, before the investigating judge decides. The investigating judge decides, preferably after consultation with the dean of the local bar association. The judge follows the standpoint of the attorney in question, unless – as the Supreme Court has phrased it and is now established case law – there is no reasonable doubt about the attorney's standpoint being incorrect (see ECLI:NL:HR:2010:BJ9262 and ECLI:NL:HR:2013:CA0434). Only to the degree that it is necessary for the investigating judge to take note of the communications to come to a decision, may he or she do so to a certain extent (see Supreme Court of the Netherlands, 22 December 2015, ECLI:NL:HR:2015:3714). The attorney can file a written complaint against the examining judge's decision within 14 days, which will be decided on by the court.

Underlying facts in the communication

8 | To what extent are the facts communicated between an attorney and a client protected, as opposed to the attorney-client communication itself?

The basic criterion is that all information that is entrusted to an attorney in his or her professional capacity is protected. Therefore, this should also concern facts communicated between an attorney and a client.

However, the District Court of The Hague gave an interim judgment on 14 January 2015 in which it decided that a governance report from a law firm containing only factual findings did not fall within the scope of legal privilege (ECLI:NL:RBDHA:2015:248). Further, it is important to note that the Court also took into consideration that the report had been given to the defendants in draft form at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities.

Agents

9 | In what circumstances do communications with agents of the attorney or agents of the client fall within the scope of the protections for attorney-client communications?

Case law stipulates that third parties assigned by the attorney to give the defence (expert) advice on matters related to the legal issue at hand can claim a derived privilege for all communications with the attorney that concern the matter for which the third party is engaged (see Supreme Court of the Netherlands, 29 March 1994 and 12 February 2002, ECLI:NL:HR:2002:AD4402).

In line with growing concerns among several authorities about the misuse of legal privilege, the Supreme Court decided on 26 January 2016 that the mere fact that communications between a third person and a client are sent in carbon copy to a professional trusted with privileged information will not automatically mean that legal privilege can be invoked. In these situations, it remains necessary that the information be shared with the attorney to obtain or receive legal advice (see Supreme Court of the Netherlands, 26 January 2016, ECLI:NL:HR:2016:110).

Corporations claiming protection

10 | Can a corporation avail itself of the protections for attorney-client communications? Who controls the protections on behalf of the corporation?

Yes. The same protections for attorney-client communications apply for a corporation (the client) as for an individual. Moreover, in the Supreme Court decision of 3 April 2020 (ECLI:NL:HR:2020:600), it was decided that minutes and written board decisions of corporations can also contain confidential information, falling under the scope of client-attorney confidentiality. The mere circumstance that privileged information has been incorporated in those documents, does not make for that information to be considered extracted from client-attorney confidentiality. The same goes for information that has already been shared with third parties: those documents, too, can still contain client-attorney privileged information.

Communications between employees and outside counsel

11 | Do the protections for attorney-client communications extend to communications between employees and outside counsel?

When employees work at a corporation that has an attorney-client relationship with outside counsel, a convincing argument can be made that all communications between employees and outside counsel fall under the scope of legal privilege, as long as the information is shared in the context of the professional capacity of the outside attorney in the specific matter. To our knowledge, this is standard practice.

Communications between employees and in-house counsel

12 | Do the protections for attorney-client communications extend to communications between employees and in-house counsel?

In-house counsel can refuse to give information based on their professional legal privilege in the same way that outside attorneys can invoke this privilege. Therefore, as is the case for outside counsel, a convincing argument can be made that the protections for attorney-client communications extend to communications between employees and in-house counsel, as long as the communication is exchanged in the context of the professional capacity of the in-house attorney as the corporation's attorney. Employees should be aware that counsel does not act as their personal counsel and does not have client-attorney privilege concerning 'personal' communications between them.

Communications between company counsel and ex-employees

13 | To what degree do the protections for attorney-client communications extend to communications between counsel for the company and former employees?

When employees are no longer in the employment of a company that has an attorney-client relationship with counsel, then it can be said that former employees are no longer part of the company and, therefore, no longer connected to the client. However, the attorney-client privilege extends to all confidential information exchanged in the past. Further, the standpoint could be taken that former employees could (from the moment they cease to be employees) be considered as third parties. Information that is shared between a third party and an attorney falls under the scope of legal privilege if the information shared is used to prepare advice considered necessary or important for the defence. It is advisable to put in writing the engagement between the third party and the attorney, and the reason why the defence needs the input of the third party.

Who may waive protection

14 | Who may waive the protections for attorney-client communications?

The attorney decides whether or not legal privilege applies. Because an attorney must maintain confidentiality and is criminally liable when he or she intentionally does not maintain confidentiality, in our opinion, the attorney should not waive legal privilege but should instead initiate proceedings so that matters can be discussed with a judge.

Although it is the attorney who should decide whether or not information falls within the scope of legal privilege if a client acts on his or her own and shares privileged information with a third party, in practice, it will be difficult to uphold the privileged nature of those documents. Alternatively, it can be argued that even if a professional entrusted with privileged information shares documents with a third party, this does not automatically mean that he or she altogether waives confidentiality concerning this information (eg, the Advocate-General's opinion of 12 February 2013, ECLI:NL:PHR:2013:BV3004, not disputed by the Supreme Court of the Netherlands). In that specific matter, information was given to regulatory authorities with a derived privilege, but that was not the case in the judgment of the Amsterdam District Court of 4 September 1991, NJ 1992, 351, where an attorney had disclosed privileged information to a third party out of court, and could nevertheless still invoke legal privilege concerning this information in court. More recently, in its judgment of 3 April 2020, the Supreme Court of the Netherlands decided that information, shared by a client with a third party, can still contain information falling within the scope of client-attorney privilege that should remain confidential.

Actions constituting waiver

15 | What actions constitute waiver of the protections for attorney-client communications?

If an attorney should decide to waive legal privilege, this is established by disclosure of the privileged information. The District Court of The Hague gave an interim judgment on 14 January 2015 in which it decided that legal privilege did not apply to a specific (factual) report, considered that the report at hand had been given to the defendants in draft form at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities (ECLI:NL:RBDHA:2015:248).

The Court did not expressly consider that it believed that this could be seen as an implied waiver, but this opinion could be derived from the judgment.

Accidental disclosure

16 | Does accidental disclosure of attorney-client privileged materials waive the privilege?

Accidental disclosure of attorney-client communication constitutes a violation of the obligation to maintain confidentiality, and therefore, does not waive legal privilege. Only in the case that this communication is the object of, or has contributed to the commission of, a criminal offence, does professional legal privilege not apply to this communication.

There appears to be no case law in the Netherlands regarding accidental disclosure, and no procedure exists that could prevent a third party from using information disclosed inadvertently.

Sharing communications among employees

17 | Can attorney-client communications be shared among employees of an entity, without waiving the protections? How?

When attorney-client communications are shared among employees of an entity, this should not constitute waiving the protections of legal privilege. First, the attorney decides whether communications fall within the scope of his or her legal privilege. Further, as far as we know, there is no case law about whether or not protections are waived when privileged information is shared among employees and, in dawn raids, it is general practice to filter the employees' documents and mailboxes to leave privileged information out of the seizure.

As an additional safeguard, one could establish in writing that the attorney can communicate with multiple persons within the company-client as his or her contact persons on behalf of the client, so there is even less chance of discussion about whether or not further internal distribution of attorney-client communication among these persons could affect the privileged nature of the attorney-client communication.

Exceptions

18 | Describe your jurisdiction's main exceptions to the protections for attorney-client communications.

The main exceptions to the protections for attorney-client communications are the following:

- Documents that are the object of, or have contributed to the commission of, a criminal offence (*corpora et instrumenta delicti*) do not fall under the scope of legal privilege. Those documents can therefore be seized (article 98, paragraph 5 of the Code of Criminal Procedure). Because, in most cases, this is likely to be a topic of discussion between the authorities and the attorney, documents can be sealed and the attorney can file a complaint with the district court.

- Based on Supreme Court case law, attorney–client communications can be seized if the search for truth prevails over the concept of professional legal privilege. This is only allowed in exceptional circumstances.
- Based on article 2a of the Money Laundering and Financing of Terrorism Prevention Act, attorneys are obliged to notify authorities when unusual financial transactions are encountered when they give advice or assistance on activities of a fiscal nature, on buying or selling real estate, on administering financing or valuables, on incorporating or managing companies or on buying, selling or acquiring companies.
- The District Court of The Hague judged that governance reports that contain only factual findings and factual material and no legal findings, qualifications or conclusions, do not fall within the scope of legal privilege. However, as mentioned earlier, a relevant consideration of the Court concerning this decision was that the report had been given in draft form to the defendants at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities.
- It is advisable for the attorney and client to always indicate that the correspondence between them is confidential by labelling it as such (eg, 'client–attorney privileged').
- The legal privilege for communications that do not fall under the scope of the privilege should not be misused.
- An attorney should not voluntarily cooperate with the authorities or permit to seize confidential documents. The attorney should always invoke his or her legal privilege. Also, see the Manual for Attorneys concerning External Investigations, published by the Netherlands Bar in February 2018. This manual offers practical guidance for attorneys on how to act in criminal investigations and investigations by other government authorities.
- The decision on whether certain documents are confidential should first and foremost be taken by the attorney. If a discussion arises, only competent judges, and not investigating government officials, can give final decisions about the seizure of confidential documents.
- When government officials want to seize attorney–client communications, these communications should be sealed by the investigating judge, to enable the attorney in question to share his or her point of view about the privileged nature of the documents. The attorney's standpoint should be respected by government authorities and the investigating judge, unless, reasonably, there can be no doubt about this position being incorrect. The attorney can file a written complaint with the district court against the decision of the investigating judge and eventually appeal the decision of the district court at the Dutch Supreme Court.

Litigation proceedings overriding the protection

- 19 | Can the protections for attorney–client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

When an attorney invokes his or her legal privilege when he or she is called to testify before court, the court will assess whether the refusal to testify is reasonable. The court will decline the claim for privilege regarding all that is considered not to be entrusted to the attorney in his or her professional capacity.

Corpora et instrumenta delicti can be seized, as can documents that can help to reveal the truth, but only if exceptional circumstances demand that the search for truth prevails over the legal privilege.

Recognition of foreign protection

- 20 | In what circumstances are foreign protections for attorney–client communications recognised in your jurisdiction?

In civil proceedings, a Dutch court can hear witnesses at the request of a foreign authority, if the request is based on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) (The Hague Evidence Convention). Based on article 11 of this Convention, the witness may refuse to give evidence insofar as he or she has a privilege or duty to refuse to give the evidence under the law of the foreign authority, and the privilege or duty has been specified in the request or has been otherwise confirmed to the Netherlands by the foreign authority.

A foreign authority can also request a Dutch court to hear witnesses based on Council Regulation (EC) No. 1206/2001 on cooperation between the courts of member states in the taking of evidence in civil or commercial matters. Under article 4(1)(e) of this Regulation, a request of a foreign authority must contain:

Where appropriate, a reference to a right to refuse to testify under the law of the member state of the requesting court.

Best practice to maintain protection

- 21 | Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained.

The best practices are as follows:

WORK-PRODUCT

Elements

- 22 | Describe the elements necessary to confer protection over work-product.

In the Netherlands, the notion of 'work-product' as a separate component of legal privilege remains unfamiliar. However, legal privilege extends to all documents written to or by an attorney or documents given or sent to an attorney in his or her professional capacity (ie, giving advice, support and representation). In a Supreme Court case of 24 January 2006 (ECLI:NL:HR:2006:AU4666), the mother of an accused had provided her diary to the attorney of the accused. The Supreme Court considered the diary as information that was shared with the attorney in his professional capacity, and thus the diary fell within the scope of legal privilege. Documents created in anticipation of litigation fall under the scope of legal privilege because an attorney and a client have a fundamental right to prepare for proceedings in confidence.

Because there is no separate notion of 'work-product' in the Netherlands, the same rules and principles that apply to attorney–client communications also apply to documents created in anticipation of litigation. The answers to the questions concerning work-product will, therefore, mainly refer to the answers concerning legal privilege and attorney–client communications.

Exclusions

- 23 | Describe any settings in which the protections for work-product are not recognised.

Since the Netherlands does not recognise the 'work-product' distinction, reference is made to the settings in which attorney–client communications are not recognised.

Who holds the protection

24 | Who holds the protections for work-product?

It is the attorney who decides whether legal privilege applies; it is a duty incumbent on the attorney. The legal privilege follows the privileged document, and thus also the work-product. It does not matter where the work-product is found. This means that the client can also invoke the protection for a (draft) work-product at his or her premises or on his or her computer. The same goes for third parties instructed by the defence to render advice and who possess documents or work-products received from the defence (attorney).

Types of work-product

25 | Is greater protection given to certain types of work-product?

The District Court of The Hague, in an interlocutory judgment of 14 January 2015, judged that governance reports that contain only factual findings and factual material and no legal findings, qualifications or conclusions, do not fall within the scope of legal privilege (ECLI:NL:RBDHA:2015:248). However, a relevant consideration of the Court with regard to this decision was that the report had been given to the supervisory board members in draft form at an earlier stage and that the report entailed the reservation that it could be shared with the relevant authorities.

In-house counsel work-product

26 | Is work-product created by, or at the direction of, in-house counsel protected?

In-house counsel admitted to the Netherlands Bar can invoke the same professional legal privilege as outside attorneys. This legal privilege also applies to documents created in anticipation of litigation.

Work-product of agents

27 | In what circumstances do materials created by others, at the direction of an attorney or at the direction of a client, fall within the scope of the protections for work-product?

Third parties assigned by the attorney to give the defence (expert) advice on the legal issue for which the client has approached the attorney can claim privilege.

Third parties overcoming the protection

28 | Can a third party overcome the protections for work-product? How?

No. It is the attorney, not a third party, who decides whether the right to legal privilege applies. Other than a judge who decides that exceptional circumstances overcome protections of legal privilege, no third party can overcome these protections.

Who may waive work-product protection

29 | Who may waive the protections for work-product?

The attorney decides whether or not legal privilege applies. Because an attorney must maintain confidentiality and is even criminally liable when he or she does not, the attorney should not waive legal privilege.

Actions constituting waiver

30 | What actions constitute waiver of the protections for work-product?

If an attorney should decide to waive legal privilege, this is established by disclosure of the privileged information. The District Court of The Hague, in its decision that legal privilege was not applicable to a specific (factual) report, considered that the report at hand had been given to the defendants in draft form at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities (ECLI:NL:RBDHA:2015:248).

The Court did not expressly consider that it was of the opinion that this could be seen as an implied waiver, but this opinion could be derived from the judgment.

Client access to attorney files

31 | May clients demand their attorney's files relating to their representation? Does that waive the protections for work-product?

A client has the right to be informed of all the relevant information in his or her case and, therefore, also of their attorney's files relating to their representation (Rule 16 of the Rules of Professional Conduct 2018). However, this does not waive protections.

Accidental disclosure of work-product

32 | Does accidental disclosure of work-product protected materials waive the protection?

Not applicable.

Exceptions

33 | Describe your jurisdiction's main exceptions to the protections for work-product.

These are the same exceptions that apply to attorney-client communications:

- Documents that are the object of, or have contributed to the commission of, a criminal offence (*corpora et instrumenta delicti*) do not fall under the scope of legal privilege. Those documents can therefore be seized (article 98, paragraph 5 of the Code of Criminal Procedure). Because, in most cases, this is likely to be a topic of discussion between the authorities and the attorney, documents can be sealed and the attorney can file a complaint with the district court.
- Based on Supreme Court case law, attorney-client communications can be seized if the search for truth prevails over the concept of professional legal privilege. This is only allowed in exceptional circumstances.
- Based on article 2a of the Money Laundering and Financing of Terrorism Prevention Act, attorneys are obliged to notify authorities when unusual financial transactions are encountered when they give advice or assistance on activities of a fiscal nature, on buying or selling real estate, on administering financing or valuables, on incorporating or managing companies or on buying, selling or acquiring companies.
- The District Court of The Hague judged that governance reports that contain only factual findings and factual material and no legal findings, qualifications or conclusions, do not fall within the scope of legal privilege. However, as mentioned earlier, a relevant consideration of the Court concerning this decision was that the report had been given in draft form to the defendants at an earlier stage, and a reservation had been made that the report could be shared with the relevant authorities.

Litigation proceedings overriding the protections

- 34 | Can the protections for work-product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

When an attorney invokes his or her legal privilege when he or she is called to testify before court, the court will assess whether the refusal to testify is reasonable. The court will decline the claim for privilege regarding all that is considered not to be entrusted to the attorney in his or her professional capacity.

Corpora et instrumenta delicti can be seized, as can documents that can help to reveal the truth, but only if exceptional circumstances demand that the search for truth prevails over the legal privilege.

Recognition of foreign protection

- 35 | In what circumstances are foreign protections for work-product recognised in your jurisdiction?

In civil proceedings, a Dutch court can hear witnesses at the request of a foreign authority, if the request is based on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) (The Hague Evidence Convention). Based on article 11 of this Convention, the witness may refuse to give evidence insofar as he or she has a privilege or duty to refuse to give the evidence under the law of the foreign authority, and the privilege or duty has been specified in the request or has been otherwise confirmed to the Netherlands by the foreign authority.

A foreign authority can also request a Dutch court to hear witnesses based on Council Regulation (EC) No. 1206/2001 on cooperation between the courts of member states in the taking of evidence in civil or commercial matters. Under article 4(1)(e) of this Regulation, a request of a foreign authority must contain:

Where appropriate, a reference to a right to refuse to testify under the law of the member state of the requesting court.

OTHER ISSUES

Who determines what is protected

- 36 | Who determines whether attorney-client communications or work-product are protected from disclosure?

It is the attorney who should be asked whether he or she believes that the communications or work-product fall within the scope of legal privilege. The examining judge will then decide whether or not the attorney is correct in his or her point of view, and the attorney can file a written complaint against this decision.

Common interest

- 37 | Can attorney-client communications or work-product be shared among clients with a common interest who are represented by separate attorneys, without waiving the protections? How may the protections be preserved or waived?

Although it is the attorney who should decide whether or not information falls within the scope of legal privilege, when a client acts on his or her own and shares privileged information with a third party, in practice, it will be difficult to uphold the privileged nature of those documents. In this particular situation, whether it could effectively be argued that the client did not mean to waive confidentiality depends on the circumstances. We are unaware of any case law on this specific situation.

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Limited waiver

- 38 | Can attorney-client communications or work-product be disclosed to government authorities without waiving the protections? How?

No definitive answer can be given to this question. On one hand, sharing privileged documents with the authorities will make it difficult to uphold the privileged nature of the documents. On the other hand, the Supreme Court considers that even if a professional entrusted with privileged information shares documents with a third party, this does not automatically mean that he or she altogether waives confidentiality. In its judgment of 3 April 2020, the Supreme Court of the Netherlands decided that information, shared by a client with the Dutch Central Bank and the Ministry of Finance, can still contain information falling within the scope of client-attorney privilege that should remain confidential, therewith disproving the doctrine confidentiality gets waived by the sharing of privileged information with third-party government authorities.

Other privileges or protections

- 39 | Are there other recognised privileges or protections in your jurisdiction that permit attorneys and clients to maintain the confidentiality of communications or work-product?

No, the only legal privilege protections recognised in the Netherlands are those discussed.

UPDATE AND TRENDS

Proposals and developments

- 40 | Are there any other current developments or trends that should be noted?

There are no updates at this time.

Coronavirus

41 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Since February 2020, Dutch courts have made adjustments to further provide for the handling of cases without the in-court presence of all parties concerned. That also applies to, for example, the handling by a court of complaints against the seizure of attorney-client communications. Further, laws and regulations have been implemented to enforce social distancing in the Netherlands.

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