## CONTENTS

<table>
<thead>
<tr>
<th>Global overview</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matthew T Reinhard and Dawn E Murphy-Johnson</td>
<td></td>
</tr>
<tr>
<td>Miller &amp; Chevalier Chartered</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Argentina</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximiliano D’Auro and Tadeo Leandro Fernández</td>
<td></td>
</tr>
<tr>
<td>Estudio Beccar Varela</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Brazil</th>
<th>12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fernanda Ferrer Haddad and Ricardo Quass Duarte*</td>
<td></td>
</tr>
<tr>
<td>Trench, Rossi e Watanabe Advogados</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>England &amp; Wales</th>
<th>16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kate Menin, Tim Vogel, Ciara Dunny and Umesh Bhudia</td>
<td></td>
</tr>
<tr>
<td>Addleshaw Goddard LLP</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Germany</th>
<th>23</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kai Hart-Hönig</td>
<td></td>
</tr>
<tr>
<td>Dr Kai Hart-Hönig Rechtsanwälte</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Japan</th>
<th>28</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tsuyoshi Suzuki, Rin Moriguchi and Mariko Sumiyoshi</td>
<td></td>
</tr>
<tr>
<td>Momo-o, Matsuo &amp; Namba</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mexico</th>
<th>32</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diego Sierra and Pablo Fautsch</td>
<td></td>
</tr>
<tr>
<td>Von Wobeser y Sierra, SC</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Netherlands</th>
<th>35</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enide Perez</td>
<td></td>
</tr>
<tr>
<td>Sjöcrona Van Stigt Advocaten</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nigeria</th>
<th>41</th>
</tr>
</thead>
<tbody>
<tr>
<td>Babajide Oladipo Ogundipe and Morenikeji Osilaja</td>
<td></td>
</tr>
<tr>
<td>Sofunde, Osakwe, Ogundipe &amp; Belgore</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Switzerland</th>
<th>46</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominique Müller and Miguel Oural</td>
<td></td>
</tr>
<tr>
<td>Lenz &amp; Staehelin</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>United States</th>
<th>51</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matthew T Reinhard, Dawn E Murphy-Johnson and Sarah A Dowd</td>
<td></td>
</tr>
<tr>
<td>Miller &amp; Chevalier Chartered</td>
<td></td>
</tr>
</tbody>
</table>
Preface

Legal Privilege & Professional Secrecy 2017
Second edition

Getting the Deal Through is delighted to publish the second edition of Legal Privilege & Professional Secrecy, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 Getting the Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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.

Getting the Deal Through

London
May 2017
Global overview

Matthew T Reinhard and Dawn E Murphy-Johnson
Miller & Chevalier Chartered

As we highlighted in the first edition of Legal Privilege & Professional Secrecy, in an increasingly global landscape, cross-border legal disputes make the news around the world. But issues concerning legal privilege and professional secrecy are increasingly the lead story. More and more often, lawyers are finding themselves in the crosshairs of international investigations and litigation – with the secrets they are professionally and legally bound to keep at risk – making it crucial for attorneys working on day-to-day international matters and corporate counsel guiding their companies into new international markets to appreciate the intricacies of local privilege and professional secrecy protections.

As 2016 drew to a close, news hit that Teva Pharmaceuticals Inc, an Israel-based pharmaceuticals company, had entered into a deferred prosecution agreement with the US Department of Justice to resolve criminal charges relating to the bribery of government officials in Russia, Ukraine and Mexico. As part of that resolution, Teva paid more than US$283 million in criminal penalties – an amount that reflected a 20 per cent ‘discount’ for the company’s substantial cooperation and remediation. That said, the reduction could have been greater, but for the company’s overbroad assertions of attorney–client privilege. As a result, and as reported by the press, the company did not receive full ‘cooperation credit’.

Weeks later, news sources around the world reported that German authorities had raided the offices of the international law firm that Volkswagen had hired to conduct an internal investigation of the company’s emissions scandal. Media reports analysed the rules governing communications between lawyers and their clients, and reporters interviewed experts on the differences between the principles that apply to attorney–client communications in the US as opposed to those in place in Germany. Indeed, variances in the attorney–client privilege may present particular risks for law firms and corporations with multiple global offices, where the same material may be protected in one location but not another. Challenges presented by ‘cloud’ computing and the transfer of data – instantly – around the globe only add to these complexities.

Cases involving attorneys as whistle-blowers have also recently led the headlines. In early 2017, a jury awarded US$8 million to the former general counsel of US company Bio–Rad Laboratories, Inc, who alleged in a civil suit that the company terminated his employment after he raised issues concerning potential bribes and kickbacks paid by company representatives to government officials in China. As was widely reported in the media, the former in-house lawyer was permitted to introduce evidence of and elicit testimony about attorney–client communications during the week-long jury trial.

As cases like these become even more commonplace, the intricacies of legal privilege and professional secrecy across multiple jurisdictions will be ever more important to attorneys engaged in cross-border matters. The constitutions, laws and regulations of many nations prohibit attorneys from revealing their clients’ secrets, but the country-specific nuances are legion. This book intends to bring to light some of the major differences between jurisdictions so that practitioners can best shape their approaches to communicating with their clients, effectively gather and use evidence when their work takes them outside their home country, and identify local counsel well versed in the contours of local protections for attorney–client communications and attorney work product.

The authors of this book continue to be at the top of their game in terms of knowing the ins and outs of the protections embodied in legal privilege and professional secrecy in their home countries. Each country-specific chapter, written by well-qualified attorneys, brings important local insights into the issues of the day. That said, this guide is just that: a guide. Complex questions should always be addressed by competent and diligent local counsel.
Argentina

Maximiliano D’Auro and Tadeo Leandro Fernández
Estudio Beccar Varela

Domestic legislation

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 Argentina, communications between an attorney and a client are protected from disclosure through several regulations. Legal privilege is linked to constitutional rights. According to section 18 of the national Constitution:

No body may be compelled to testify against himself. The defense by trial of persons and rights may not be violated. The domicile may not be violated, as well as the written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed...

At a national level, should a lawyer disclose confidential information regarding a client, he or she could fall under section 156 of the Argentine Criminal Code (ACC). This section sets forth a penalty for the person who reveals, without just cause, any secret information whose disclosure could cause damage if this information was known to him or her due to his or her occupation, employment, profession or art. The sanction for such offence is the imposition of fines ranging from 1,500 to 95,000 Argentine pesos and special disqualification from practising such profession, if applicable. Apart from this section of the ACC, attorney–client privilege is not ruled as such nationwide.

Pursuant to section 244 of the National Criminal Procedural Code (CPC), which applies in the courts of the City of Buenos Aires and in federal courts all across the country, lawyers shall refrain from testifying about secret actions that come to their knowledge in the practice of their profession. Notwithstanding, lawyers cannot refuse to testify when the interested party (generally, their client) has released them from their professional secret. Section 237 impedes the seizure of letters or documents sent or delivered to attorneys regarding the performance of their duties (other than instruments or proceeds of crime). Section 255 also excludes attorneys from being cited as expert witnesses in criminal proceedings where legal privilege could be infringed.

In addition, section 444 of the National Civil and Commercial Procedural Code (CCPC), which also applies in the courts of the City of Buenos Aires and in federal courts all across the country, sets forth that a witness may refuse to answer a question if such answer would reveal information protected by professional secrecy (including attorney–client privilege).

Other regulations that protect professional secrecy are set forth in local procedural codes and professional ethics codes from a particular Bar in a certain jurisdiction. In this regard, Argentina is divided into 23 districts (provinces) and one autonomous district, the City of Buenos Aires. Each of the provinces has its own constitution, laws, authorities, form of government, etc, though these must first and foremost comply with the national Constitution and laws. Local regulations often provide similar regulations regarding professional secrecy.

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.

In principle, in Argentina there are no relevant differences between the status of private practitioners and in-house counsel, in terms of protections for attorney–client communications. Argentine law does not distinguish between external counsel or in-house lawyers, and therefore they are all bound by professional secrecy.

There is specific reference to in-house counsel in section 20 of the Ethics Code, which provides, regarding freedom of action, that a lawyer is free to accept or reject cases in which professional intervention is requested, without expressing the reasons for such decision, except when he or she is acting as an employee. In such a case, lawyers may justify their refusal on the grounds of ethical or legal rules that may affect them personally or professionally.

Likewise for private practitioners, communications between in-house counsel and management are protected as long as they are made on the occasion or in the exercise of their profession.

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.

Pursuant to Argentine law, professional secrecy includes not only communications but also work product. However, this area is not as developed as it is in the United States (see question 22).

As noted above, section 237 of the CPC forbids the seizure of letters or documents sent or delivered to attorneys regarding the performance of their duties, other than the instruments or proceeds of crime.

In addition, section 318 of the Civil and Commercial Code sets forth that correspondence can be filed as evidence by the recipient,
Attorney–client communications

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

In principle, communications between clients and attorneys are privileged if they act in such capacity, in other words, in their professional practice. Law No. 23,187 does not exhaustively define the scope of the legal privilege, but indicates that there are specific rights regarding professional secrecy attached to the activities of providing legal advice, defending, assisting and representing clients in proceedings. However, the simple inclusion of non-legal items in the attorney–client communications does not destroy the professional secrecy and the communication remains confidential.

Communications from client to attorney for the purpose of obtaining legal advice are protected. Some scholars argue that the protection also covers other communications made in the presence of third parties. In this regard, it is argued that professional secrecy extends to communications received from or made to the client, the opponent, other colleagues and third parties. Other scholars argue that professional secrecy also extends to communications with lawyers in the frame of personal relationships, and not exclusively to legal matters.

Finally, it is generally accepted that ‘client’ should be understood in a broad sense, in other words, involving people who eventually do not establish a professional relationship with the lawyer. Furthermore, the privilege stands beyond the term of the professional services contract.

Some case law states that personal information of the client, such as name, address, phone number, occupation, marital status and some professional contract details, can be disclosed without the prior authorisation of the client. However, Discipline Tribunals of Bar Associations established that providing such information could infringe legal privilege.

To exercise the legal profession in the jurisdiction of the City of Buenos Aires – and, therefore, for professional secret to apply – an individual is required to:

- have a law degree issued by competent authority;
- be admitted to the City of Buenos Aires Bar Association (or, in certain cases, be admitted to the Bar of the corresponding jurisdiction where lawyers are exercising their professional practice); and
- have no incompatibilities and impediments.

Law No. 23,187 sets forth incompatibilities in the following cases:

- The National President and Vice President, ministers, secretaries and undersecretaries of the Executive Branch, the Attorney General of the National Treasury and its deputy, the Mayor of the City of Buenos Aires and its secretaries.
- National and local legislators, during their mandate and regarding administrative proceedings in which their clients could have conflict of interests, except in criminal cases.
- The judges, judicial officers and employees of any jurisdiction; members of the Attorney General’s Office, National Administrative Investigations, members of administrative courts except when professional practice is a legal obligation in order to represent the national, provincial or municipal state.
- Members of the armed forces and members of their courts, officials and members of the Federal Police, National Gendarmerie, Naval Prefecture, National Aeronautical Police, National Prison Service, Provincial Police, when the rules governing these institutions so provide.
- Judges and officials of municipal courts of the City of Buenos Aires.
- Retired lawyers, regardless of the jurisdiction where they have obtained retirement, to the extent provided by the pension legislation in force on the date the retirement was obtained.
- Lawyers practising the profession of notary public.
- Lawyers practising the profession of public accountant, auctioneer or other judicial auxiliary. The incompatibility is limited to their professional exercise in the respective court and for the duration of their functions.
- Retired judges and judicial officers. The incompatibility is limited to their professional exercise before the courts they used to belong for a term of years after leaving office.

However, lawyers who are incompatible according to the above may act on their own behalf or on behalf of their spouses, blood relative in the direct line of ascent or descent, pupil or adopted child. They may also act on those cases that are inherent of their office or employment.

In addition, Law No. 23,187 sets forth impediments in the following cases:

- lawyers who are suspended from the Buenos Aires City Bar Association; and
- lawyers who are excluded from any Bar Association, during the term of the sanction.

Moreover, the Code of Ethics of the Province of Buenos Aires sets forth that the obligation of maintaining secrecy is absolute to lawyers, even when the clients authorise the disclosure.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

Professional secrecy regarding attorney–client communications under Argentine law is considered to be wide-ranging.

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

By virtue of the provisions noted in question 1, only clients can release attorneys from the professional secrecy, unless disclosure is necessary for the attorney’s self-defence.

The Ethics Code of the Province of Buenos Aires sets forth that the obligation to maintain secrecy is absolute. Furthermore, it establishes that the attorney may not be released from such duty by any authority or person – not even by the client. In our view, this should be construed as preventing the attorney from obtaining broad or anticipated waivers from their clients. However, ex post facto waivers provided by the clients for specific disclosures should be admitted.

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

As stated above, it is broadly accepted that professional secrecy is wide-ranging under Argentine law. This covers not only the communication itself but also the underlying facts. However, some case law
states that professional secrecy is not accepted when the underlying facts are widely known.

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?

In principle, the protection only covers attorney–client communications. However, some scholars argue that communications with agents of the client fall within the scope of the protections for attorney–client communications, as well as some agents of the attorney.

When other professionals (eg, public notaries, accountants, etc) intervene in the relationship, they are ruled by their own ethical or legal regulation on professional secrecy.

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

Although there are no specific provisions, it is accepted that a corporation can avail itself of the protections for attorney–client communications. The protection on behalf of the corporation is controlled by those who are empowered by law, corporate by-laws or powers of attorney to represent the company.

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

Although there are no specific provisions, the protections for attorney–client communications extend to communications between employees and outside counsel if the conditions set forth in question 5 are met.

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

Although there are no specific provisions, the protections for attorney–client communications extend to communications between employees and in-house counsel if the conditions set forth in question 5 are met.

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

The protections for attorney–client communications extend to communications between counsel for the company (in-house and external counsel) and former employees as long as the requirements described in question 5 are fulfilled. However, it should be noted that this situation could remain unclear depending on the particular circumstances.

14 Who may waive the protections for attorney–client communications?

In principle, the client may waive the protections for attorney–client communications.

Section 120 of the Ethics Code sets forth, as lawyers’ obligations, that they shall strictly preserve the attorney–client privilege, refusing to answer questions, even from judges, LEAs or other competent authorities, that would entail a violation of the attorney–client privilege. Lawyers will only be exempted from this obligation if:

- the client consents;
- it is necessary for their self-defence.

As mentioned above, section 156 of the ACC sets forth a penalty for the person who reveals, without just cause, any secret information whose disclosure could cause damage if this information was known to him or her due to his or her occupation, employment, profession or art. In this regard, some courts have stated that it constitutes just cause if the revelation of a fact is essential to defend the reputation of the attorney. In regard to this, some courts have stated that it constitutes just cause if the revelation of a fact is essential to defend the reputation of the attorney.

When other professionals (eg, public notaries, accountants, etc) intervene in the relationship, they are ruled by their own ethical or legal regulation on professional secrecy.

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

As mentioned above, the express, specific and informed authorisation of the client can constitute waiver of the protections for attorney–client communications. In addition, it is broadly considered that the obligation of professional secrecy of lawyers ceases when they need to defend themselves from accusations made by their clients. In such case, lawyers can reveal anything that is strictly relevant to their defence.

Additionally, some scholars consider that professional secrecy is waived when the lawyer is informed by their clients that they are going to commit crimes. In this regard, section 25(c) of the Ethics Code of the Province of San Luis sets forth that when the client informs his or her lawyer of an intent to commit a crime, the protection of the communication is left to the conscience of the lawyer, who could make the necessary disclosures to prevent the criminal act or protect people from danger.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

Although there are no specific provisions, an inadvertent disclosure of an attorney–client communication can, depending on the context, constitute a waiver of the protection, according to some courts’ interpretation.

Some scholars argue that when a communication has been made to third parties, even inadvertently, such communication is no longer protected by the duty of confidentiality. They reason that both attorney and client have left behind the exclusivity and confidentiality of the information when talking to a third person not included in the privilege.

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

Attorney–client communications can be shared among employees of the entity (owner of the secret) without waiving the protections, as long as they are interested parties. However, it should be noted that this situation depends on the particular circumstances. It is generally accepted that communication is confidential if the client can reasonably have expected the communication to be kept secret. As a consequence, it could be considered that communications made in the presence of third parties who are not staff or agents of the attorney are not confidential; and similarly, communications made to the attorney by the client with the instruction to share them with such third parties are not confidential communications.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

Pursuant to Argentine law, there are no exceptions to the protections for attorney–client communications. However, some scholars argue that neither the attorney–client privilege nor the attorney-work-product privilege protects attorney–client communications that are in furtherance of a current or planned crime.

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

Protection for attorney–client communications cannot be overcome by any criminal or civil proceedings where waiver has not otherwise occurred.

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

There are no specific provisions in this regard. However, by virtue of Constitutional rights and Public and Private International Law, foreign protections for attorney–client communications should be recognised in Argentina to at least the same extent as local protection.

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

The best practice in Argentina to ensure that protections for attorney–client communications are maintained is to strictly observe
the requirements mentioned in question 5. Regarding in-house counsel, it is recommended to provide them with an office that is publicly identified as the ‘legal office’, and separate them from the rest of the administrative offices in the premises of the employer.

Work product

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

Pursuant to Argentine law, all communications and documentation are protected from disclosure to the extent they fall within the scope of attorney–client privilege. In the United States, the work product theory is not as developed as in the United States. Argentine procedural rules do not include a concept of ‘discovery’. However, before the start of proceedings, parties can request from the court:

- preparatory measures, which are intended to prepare for the proceeding by obtaining data, reports or specific information necessary to the filing of the claim. Preparatory measures can be requested by potential claimants or defendants; and
- production of evidence before trial. These measures are aimed at preventing evidence from being lost. Section 126 of the CCPC establishes that parties can request the disclosure, protection or seizure of documents that are related to the subject matter of the claim. The anticipated production of evidence must be carried out with the intervention of the other party, unless there are reasons of urgency. If so, the court will order the intervention of a public defence attorney.

Once the proceedings have begun, the parties and third parties have a duty to produce documents in their possession, or disclose the location thereof, when the documents are relevant to the case. If the document is in the possession of a third party, the court will request the third party to submit the document to the proceedings. The third party can challenge its filing if the document is its exclusive property, and disclosure may cause damage to the third party. It is broadly accepted that lawyers can invoke professional secrecy before such requests in any civil and commercial proceedings.

Regarding Criminal Procedural Law, section 237 of the CPC impedes the seizure of letters or documents sent or delivered to attorneys for the exercise of their profession (other than the instruments or proceeds of crime).

23 Describe any limitations on the contexts in which the protections for work product are recognised.

Under Argentine law there are no specific provisions regarding limitations on the contexts in which the protections for work product are recognised. Also, according to Law No. 23,187, lawyers’ firms or professional offices are inviolable. However, judges could issue a search warrant over law firms, and in such case the competent authority that ordered the measure shall give duly notice to the corresponding Bar Association, and the lawyer may request the presence of a member of the Bar during the search. Search warrants are an exception to the principle stated in section 18 of the National Constitution, which must be carefully considered by the judge when authorising the order.

24 Who may invoke the protections for work product?

Lawyers can invoke the protections for work product in response to a court request.

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

Pursuant to Argentine law, there are no specific provisions in order to give greater protection to certain types of work product. As mentioned above, section 237 of the CPC impedes the seizure of letters or documents sent or delivered to attorneys in the exercise of their profession (other than the instruments or proceeds of crime).

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

As long as the in-house counsel meets the requirements mentioned in question 5, professional secrecy is protected, including work product. However, LEAs and other competent authorities can demand documents from an employee when it is useful for a criminal investigation. Furthermore, LEAs and other competent authorities can also raid an employee’s home or office and seize documents with a proper search warrant issued by a judge.

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?

In principle, the protection only covers attorney–client communications. However, some scholars argue that communications with agents of the client fall within the scope of the protections for attorney–client communications, as well as some agents of the attorney. When other professionals (eg, public notaries, accountants, etc) intervene in the relationship, they are ruled by their own ethical or legal regulation on professional secrecy.

In addition, through a judge’s search warrant, LEAs and other competent authorities can require any person to produce documents or raid any person’s home or office whenever this information is considered significant for a criminal investigation.

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

How?

Pursuant to Argentine law, all communications and documentation are protected from disclosure if they fall within the scope of attorney–client privilege, as long as the requirements of question 5 are fulfilled, in the light of the regulations described in question 1.

29 Who may waive the protections for work product?

In principle, the client may waive the protections for work product. See question 14.

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

Pursuant to Argentine law, all communications and documentation are protected from disclosure if they fall within the scope of attorney–client privilege, as long as the requirements of question 5 are fulfilled, in the light of the regulations described in question 1. See question 15 and 34.

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

Clients may demand their attorney’s files relating to their representation as long as the files belong to them. Consequently, that action could waive the protections for work product.

32 Under what circumstances is an inadvertent disclosure of work product excused?

Although there are no specific provisions, an inadvertent disclosure of work product could constitute a waiver of the protection, according to the interpretation of some courts. See question 16.
33 Describe your jurisdiction’s main exceptions to the protections for work product.

Pursuant to Argentine law, there are no exceptions to the protections for attorney-client communications, other than those explained in question 15 and 34.

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

Protections for work product can only be overcome by criminal proceedings where waiver has not otherwise occurred through a judge’s order. Searches and seizures can only take place under a warrant issued by a competent judge in the course of a criminal investigation, and specifically directed to certain elements or documentation.

Prior to issuing the warrant, the judge must state formally for the record the reasons and evidence or circumstantial evidence that justify the issuance of the search and seizure order in a lawyer’s office. The search and seizure procedure cannot take place without the presence of a representative of the Bar Association duly summoned by the Court to that effect.

Pursuant to section 231 of the CPC, the judge may order seizure of objects related to a crime, subject to confiscation or that could be used as evidence. Also, the police may take such measures in urgent cases.

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

There are no specific provisions in this regard. However, by virtue of Constitutional rights and Public and Private International Law, foreign protections for attorney-client communications should be recognised in Argentina to at least the same extent as local protection. However, this is unclear under Argentine law.

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

See questions 7, 14 and 34.

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 there are no specific provisions, attorney-client communications or work product can be shared among clients with a common interest who are represented by separate attorneys, without waiving the protections. However, the extent of the protections in such cases remains unclear.

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

In principle, neither attorney-client communications nor work product cannot be disclosed to government authorities without waiving the protections.

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?

Under Argentine law, attorneys are not ‘compelled subjects’ with regard to informing on suspicious transaction reports (anti-money laundering Law No. 25,246 as amended (AML Law)).

Pursuant to section 14 of the AML Law, the Financial Information Unit (UIF) can request information from any public entity, agency, private legal entity or person, all of which are obligated to provide such information in the terms set forth in the request. In addition, when the UIF is investigating a report of suspicious operation, compelled subjects must collaborate and cannot allege against the UIF any bank, fiscal, stock market, professional secrecy or any contractual confidentiality agreement.

According to section 70 of the AML Law, the institutions and persons that are compelled subjects are:

- financial institutions;
- exchange houses and any persons or legal entities authorised by the Central Bank to operate in currency exchange;
- persons or legal entities that exploit gambling games;
- stock agents, managing entities of investments funds, agents of the open electronic market and any intermediaries in the purchase, rent or lending of securities that operate within the scope of an exchange;
- brokers registered in the futures and option markets;
- public registries of commerce, agencies of control of legal entities, real estate property registries, property registries of motor vehicles, pledge registries, boat ownership registries and aircraft registries;
- persons or legal entities dedicated to the trading of works of art, antiques or other luxury items, stamps or coin investments or to the export, import, manufacturing or industrialisation of jewellery or goods with precious metals or stones;
- insurance companies;
- companies that issue travellers’ cheques, operators of credit or purchase cards;
- companies dedicated to cash-in-transit services;
- companies that use postal services that wire or transport money;
- companies that issue postal services that wire or transport money;
- public notaries;
- capitalisation or savings entities;
- customs brokers;
- the Central Bank of Argentina, the federal tax authorities, the National Superintendency of Insurance, the Securities Exchange Commission, the General Inspection of Justice, the National

**ESTUDIO BECCAR VARELA**

Maximiliano D’Auro  
Tadeo Leandro Fernández

Edificio República, Tucumán 1, 3rd Floor  
C1049AAA Buenos Aires  
Argentina

mdauro@ebv.com.ar  
tfernandez@ebv.com.ar

Tel: +54 11 4379 6800/4700  
Fax: +54 11 4379 6860  
www.ebv.com.ar

© Law Business Research 2017
Institute for Associations and Social Economy, and the National Antitrust Court;
• insurance producers, consultants, agents, brokers, assessors and loss adjusters;
• licensed professionals whose activities are regulated by professional councils of economic science;
• legal entities that receive donations or contributions from third parties;
• licensed real estate agents or brokers and entities whose corporate object is real estate brokerage, owned by or administrated exclusively by licensed real estate agents or brokers;
• persons or legal entities whose usual activity is the sale or acquisition of cars, trucks, motorcycles, buses and microbuses, tractors, agricultural machinery, road machinery, boats, yachts and the like, aeroplanes and aerodynes;
• persons or legal entities that act as trustees, and persons or legal entities that own or are affiliated with trust accounts, trustors and trustees in connection with trust agreements; and
• legal entities that organise and regulate professional sporting activities.
Domestic legislation

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

Several pieces of legislation give protection to the confidentiality of attorney–client communications, such as:
- the Brazilian Constitution;
- the Code of Ethical Conduct issued by the Brazilian Bar Association;
- Federal Law 8.906/94, which governs the Brazilian legal profession;
- the Code of Civil Procedure;
- the Code of Criminal Procedure; and
- the Criminal Code.

A broad concept of protection is found in the Brazilian Constitution and comprises:
- the confidentiality of legal communications prepared for professional use;
- attorney–client privilege; and
- the inviolability of lawyers’ offices and related work files.

As a result of this constitutional protection, communications between a client and their lawyer 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, even if the client authorises the deposition. Exceptions to the general rule of confidentiality occur in very few situations and need to be carefully analysed on a case-by-case basis.

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.

In Brazil, as long as the communication involves legal issues and provided that the attorney is licensed or registered at the competent Brazilian bar, the privilege prevails. Brazilian law draws no specific distinction between external and in-house attorneys in relation to professional rights, duties and protections. Besides this, in general, under the Brazilian system, non-legal professionals are not allowed to advise on legal issues. In the exceptional cases in which they are authorised to do so (eg, filing habeas corpus or acting in administrative proceedings), non-legal professionals cannot benefit from privilege, which is exclusive to those duly licensed at the Brazilian Bar.

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.

In Brazil, there is no specific work product doctrine. Nevertheless, article 7(II) of Federal Law 8.906/94 sets forth that a lawyer has the right to the ‘inviolability of its office or place of work, as well as its work instruments, and written, electronic, telephonic and telematics correspondence, as long as [it is] related to the legal profession. Commentators understand that:

- considering that the law makes reference to the inviolability of attorneys files and data, they will be covered by such rule in any environment and situation that they are placed. (MAMEDE, Gladston. ‘The legal profession and the Brazilian Bar Association’, second edition, Atlas, 2003, p193)

This inviolability may be breached by court order in case the lawyer is being criminally investigated or when there is a paramount interest of justice.

In any case, the question of whether or not a certain document is protected from discovery as a result of the work product doctrine does not come up often, as Brazil does not have the concept of ‘pretrial discovery’, as in some common law jurisdictions. This means that, as a general rule, a party may not be 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). 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 defence. That is to say, in principle each party must produce its own documents.

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 are in the other party’s possession and cannot be produced otherwise. However, the judge may order the production of documents that are in possession of the other party (or a third party), but only if:
- the documents to be produced are clearly identified (no ‘fishing expedition’ is admitted);
- there are reasons for the requesting party to believe that the documents are in the other party’s possession; and
- the requested documents are relevant to the outcome of the case.

If the party refuses to produce the document, the judge will not allow the refusal if:
- the party has a legal obligation to produce;
- the party makes reference to the document as a means of evidence; and
- the document is considered ‘common’ to the parties (eg, a contract).

Nevertheless, in view of the broad protection afforded by the Constitution and the law to attorney–client communications and to a lawyer’s ‘work instruments’, the lawyer can certainly object if any of the parties seek production of a certain document prepared by the lawyer in the exercise of the legal profession.

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

There are several decisions confirming the protections related to the confidentiality of legal communications for professional use, and the inviolability of lawyers’ offices and their work files.

The Superior Court of Justice, which is Brazil’s highest court in terms of federal law interpretation, issued a decision considering a judicial order for search and seizure of documents (mainly internal correspondences of the legal department, related to an audit in certain loans, and technical opinions about the regularity of certain contracts) at the
legal department of a state-controlled bank illegal for violating the attorney–client confidentiality rules (RMS 27.419–SP, 3rd Panel, reporting Justice Napoléão Nunes Maia Filho, published on 22 June 2009). This same Court issued a decision disregarding the inviolability of lawyers’ work files considering the fact that they were being criminally investigated and that the corresponding files were not related to the legal profession (RHC 66.730–RJ, 6th Panel, reporting Justice Nefi Cordeiro, published on 1 April 2016).

Attorney–client communications

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

The Code of Ethical Conduct of the Brazilian Bar Association provides that communications of any nature between a client and their lawyer are deemed to be confidential and not subject to disclosure to third parties. Thus, the privilege:

- covers all communications related to the attorney’s professional activity with a client; and
- applies to any lawyer licensed at the competent Brazilian Bar to practise Brazilian law or registered at the competent Brazilian Bar to advise on foreign law in Brazil.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

As a general overview, attorneys may breach the confidentiality granted by the attorney–client privilege:

- if the communication is in furtherance of a crime, or to avoid threat to one’s life or honour;
- for the attorney’s own protection and defence against the client, but limited to such defence purposes; and
- if previously authorised by a client to disclose (waiver), except to serve as witness.

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

In Brazil, professional secrecy is an obligation incumbent on the attorney. The Criminal Code establishes, in its article 154, that it is a crime to reveal, without just cause, a secret that a person knows by virtue of his or her profession. The Code of Ethical Conduct of the Brazilian Bar Association provides that the attorney has the duty of keeping confidential all facts learned during the exercise of legal profession, even against the client’s instructions.

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

The facts are also protected. For example, the attorney is not obliged to testify about facts related to his or her clients’ cases.

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?

The protection will prevail only if the communication is exchanged with an attorney duly licensed or registered at the competent Brazilian Bar. On the other hand, there is no difference if the communication is exchanged with agents of the client, provided that it refers to legal issues and is thus prepared in the exercise of the legal profession.

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

Yes. If a corporation is a client, the communication exchanged with an attorney will be considered confidential due to the protection of the attorney–client privilege. The general rule is that all communications between clients and their attorneys are deemed to be confidential. The law does not provide an answer on who controls the protections on behalf of the corporation, so this question must be decided on a case-by-case basis.

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

Yes. Brazilian law draws no specific distinction between in-house and outside counsel in relation to lawyers’ professional rights and duties. As long as the communication involves legal issues and the attorney (in house or outside) is licensed or registered at the competent Brazilian Bar, the privilege extends to communications between employees (clients) and outside attorneys.

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

Yes. Brazilian law draws no specific distinction between in-house and outside counsel in relation to lawyers’ professional rights and duties. As long as the communication involves legal issues and the in-house attorney is licensed or registered at the competent Brazilian Bar, the privilege extends to internal communications between employees and in-house counsel. In addition, the Code of Ethical Conduct of the Brazilian Bar Association provides that an in-house attorney must also preserve his or her liberty and independence.

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

The protection will prevail as long as the communication involves legal issues (ie, a former employee is treated as a client) and provided that the counsel acts in the exercise of the legal profession.

14 Who may waive the protections for attorney–client communications?

The client may waive the protection and authorise the disclosure of the communication. However, professional secrecy is an obligation incumbent on the attorney, who may decide whether or not to disclose the communications, even with the client’s authorisation. Also, as mentioned in question 6, attorneys may breach the confidentiality granted by the attorney–client privilege in a few situations, such as:

- if the communication is in furtherance of a crime, or to avoid threat to one’s life or honour;
- for the attorney’s own protection and defence against the client, but limited to such defence purposes; and
- if previously authorised by a client to disclose (the waiver), except to serve as witness.

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

If a privileged communication or document is given to a third party by the client or with the client’s authorisation, the client will be deemed to have waived confidentiality, and confidentiality will be lost. In contrast, if a privileged communication or document is given to a third party by the attorney in illegal breach of the obligation of confidentiality, then confidentiality will not have been waived.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

In theory, the disclosure of an attorney–client communication is excused only with authorisation of the client or in the situations given in question 6 (when the attorney may breach confidentiality).

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

Considering that the attorney–client privilege protects confidential communications between client and counsel (including both in-house and external counsel), if the communication is shared among employees that are not involved with the legal issues in discussion with the attorney, there is a probable risk of losing the protections and the confidentiality.
18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

Exceptions to the general rule of confidentiality occur in very few situations and need to be carefully analysed on a case-by-case basis. In general, attorneys may be allowed to breach attorney-client confidentiality in the following situations:

- in case of risk or threat to one’s life or honour;
- for the lawyer’s own protection and defence against the client, but limited to such defence purposes; and
- when previously authorised by a client (waiver), except to serve as witness.

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

Yes. Courts may disregard the protection where justice so requires. Article 243, paragraph 2 of the Brazilian Code of Criminal Procedure, for example, prohibits the seizure of documents from defendants’ attorneys, unless such document forms part of the corpus delicti. In the same way, Federal Law 8.906/94, which governs the Brazilian legal profession, provides the ‘inviolability’ of attorneys’ offices, tools and correspondence, but such protection may be breached. See questions 3 and 6.

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

The law does not provide an answer to this question, and there are no precedents on similar situations, so this question must be decided on a case-by-case basis. Considering that one of the instances when a party is not obliged to produce a certain document is when production may reveal facts protected by professional privilege, and also that it is a crime to reveal, without just cause, a secret that the person knows by virtue of his or her profession, we understand a party may allege that it cannot reveal a certain communication, otherwise it would breach a certain foreign attorney’s professional privilege rule. Under Federal Law 8.906/94, which governs the Brazilian legal profession, foreign lawyers have the same rights, duties and protections granted to Brazilian lawyers in relation to privilege, provided that they hold a Brazilian Bar licence authorising them to practise in Brazil.

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

The following methods are recommended to protect the attorney-client privilege:

- label sensitive documents as ‘confidential information’ and include language claiming privilege;
- limit communications on sensitive legal issues, instructing the recipient not to forward to third parties;
- ensure that the counsel is a member of the Brazilian Bar; and
- ensure that the communication with the counsel involves only legal issues, and not purely business or commercial issues.

Work product

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

As mentioned in question 3, in Brazil, there is no specific ‘work product’ doctrine. Nevertheless, article 7(II) of Federal Law 8.906/94 sets forth that the lawyer has the right to the:

...inviolability of its office or place of work, as well as its work instruments, and written, electronic, telephonic and telematics correspondence, as long as related to the legal profession.

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 inviolability.

23 Describe any limitations on the contexts in which the protections for work product are recognised.

As in Brazil there is no specific ‘work product’ doctrine, and considering that the attorneys’ work instruments are covered by the inviolability granted by the article 7(II) of Federal Law 8.906/94, the same limitations of the attorney-client communications (see question 6) are applicable:

- if the document is in furtherance of a crime, or to avoid threat to one’s life or honour;
- for the attorney’s own protection and defence against the client, but limited to such defence purposes, and
- if previously authorised by a client to disclose (waiver), except to serve as witness.

24 Who may invoke the protections for work product?

Assuming that the material was prepared by an attorney for a client, the attorney and the client will be authorised to invoke the protections. The Code of Ethical Conduct of the Brazilian Bar Association provides that an attorney must preserve his or her liberty and independence. Thus, it is possible that, in some circumstances, only the attorney invokes the protections.

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

There is no difference, considering that:

- in Brazil there is no specific ‘work product’ doctrine; and
- the attorneys’ work instruments are covered by the inviolability granted by article 7(II) of Federal Law 8.906/94.

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

Yes, provided that the document was prepared by an attorney duly licensed or registered at the competent Brazilian Bar. As mentioned in questions 2, 11 and 12, Brazilian law draws no specific distinction between in-house and outside counsel in relation to lawyers’ professional rights and duties.

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?

The protection of inviolability will prevail if the material is considered a ‘work instrument’ of the attorney. In addition, the material may also be deemed confidential if it is part of a communication exchanged between the attorney and his or her client (see question 1).

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

In principle, no, because the attorney’s work is considered inviolable. However, if the lawyer is being criminally investigated, or where there is a paramount interest of justice, this inviolability may be breached by court order.

29 Who may waive the protections for work product?

See question 14 – the same rules of attorney-client communication apply.

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

See question 15 – the same rules of attorney-client communication apply.

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

The Code of Ethical Conduct sets forth that the attorney is obliged to return the original documents provided by the client when the representation ends and in case of withdrawal of the lawsuit (article 12 of the Code of Ethical Conduct). There is no obligation for the lawyer to present other documents, such as the lawyer’s own notes. Nevertheless, if the lawyer decides to present all of his or her files, the protections for work product will not be waived.
32 Under what circumstances is an inadvertent disclosure of work product excused?
See question 16 – the same rules of attorney–client communication apply.

33 Describe your jurisdiction’s main exceptions to the protections for work product.
See question 18 – the same rules of attorney–client communication apply.

34 Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?
See question 19 – the same rules of attorney–client communication apply.

35 In what circumstances are foreign protections for work product recognised in your jurisdiction?
See question 20 – the same rules of attorney–client communication apply.

Common issues

36 Who determines whether attorney–client communications or work product are protected from disclosure?
As these issues normally arise in the context of litigation, administrative proceedings or investigations, it is up to the judge or to the person presiding over the administrative proceedings or investigations to determine whether attorney–client communications or work product should or should not be disclosed. The individuals and legal entities can appeal to the judiciary (in case of administrative proceedings) or to higher courts (in case of a matter handled by a judge) in case the privilege is not observed.

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?
No. In Brazil, professional secrecy is an obligation incumbent on the attorney, and the attorney has the duty of keeping confidential all facts learned during the exercise of the legal profession. Thus, if the attorney shares the privileged communication with a third client, it will happen in breach of his or her duty. On the other hand, if the client authorises the disclosure, it will be deemed to have waived confidentiality.

38 Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How?
Lawyers cannot be compelled to breach the client–lawyer confidentiality duty without a judicial order. Brazilian courts can order the breach of the client–lawyer privilege in exceptional and very restricted circumstances based on reasonable grounds (ie, if the lawyer is being criminally investigated or where there is a paramount interest of justice – see questions 3, 14, 18 and 19). 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.

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.

* Carlos Ayres contributed to the chapter in the previous edition, passages from which have been reproduced in this edition.
England & Wales

Kate Menin, Tim Vogel, Ciara Dunny and Umesh Bhudia
Addleshaw Goddard LLP

Domestic legislation

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

Confidentiality of client’s affairs – professional regulation of lawyers (solicitors and barristers)

Chapter 4, Solicitors Regulation Authority (SRA) Code of Conduct 2011, (Version 18) provides that the protection of confidential information is a fundamental feature of the solicitor–client relationship. The duty on the part of the solicitor to keep the client’s affairs confidential continues even after the client retainer is terminated, and after the client’s death. The duty is owed by all members of the lawyer’s staff, including support staff. The client’s affairs must be kept confidential unless disclosure is required by law, or the client consents.

Barristers have a similar duty, as set out in Core Duty 6, Rule C5 and Rule C15.5 of the Bar Standards Board Handbook, which requires them to preserve the confidentiality of their clients’ affairs.

Privilege – the law

Under English common law, Legal Advice Privilege (LAP) protects confidential communications:

• between a lawyer and his or her client;
• where the lawyer is acting within the course of their professional relationship and the scope of his or her professional duties; and
• for the purposes of seeking or giving legal advice and assistance in a relevant legal context.

This is recognised as a substantive legal right of the client at common law and under the European Convention on Human Rights, (incorporated into English law by the Human Rights Act 1998), and is available both within and outside the courts, for example to permit a client to refuse to disclose legal advice to tax authorities.

The requirement of confidentiality is generally easily satisfied because the law will imply a relationship of confidence between lawyer and client.

Civil proceedings

The Civil Procedure Rules (CPR) provide a procedure for withholding from inspection, by an opponent in litigation or by the court, documents that a party to litigation has a right or duty to withhold, such as privileged documents (CPR 31.3 (b)). As a matter of practice, privileged documents are usually referred to in lists of relevant documents exchanged between the parties, subject to a claim to withhold them. Usually parties will not need to detail every document covered by privilege individually, but it is helpful to indicate the nature or classes of documents over which privilege is claimed and the factual basis of the grounds giving rise to privilege.

Criminal and regulatory proceedings

There are no procedural rules, per se, for criminal proceedings.

Part 7 of the Proceeds of Crime Act 2002 (POCA) introduces the concept of ‘privileged circumstances’ in criminal proceedings: professional firms such as solicitors, accountants, and insolvency practitioners, who suspect (as a consequence of information received in the course of their work) that their customers or clients have engaged in tax evasion or other criminal conduct, from which a benefit has been obtained, are required to report their suspicions to the authorities. However, this does not require disclosure to the authorities of information received in ‘privileged circumstances’, as defined in the Act, or where the information is subject to LAP or other legal privilege.

A search warrant may not authorise the seizure of material subject to privilege.

Police have power under sections 50 and 51 of the Criminal Justice and Police Act 2001 to remove from premises being searched potentially privileged material, or irrelevant material. Such material may be difficult to separate from material that can be seized, because of how it is stored or its volume. However, there is a right to challenge seizure and attend an initial examination of the material taken.

Lawyers for the accused are obliged to ensure that privileged documents are not disclosed to the prosecution; they may advise their clients to waive privilege on a limited basis. In regulatory investigations a client is entitled to claim privilege on the same basis as in civil and criminal proceedings. The regulators have internal procedures that must be followed in respect of potentially privileged material. The Serious Fraud Office (SFO) procedure is as set out in its Operational Handbook. In R (McKenzie) v Director of the SFO, 2016, the procedure set out in the Operational Handbook was upheld: the SFO may continue to use an in-house IT team to identify potentially privileged documents for independent external review.

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.

There is no difference between the status of private practitioners and in-house counsel for the purpose of protecting privileged communications. Both are regarded as independent legal advisers, so, subject to the four necessary conditions listed in question 1, the communications of both are protected by LAP.

However, EU law does not recognise in-house counsel as independent, so their communications with an employer client will not be protected by privilege for the purpose of non-disclosure to EU courts. The European Court of First Instance has said that this is in line with the majority of the legal systems of the 27 EU member states (Akzo Nobel Chemicals Ltd v European Commission, 2010). Akzo confirmed an earlier decision of the European Court of Justice (AM&S Europe Ltd v European Commission, 1989). Both decisions related to advice given in the context of alleged breaches of EU antitrust laws.

At a European Commission-led antitrust dawn raid, therefore, no privilege protection will be afforded to documents prepared by in-house counsel.

There has been no suggestion that EU courts would not recognise an English law claim to privilege. It is therefore generally thought that the narrow EU exception should not affect the protection afforded to the communications of in-house counsel with their clients in relation to other topics.
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.

Under English law, litigation privilege protects confidential communications:
- between a lawyer and client and between either of them and a third party (eg, an agent of the client);
- for the dominant purpose of fighting adversarial proceedings; and
- where adversarial proceedings are in existence or in reasonable contemplation.

Unlike LAP, litigation privilege can therefore cover communications between (i) lawyers and third parties (for example, communications with experts and potential witnesses); and (ii) client and third parties, provided all the other conditions are satisfied. Litigation privilege can also cover communications between a lawyer and a client where LAP is not applicable.

Litigation privilege applies to civil, criminal and regulatory proceedings.

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

Bank of Nova Scotia v Helennic Mutual War Risks Association (Bermuda) Ltd (The Good Luck), 1992, which held that internal documents are privileged if privileged communications are reproduced in them, provided the motive for producing the documents is bona fide (for example, to enable an internal decision to be taken by the board).

In Three Rivers DC v Governor and Company of the Bank of England (No. 5), 2003, the Court of Appeal held that communications between the lawyer and employees of the client would not be privileged unless the employees were properly within the client group, narrowly defined in that case as a small group of the bank's employees actually charged with instructing the bank's solicitors. See also question 5.

In Three Rivers DC v Governor and Company of the Bank of England (No. 6), 2004, the House of Lords held that LAP extends to advice as to what should or should not be prudently and sensibly done in a ‘relevant legal context’ and is not confined to advice concerning legal rights and obligations.

In R (Prudential Plc) v Special Commissioner of Income Tax, 2010, the Court of Appeal held that while it would be logical to extend LAP to legal advice on tax law given by accountants, it declined to do so, even where the tax professional was clearly qualified to give such advice.

In Astex Therapeutics Ltd v AstraZeneca, 2016, it was decided that LAP would not cover attendance notes created during an information gathering exercise involving lawyers and employees and former employees of a corporation. The decision also noted that generically listing privileged documents in a party’s list of documents for disclosure was not sufficient, and ordered AstraZeneca to provide further details in respect of the documents over which it claimed privilege, as well as provide an explanation of the nature of privilege claimed.

In The RBS Rights Issue Litigation, 2016, the court found that the client, for the purposes of privilege, consists only of those employees authorised to seek and receive legal advice from the lawyer, and that LAP does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

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

LAP attaches to communications from attorney to client or client to attorney for the purpose of giving or receiving legal advice, in both a litigation and non-litigation context.

Lawyer

The lawyer must be a professional (solicitor, barrister or foreign lawyer) acting in a professional capacity, with a current practising certificate, and acting in a professional capacity, with a current practising certificate, but may also be a member of the lawyer’s staff. The communications of other professionals with clients, even where the professional (eg, an accountant) gives legal advice, do not attract LAP.

Corporate clients

In the case of corporate clients, difficulties can arise as to the group of people constituting ‘the client’ for the purposes of LAP, following the Court of Appeal decision in 2003: Three Rivers District Council v Bank of England (No. 5). In Three Rivers, it was held that the ‘client’ in that case should be confined to particular employees who were members of a steering group set up for the purposes of managing communications with the bank’s lawyers. It was held that LAP did not apply to communications between the bank’s lawyers and bank employees who were not members of that group.

The Three Rivers (No. 5) decision created some uncertainty as to who will fall within the ‘client’ group, and consequently as to what is protected by LAP. It has been suggested that the solution is to seek to define the ‘client’ in the lawyer’s engagement letter. However, if the ‘client’ is too narrowly defined, there is a risk that (necessary) communications with non-‘client’ employees will be created, which it will be hard to argue are privileged. If the ‘client’ is too broadly defined, there is a risk that the court might find that the definition is a sham and impose its own narrower definition. If no attempt is made at definition, uncertainty will remain, although some flexibility will be retained to argue later why particular employees should be included.

Two recent decisions have followed the definition of ‘client’ laid down in Three Rivers (No. 5). The court in Astex Therapeutics Ltd v AstraZeneca held that employees and former employees were not within the definition of the ‘client’, but were considered third parties, as they could not be regarded as forming the part of class of persons authorised to give instructions to a corporation’s lawyers. The RBS Rights Litigation confirmed that Three Rivers (No. 5) was based on principles of general application that remain binding. The judge noted that:

(i) even though an employee of a particular corporation may be authorised to communicate with that corporation’s lawyers, this does not in itself ‘constitute that employee as the client or a recognised emanation of the client’; and
(ii) it may be that only communications with an individual capable in law of seeking and receiving legal advice as a duly authorised organ of the corporation would be given the protection of LAP.

Confidentiality

It is necessary that a communication be confidential for it to attract LAP. However, ‘limited waiver’ of privilege is recognised. This suggests that the presence of a very limited number of third parties at the time of the communication, or the careful sharing of a privileged communication with third parties (both leading to some loss of confidentiality), should not, without more, result in a loss of privilege, provided those with whom the communication is shared are themselves subject to duties of confidentiality (Gotha v Sothebys, 1998).

Legal advice

Legal advice covers what should prudently and sensibly be done in a relevant legal context. It is not confined to telling the client the law; the context must, however, reasonably require the lawyer’s legal skills.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

LAP applies to advice or assistance in any ‘relevant legal context’, and individual communications will attract privilege if made within the continuum of such advice. The term ‘relevant legal context’ requires that the advice must be sought in a context in which there is a genuine need and desire to obtain legal advice (not, for example, merely a desire to cloak business advice in LAP). It will include advice relating to rights, liabilities and obligations under private or public law; and any other communication that the courts find falls within the policy underlying the justification for legal advice privilege (such as work done in relation to any investigation or inquiry that may lead to criticism, where the advice is not directly in relation to rights and obligations). The High Court has recently upheld a bank’s claim to LAP over ‘high-level’ documents prepared by external lawyers overseeing regulatory investigations.

The advice must be given qua lawyer, so where an employed lawyer also holds another office the issue may arise as to the capacity in which advice is given.
In your jurisdiction, do the protections for attorney–client communications belong to the client, or is secrecy a duty incumbent on the attorney?

The protection of both LAP and litigation privilege belongs to the client, and is the client’s to release, not the lawyer’s. Confidentiality is a professional duty of the lawyer (whether barrister or solicitor), which survives beyond the end of the lawyer or client retainer and beyond the client’s death. The lawyer may be released only if the client gives informed consent.

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

There is some uncertainty in this area. There is case law that suggests that there will be no privilege as to facts that anybody could have discovered, but which the lawyer discovers as a consequence of the client retainer. Nevertheless, one authority (The Law of Privilege, second edition, edited by Bankim Thanki, 2-73/74) concludes that privilege will protect, where disclosure is sought from the lawyer, facts known to the lawyer about the client, even though they have not been learnt from a lawyer–client communication provided:

- they have only been learnt by the lawyer as a consequence of the lawyer–client relationship;
- the facts are confidential; and
- the facts have not been learnt by the lawyer from a third party or any other source.

By contrast, the client may be asked about underlying facts that they knew at the time they consulted a lawyer, or that they have learnt otherwise than from communications with their lawyer.

The prudent approach would be to regard as privileged any facts that are communicated to the lawyer, unless the lawyer has knowledge of them from a source unconnected to his or her work as lawyer.

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?

Communications between the lawyer (and his or her staff) and the client fall within the scope of LAP. LAP cannot protect from disclosure a communication between either the client or his or her lawyer and a third party (unlike litigation privilege – see questions 22–23). It will not protect communications between other professionals engaged by the lawyer or client.

However, where an agent (for either client or lawyer) is acting purely as a channel for the privileged communication (such as a foreign language interpreter), the communication will be protected by LAP.

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

There is no distinction in English law between individuals and corporations for the purposes of LAP, but only the communications of those within the corporation who are charged with instructing the lawyer (the ‘client group’) for the purpose of the particular retainer, will be protected.

The person within the corporation tasked with instructing the lawyer will, as a matter of practice, control privileged communications. Directors usually have obligations of confidentiality set out in their service agreements. They also have statutory duties in the Companies Acts (sections 172 and 173) to promote the success of the company and to avoid conflicts. Even if there is no express duty of confidentiality in a director’s service agreement, the role of director is a fiduciary one, giving rise to an equitable duty of confidence to his or her company.

In-house counsel instructing external lawyers will be subject to the same professional duties as to client confidentiality as the external lawyer.

Do the protections for attorney–client communications extend to communications between employees and outside counsel?

They do, only subject to the employee properly being part of the client group within the corporation for the particular retainer with the lawyer. (See question 5).

An in-house counsel may communicate on a privileged basis to its internal corporate client and also, as the client, with outside counsel.

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

Yes. Where a corporation has in-house and outside counsel, there may be two strands of privileged communication: between the in-house counsel and its internal client group; and between the in-house counsel charged with instructing outside counsel and the outside counsel. See also question 2 as to the position under EU law.

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

Recent cases (Astex Therapeutics Ltd v AstraZeneca, The RBS Rights Issue Litigation) have found that communications between counsel (in-house or external) and former employees of a corporate client are not likely to be protected by LAP, as the ex-employees were not considered part of the ‘client’.

Where communications are privileged when first made, while the recipient is employed either by the lawyer or the client, they will remain privileged after the employee leaves his or her employment. Once a particular client’s privilege has attached to a document or other communication the privilege remains, subject only to waiver, for his or her benefit, and that of his or her successors in title for all time.

Who may waive the protections for attorney–client communications?

Only the client may waive privilege by choice. However, inadvertent waiver is also possible, for example, if a lawyer sends documentation in error to an opponent in the course of litigation. This is because a lawyer has ‘apparent authority’ to waive privilege while acting for the client in litigation, despite having no actual authority to waive privilege. Other parties involved in the litigation are entitled to assume that the lawyer has waived privilege with the client’s consent.

What actions constitute waiver of the protections for attorney–client communications?

Waiver may take place by relying on privileged material in court documents or witness statements, by including privileged documents in the section of the list of relevant documents that lists those offered for inspection, by failing to redact privileged parts of a document that is not otherwise privileged, or by deploying documents in court. However, a mere reference to legal advice having been sought and given does not amount to a waiver.

CPR 31.20 provides that a party to civil proceedings who receives a document that is disclosed inadvertently may only use it with the permission of the court. If the receiving party realises that the document has been disclosed by mistake, or if it would have been obvious to a hypothetical reasonable solicitor that a mistake has been made, it cannot be used.

Where a client sues a former lawyer for negligence, he or she is taken to have impliedly waived privilege in relation to documents created under the retainer in the course of which allegedly negligent advice was given. Also, a party claiming its legal costs from an opponent or challenging its own lawyer’s fees is required to disclose privileged documents to a costs judge, if necessary, to prove the costs claim. This does not necessarily entitle the opponent to inspect them: the court must strike a balance between the two competing principles of the right of a party to litigation to see relevant material, and the right to maintain confidentiality in privileged documents.
16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

Inadvertent disclosure will not constitute a waiver if the party to whom the disclosure is made is aware that the lawyer’s authority did not extend to withholding privilege. The party receiving the disclosure must know, or should know, that the lawyer has sent or disclosed the docu-
ment by mistake. Whether or not privilege is treated as waived will often depend on whether it is too late to reverse the position by injunc-
tion, or at least to prevent the use of documents in the litigation.

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

Where it is necessary to pass on privileged advice within a large organi-
sation, privilege will not be lost, provided there is good reason for sum-
marising the advice. The law recognises that businesses receive legal
advice for the purpose of making commercial decisions: a record or summary has the same protection as the original communication for the purposes of privilege. However, unless there is a good reason, communications subject to LAP should not be shared among employees.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

Public policy will not permit privilege to be used to mask iniquity. Communications between a client and lawyer will not qualify for privi-
lege when they seek or give legal advice, which is required by the client or a third party to facilitate or guide the commission of a crime or fraud or to conceal either. The lawyer (and even the client) may be unaware of the criminal or fraudulent purpose that is to be furthered. This excep-
tion is the ‘crime-fraud exception’ (R v Cox and Railton, 1884). Such communications are not privileged in the first place, due to illegality.

The exception was codified under section 10(2) of the Police and
Criminal Evidence Act 1984 (PACE):

...items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

Seeking legal advice as to whether a course of conduct would be crimi-
nal or about an allegation of criminal conduct is legitimate, and such a communication will attract LAP. However, the crime-fraud exception can apply even where litigation has begun, so it may apply to advice given in the course of litigation.

Privilege may be abrogated by statute in certain limited circum-
stances, for example, sections 327–329, 330 and 332 of POCA contain express provisions for disclosure of privileged information, to be made to the National Crime Agency where a lawyer knows or suspects that money laundering may be occurring.

The Regulation of Investigatory Powers Act 2014 (RIPA) is the principal current legislation that empowers the state to conduct covert surveillance. It does not refer to privilege. In 2009, the House of Lords
held in In re McE, that RIPA does permit the covert surveillance of
meetings between clients and their lawyers in a police station, despite
the right under section 58 of PACE, which gives a detained person a right to a private consultation with a lawyer.

The Investigatory Powers Act 2016 allows certain government
agencies to apply for a warrant against a communications service pro-
vider for the interception and review of legally privileged information. However, a condition of public interest, necessity and prevention of death, or serious injury, must be satisfied before such a warrant can be issued.

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

Where a third party is able to adduce secondary evidence of privileged material, privilege may be lost. This may happen if the third party steals or otherwise obtains a privileged document. However, in these circumstances the court may grant an injunction to prevent the use of the privileged material, or the secondary evidence.

The court will not itself override privilege, because of the abso-
lute nature of the protection, unless statute permits (see question 1) although it may review whether a communication is properly privi-
ileged (see question 36).

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

English law gives protection to communications with foreign lawyers (not the same thing as recognising foreign laws on lawyer–client com-
munications). It is English law that will determine the issue, not foreign law, so this may result in protections that exist in foreign jurisdictions not being upheld by the English courts.

The position may be slightly different in arbitrations conducted under English procedural law as the tribunal has a discretion to refuse to order production of documents that are protected under foreign law, but not under English law.

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

Best practice is set out by the SRA Code of Conduct in a list of Indicative Behaviours, which, if followed by solicitors, will ‘tend to show’ that the solicitor has achieved the required outcome in this case keeping client communications confidential.

We suggest that, in practice, the following will assist:

• documents that are likely to be privileged should be marked as such (‘privileged and confidential’) and kept separately from others;

• instructions and advice on different matters for the same client are kept separate so as to preserve the ‘continuum’ of legal advice;

• separate files or electronic file sites are maintained for solicitor–client
communications and inter partes communications (with communications with court or arbitrator included in the latter);

• document inspection is planned carefully, whether conducted in person (hard copy documents) or by exchange of databases, to ensure no privileged documentation is disclosed in error;

• clients should be warned not to create new documents that are potentially disclosable;

• potential conflicts between existing or former clients should be policed to ensure that the lawyer is not obliged to disclose informa-
tion or material to a client, A, which is or has been generated in the course of work carried out for another client, B; and

• all instructions to third parties and interviews with witnesses should be carried out by a lawyer.

Work product

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

See question 3. Litigation privilege protects confidential communications:

• between a lawyer and client and between either of them and a third party (eg, an agent of the client);

• made for the dominant purpose of litigation; and

• where litigation is in existence or in reasonable contemplation.

It also protects confidential documents, which strictly speaking are not communications, but that are created by the lawyer, client or third party and that come into existence for the dominant purpose of litiga-
tion. In the same way LAP protects confidential documents created
by a lawyer or client for the purpose of giving or receiving legal advice such as lawyer’s memoranda, working papers (where the papers reflect the trend of legal advice and not only a lawyer’s train of enquiry), drafts and documents evidencing privileged communications.

LAP also protects communications or documents between client and lawyer that relate to contentious matters, so it adds nothing to claim both LAP and litigation privilege over a communication or docu-
ment (see question 3).

23 Describe any limitations on the contexts in which the protections for work product are recognised.

For a communication to be covered by litigation privilege, it must have been made with the dominant purpose of use in actual or anticipated litigation. A dominant purpose is one that is more important than any other. Where a communication has two or more purposes, it will not be
covered by litigation privilege if it has been made for a secondary, or equal, purpose.

The ‘actual or anticipated proceedings’ required for litigation privilege refers to any first instance or appeal litigation, civil or criminal, whether or not in a court of record, including quasi-judicial proceedings. They must be adversarial. Litigation privilege can apply to actual or anticipated arbitrations.

The proceedings must also be ‘reasonably in prospect’ when the relevant communication is made. This does not require a likelihood of more than 50 per cent that they will occur. However, it is insufficient if they are a mere possibility, or if there is a distinct possibility that sooner or later someone may issue a claim. Proceedings may be ‘in prospect’ even if a claimant’s cause of action has not yet arisen, or a party is unaware that they are reasonably in prospect. There is no requirement for any subsequent proceedings to concern matters related to the anticipated proceedings that originally gave rise to the privilege. A party cannot self-certify that litigation was in reasonable contemplation; the test is objective and unless it is obviously satisfied, some evidence may be required to assist the court.

Ligation privilege can only arise in favour of someone who is or was a party (or prospective party) to the proceedings that give rise to the privilege.

Ligation privilege cannot be claimed to resist disclosure where the party seeking disclosure and the party from whom disclosure is sought have a joint interest in the subject matter of the communication when it is created. Such a joint interest may exist, for example, between a trustee and its beneficiary or a company and its director. Similarly, it cannot be claimed to resist disclosure between two clients who jointly instruct the same lawyer.

24 Who may invoke the protections for work product?
As with LAP, litigation privilege belongs to the client.

Ligation privilege may also be asserted by successors in title to the privilege holder.

25 Is greater protection given to certain types of work product?
No. All types of work product are treated equally provided they meet the conditions for LAP or litigation privilege.

26 Is work product created by, or at the direction of, in-house counsel protected?
Yes, subject to the position under EU law (see question 2).

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?
Materials created by a third party can attract privilege when they are confidential communications with a client or his or her lawyer, made for the dominant purpose of litigation, and where adversarial proceedings are in existence or in reasonable contemplation. For example, subject to the next paragraph, provided the dominant purpose test is satisfied, experts’ draft and final reports, or witnesses’ draft and final statements, will remain privileged until (in the case of the final report or witness statement) it is served in the relevant proceedings.

Where CPR 31.10 applies (where an expert has been engaged to give evidence in civil proceedings), privilege is not available to protect a party’s instructions to his or her expert, even where the dominant purpose test is satisfied. However, the disclosure of an expert’s instructions can only be ordered where the court is satisfied that there are reasonable grounds to consider that the statement of material instructions (required in the expert’s report) is inaccurate or incomplete.

The exception has been tested in the courts. It does not abrogate privilege in respect of an expert used ‘behind the scenes’ in litigation to advise generally on the merits of a client’s case.

If the material was not made for the dominant purpose of litigation, unless a third-party professional is, or is working under a lawyer, his or her documents will not be subject to privilege.

28 Can a third party overcome the protections for work product?
How?
Yes, if the privilege is waived by or on behalf of the client (see questions 14 to 16).

29 Who may waive the protections for work product?
Waiver of litigation privilege works as for LAP (see question 14).

30 What actions constitute waiver of the protections for work product?
Waiver of litigation privilege works as for LAP (see question 15).

31 May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product?
Yes a client is entitled to demand his or her solicitor’s files. This does not waive the protections over documents in those files as the privilege belongs to the client.

32 Under what circumstances is an inadvertent disclosure of work product excused?
Waiver of litigation privilege works in the same way as for LAP (see question 14).

33 Describe your jurisdiction’s main exceptions to the protections for work product.
The exceptions in question 18 apply equally to litigation privilege. See also the CPR 35 exception set out in question 27.

A document that predates the litigation, and that was not previously in the party’s possession, is not made privileged by being sent to the party for the dominant purpose of litigation.

There are also limited statutory exclusions to privilege. RIPA has been held to override legal professional privilege (see question 18).

34 Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?
See question 18.

35 In what circumstances are foreign protections for work product recognised in your jurisdiction?
The actual or anticipated proceedings (litigation or arbitration) required for litigation privilege can be foreign.

If privilege has been lost in another jurisdiction, that will not bind the English court, although it may have an effect if the document has lost its confidentiality in another jurisdiction.

If a foreign court has formally recognised privilege in an order or judgment, that is a matter for enforcement of foreign judgments.

(See also question 20.)

Common issues

36 Who determines whether attorney-client communications or work product are protected from disclosure?
In the first instance, lawyers for the parties providing disclosure are responsible for determining which documents are privileged and should be withheld from inspection (hence the need to mark potentially privileged documents as such (see question 21, first bullet point). Lawyers have duties as officers of the court, as well as to their clients: if a lawyer is not satisfied, in good faith, that it is probable that a claim for privilege can be made out, it should not be made.

If a claim to privilege is challenged by another party to litigation, or by a regulator, either in respect of a particular document or classes of documents, the court will usually make a determination on privilege, either in respect of a generic type of document or documents, or on inspection of the particular document in question. Additionally, where there is a firm evidential basis to do so, the court can make an order requiring a party claiming privilege to explain in sufficient detail the basis upon which that claim has been advanced.

In a dawn raid by a prosecutor or regulator, an independent lawyer may be brought in to determine privilege challenges.
Who is the ‘client’?
The difficulties described in question 5 (who is the ‘client’ for the purposes of legal advice given to a large organisation) were acknowledged in March 2016 by the President of the Supreme Court, Lord Neuberger, who recognised that modern legal and commercial practice gives rise to problems in relation to privilege and that the Three Rivers (No. 3) decision has not been followed in a number of other jurisdictions. Lord Neuberger stated that the ‘law as it is currently understood can lead to difficulties when a company carries out internal investigations, and a regulator, prosecutor or other entity asks for the resulting documents’ (9 March 2016, ‘Youth at Risk’ breakfast meeting). However, the Three Rivers (No. 3) decision has recently been confirmed in The RBS Rights Issue Litigation. In his judgment, Justice Hilyard noted that the Three Rivers (No. 3) decision has been heavily criticised, and that it may need to be considered by the Supreme Court in due course. RBS was granted permission to appeal the decision, although it has now dropped its appeal, so there is no imminent prospect of the Supreme Court looking at the issue. So, problems persist for corporations carrying out internal investigations, for whom there is a danger of creating disclosable material as a consequence of employee interviews, in the absence of litigation.

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?

‘Common interest’ privilege protects the communications of parties with sufficient identity of interest. They need not instruct the same lawyer (Buttes Gas and Oil Co v Hammer (No. 3), 1981). The communication must take place confidentially. What constitutes a common interest will depend on the facts—there is no standard definition. The parties need not have identical interests; a relationship giving rise to a duty of confidence may suffice, for example.

Where there is already privilege in the material that is shared, the only question will be whether privilege has been lost by waiver (see question 3). Common interest privilege will, therefore, only have a role to play where new communications are created as a result of parties with sufficiently similar interests sharing information or documents.

Common interest privilege provides protection against inspection by third parties, but will not entitle each of the parties to obtain additional documents or information from the other party (unlike joint privilege, which arises where the same lawyer is instructed by both parties—see question 39). Common interest privilege may be waived without the consent of all parties to the privilege acting together; waiver by one party is sufficient.

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

English law recognises a concept of limited waiver, where the privilege in a document is not lost where it is disclosed for a limited or defined purpose. This means that documents that have been made available in earlier proceedings or investigations may be protected from disclosure in subsequent proceedings.

Public bodies are often given statutory powers to request documents in the course of their investigations. The courts will closely scrutinise such powers to determine whether there is any express intention to abrogate privilege.

A privileged document can be shared with a regulator on the basis of either a limited waiver or without prejudice privilege where a
company or individual wishes to cooperate with an investigation or settle a dispute with a regulator. This limited waiver will provide a protection against the document being disclosed in other proceedings.

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?

‘Without prejudice privilege’ is available to protect communications in furtherance of negotiations with an adversary, with a view to settling a claim or potential claim, on the basis of the public policy to encourage settlements or an implied contract between the negotiating parties. The privilege belongs to both parties jointly, so cannot be waived by one of them.

‘Joint interest privilege’ may arise where A takes legal advice for himself or herself that also benefits B because they have the same interest, or indeed where A and B instruct the same lawyer (in which case it is known as ‘joint privilege’). In either case, A and B will be sharing the cost of the legal advice. It is necessary for both those sharing the joint privilege, and the lawyers, to know, or to show that they ought to have known, that they enjoyed shared legal advice privilege with the others. Classic cases are: trustees and beneficiaries, partnerships and individual partners, and a company and its shareholders, save, obviously where the trustee, partnership or director seeks advice in relation to a dispute or potential dispute with beneficiary, partner or shareholder or in respect of his or her personal legal position.
Germany

Kai Hart-Hönig
Dr Kai Hart-Hönig Rechtsanwälte

Domestic legislation

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

German law protects communications between an attorney and his or her client by recognising a lawyer’s right to refuse to testify in court with respect to matters to which the lawyer’s professional duty of secrecy extends – namely, all matters that the lawyer becomes aware of in the exercise of his or her profession.

However, despite being designed as a rule of evidence, this right to refuse to testify also applies to other matters including communications with authorities or third parties, or internal investigations.

All such matters are governed by federal law, regardless of whether the proceedings concern substantive state law or are being administered by a German state.

Dependent on the nature of the proceedings, the right to refuse testimony is governed by:

- section 383(1) No. 6 of the Civil Procedure Code;
- section 55(1) Nos. 2 and 3 of the Criminal Procedure Code (including regulatory proceedings, for instance by the Federal Cartel Office, according to section 46(1) of the Regulatory Offences Act);
- section 98 of the Code of Administrative Court Procedure;
- section 118 of the Code of Social Court Procedure;
- section 177 of the Tax Code; and
- section 84 of the Code of Fiscal Court Procedure.

Not exercising this right – in other words, not observing the duty of secrecy – constitutes a criminal misdemeanour pursuant to section 203(1) No. 3 of the German Criminal Code, unless an attorney is discharged of this duty by the client.

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.

Whether in-house counsel enjoy the protection of the lawyers’ privilege is disputed. While scholars and practitioners generally advocate the extension of the privilege to in-house lawyers, the courts have been very reluctant. As a rule, the privilege can only be invoked by in-house lawyers if they are admitted to practise law and if their position within the employer’s organisation is comparable to that of an independent external lawyer, and even then only to the extent that the in-house lawyer has acted in his or her capacity as a lawyer rather than in a managerial or clerical role. As to criminal defence, it has been ruled that the in-house lawyer must be discernibly appointed as a defence counsel and this needs to be proven, inter alia, by having the defence-related files stored in a clearly separate fashion from other files.

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 protection of lawyers’ work product is very differently regulated as regards the areas of law.

Under the rules regarding burden of proof in civil proceedings, each party to a court proceeding is responsible for pleading and proving all facts relevant to support its claim or defence. As a general rule, litigants do not have to disclose information enabling the opponent to plead and prove its case. Pretrial discovery proceedings are alien to the German system.

As a result, the opponent or a third party is only obligated to produce documents at a litigant’s request when the litigant has the right to demand the production of such documents under contract or statutory law. In the absence of such right, a litigant must obtain all the information required to support its case, from publicly available sources or from documents it possesses or to which it has access.

The court may, officio, order litigants and third parties to produce documents (including electronically stored ones) in their possession, which either party has referred to in the proceedings, also in the pretrial stage. This also applies to lawyers’ work products. The obligation to produce documents is independent of the allocation of the burden of proof among the litigants. In practice, the courts tend to exercise the sweeping power fairly cautiously. The court cannot enforce its order. It can only take a refusal into consideration while evaluating the evidence.

In criminal cases (as well as regulatory offence-related cases) a defendant is not required to produce anything, let alone a communication with his or her lawyer.

This rule does not apply in cartel cases as long as the proceedings are considered merely administrative, and not having turned into proceedings aiming to prosecute because of regulatory offences. The prevailing opinion and the courts construe section 59(1) sentence 1 No. 3 of the Anticompetition Act in a way that the corporation is obliged to produce all relevant information upon request of the Cartel Office, including communication with its lawyers.

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

The Regional Court Hamburg (608 Qs 18/10 – 15 October 2010) held that lawyers’ minutes of interviews with witnesses in the course of an internal investigation are not privileged and can be seized. Witnesses are not considered to be clients of lawyers who are acting on behalf of a corporate. This being said, the lawyer is not allowed to testify about the interviews unless the client (ie, the corporate) waives the privilege.

The Regional Court Mannheim (24 Qs 1/12 – 3 July 2012) ruled that all documents produced in the course of an internal investigation are protected if they are in the possession of the lawyer, irrespective of from whom the information was collected.

The Regional Court Braunschweig (6 Qs 116/15 – 21 July 2015) adjudicated that documents engendered in the course of an internal investigation earmarked to prepare the corporate for a defence are protected independent of and prior to a possible institution of criminal or administrative proceedings against the corporate and regardless of whether they are in the possession of the lawyer or the corporate.

The aforesaid decision spells a fundamental extension of the protection. However, the vast majority of the legal literature has not (yet) adopted this stance but is either disapproving or undecided. Whether or not the Hamburg decision no longer reflects the prevailing opinion of prosecutors and the respectively competent courts, remains to be seen.
Attorney–client communications

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

The protection over attorney–client communication encompasses facts entrusted to the lawyer, or that the lawyer became aware of in his or her capacity as a lawyer.

The presence of third parties who are not privileged professionals does not impair the protection, but non-privileged third parties could be compelled to testify about the communication.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

See questions 3 and 4 regarding limitations in the context of litigation.

Communications made in the course of internal investigations only enjoy a small degree of protection. The content of the communications cannot be obtained by authorities by interviewing the attorney, but it may be obtained by interviewing the persons if they themselves cannot invoke a personal right to silence. This only applies if the persons are being individually suspected or accused of having committed criminal or regulatory offences or are officers of a company that is, as such, an affected party (ie, are subject to forfeiture under criminal law or regulatory offences law, or subject to an administrative fine), at least at a managerial level (lower ranking employees are not attributed the right to silence because this is derived from the higher ranking supervisors’ exposure to be held liable for, for example, an organisational shortcoming that resulted in criminal wrongdoing).

Work product and notes that have resulted from communications are only protected from seizure of the attorney’s as well as the client’s possession if the client is suspected or accused of criminal or regulatory-offensive wrongdoing. Attorney–client communications other than those resulting from a criminal defence relationship between client and attorney are only protected when they are in the possession of persons who are themselves entitled to the right to silence – often only the attorney.

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

The privilege belongs to the client, not the lawyer. The client can release the lawyer from his or her duty to secrecy.

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

Facts are not privileged, unless they result from enquiries conducted by a criminal defence counsel in the course of and for the purpose of the defence.

However, neither a lawyer nor the client can be compelled to disclose facts outside the scope of the mandate, provided the client is entitled to invoke a right to silence.

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?

As a rule, communications with a lawyer’s agent fall inside the scope of privilege, and communications with the client’s agent fall outside the scope of privilege.

Lawyers’ agents (eg, lawyers’ certified tax advisers and certified auditors) enjoy professional privilege. Besides this, the assistants to such professionals share the professionals’ privilege to the extent they are involved in the matter at hand. This means that an assistant’s role needs to be inequitably documented to ensure his or her privilege.

Agents to the client who do not enjoy their own privileges are usually not within the possible scope of privilege of the attorney. Making them assistants to the attorney might only work if it is not seen as an unlawful way of stretching the privilege.

An attorney’s use of unprivileged persons does not destroy the privilege in its entirety, but makes it vulnerable because these persons can be interviewed as witnesses by authorities and materials in their possession can be seized.

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

Yes, a corporation can avail itself of the protections for attorney–client communications.

Depending on the client’s legal entity – and perhaps also which body (eg, management board or supervisory board) and for what purpose (eg, advising the company or seeking compensation from directors) – the privilege can only be waived by the responsible officers: as a rule, the managing directors or the chair of the supervisory board.

Where a group is concerned, whether officers of the parent company are entitled to waive privilege on behalf of affiliates depends on the legal structure.

In the event that the relevant time of the case at issue spans terms of office of incumbent and former officers, the person whose approval is required for waiving a privilege is a controversial matter, and not unanimously decided by courts.

This becomes a particularly important matter if former officers are targeted on grounds of wrongdoing because this is derived from the higher ranking supervisors’ exposure to be held liable for, for example, an organisational shortcoming that resulted in criminal wrongdoing.

Work product and notes that have resulted from communications are only protected from seizure of the attorney’s as well as the client’s possession if the client is suspected or accused of criminal or regulatory-offensive wrongdoing. Attorney–client communications other than those resulting from a criminal defence relationship between client and attorney are only protected when they are in the possession of persons who are themselves entitled to the right to silence – often only the attorney.

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

No, unless the employees are entitled to invoke the right to silence for personal reasons (eg, being the director of a company that is subject to criminal investigation).

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

No, because the in-house counsel, as a rule, does not enjoy privilege (see question 2).

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

In general, the privilege of an external counsel (in-house counsel as a rule does not have privilege) does not extend to employees, irrespective of being incumbent or former employees, unless they are entitled to invoke the right to silence for personal reasons (eg, being or having been the director of a company that is subject to criminal investigation).

14 Who may waive the protections for attorney–client communications?

The client or (in the event of demise or merger) the client’s legally recognised successor may waive their own privilege.

When an attorney jointly represents more than one client (which is not allowed in criminal proceedings), a client can waive privilege only as to his or her own communications with the lawyer.

The concept of a joint defence or common interest agreement does not exist in Germany. Communications with another client’s lawyers are not privileged communications.

Communications between a current client and former employees are not privileged communications. Hence, sensitive information should only be shared in the event that the interests of all the clients can be expected to be largely identical, and that this will not change with the passage of time.

As given in question 10, in the event that the relevant time of the case at issue spans terms of office of incumbent and former officers, the person whose approval is required for waiving a privilege is a controversial matter, and not sufficiently unanimously decided by courts. This becomes a particularly important matter if former officers are
targeted on grounds of wrongdoing – hence the waiver could be to their disadvantage but to the benefit of the company. The prevailing opinion is that the approval of the incumbent officers is sufficient. However, there are strong arguments that the trusting cooperation between officers and lawyers would be impaired if officers were concerned that entrusted matters could become disclosed without their approval.

15 What actions constitute waiver of the protections for attorney–client communications?
Waivers can occur expressly or in an implied manner. Both kinds need to be made voluntarily, however, authorities do not need to caution persons about the legal requirements.
Waivers can be revoked, without retroactive effect as to admissibility, and can be limited to certain matters but not to single facts.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?
As waivers can be revoked and limited at any time, whether inadvertent disclosure will result in admissible evidence depends on the extent to which communication has been disclosed. A lawyer’s disclosure without sufficient waiver exposes him or her to the risk of criminal prosecution but does not render the disclosed communication inadmissible.

17 Can attorney–client communications be shared among employees of an entity, without waiving the protections? How?
Sharing communications does not waive protections, but the protections become penetrable to the extent that employees of the entity cannot invoke personal rights to silence.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.
In Germany there are no such exceptions. Even if a client uses the legal advice to later engage in unlawful conduct, the lawyer is not allowed to disclose communications. However, the authorities are permitted to seize relating documents that could be deemed objects used in committing a crime. The lawyer is allowed to disclose communications to defend himself or herself if he or she is suspected of having aided and abetted the client’s wrongdoing.

An exception is made under the German Money Laundering Act, if there are indications of intended money laundering or that legal advice is sought to launder money, but not if this is ascertained only in the course of providing advice. If obliged to file a suspicious activity report, the client must not be tipped off.

When a litigant uses ‘advice of counsel’ as an affirmative defence, he or she cannot withold from discovery his or her lawyer’s communications concerning that advice. However, this may almost certainly weaken his or her defence, because advice of counsel only causes exonerating effects if it satisfies criteria in terms of, for instance, methodology being state-of-the-art and reflecting the legal situation adequately.

If criminal proceedings or proceedings as regards regulatory offences other than cartel offences ensue from preceding administrative proceedings, it is disputed whether the communications that occurred before are privileged.

19 Can the protections for attorney–client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?
See question 18.

20 In what circumstances are foreign protections for attorney–client communications recognised in your jurisdiction?
Only communications with lawyers admitted in Germany or allowed to work as lawyers in Germany, as well as lawyers admitted in member states of the World Trade Organization, enjoy protection.

21 Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained.
Lawyers should carefully protect confidential communications by being aware of the vulnerabilities of privileged information as set out above, in particular by sharing it with persons who are not privileged.

Also, lawyers should carefully label documents and provide privilege logs when producing documents. Lawyers should accurately separate privileged files from non-privileged files. Mixing such files together imperils protection for the genuinely privileged communication.

Eventually, lawyers have to create awareness of the privilege issue for all persons who are involved in the conduct of the case, and could either engender non-privileged communication or become witnesses who could be compelled to testify about privileged communication.

Work product

22 Describe the elements necessary to confer protection over work product.
There is no work-product doctrine in place in Germany. However, the absence of such doctrine may be deemed less critical since pretrial discoveries are alien to German law too.

The protection of work products follows very closely the protection of any communication, including verbal communication. This means that work product of a lawyer or his or her privileged assistants is required, irrespective of whether it is for litigation or advice purposes. The work product of clients is only protected if it is engendered by a defendant in a criminal or regulatory-offensive case.

Once again, the scope of protection only matters in the event of searches and seizures in the course of criminal or regulatory-offensive matters.

23 Describe any limitations on the contexts in which the protections for work product are recognised.
See question 22.

24 Who may invoke the protections for work product?
The client, lawyer or both may invoke the protections.

25 Is greater protection given to certain types of work product?
No, but the more the papers reflect an attorney’s mental processes instead of facts, the more likely it is that the protection will not be questioned.

26 Is work product created by, or at the direction of, in-house counsel protected?
Work product of in-house counsel is, as a rule, not protected unless they are admitted to practise law and if their position within the employer’s organisation is comparable to that of an independent external lawyer – and even then only to the extent that the in-house lawyers have acted in their capacity as lawyers rather than in a managerial or clerical role. As to criminal defence, it has been ruled that the in-house lawyer must be discernibly appointed as a defence counsel and this needs to be proven, inter alia, by having the defence-related files stored in a clearly separated manner from other ones.

That work product has been created at the direction of in-house counsel does not matter as such regarding protection. The regular rules apply.
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?

As a rule, materials created at the direction of a lawyer fall within the scope of protection; in contrast, materials created at the client’s direction fall outside the scope of protection.

See also the information on privilege in question 9.

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

As a rule the protections are not surmountable. Even if reference is made to protected products in civil proceedings and the party is thus obliged to produce this product, the production is not enforceable.

29 Who may waive the protections for work product?

Only the client can waive work product protections, unless the lawyer can assert an exceptional interest, such as defending himself or herself against criminal allegations.

See question 14 as to approval of former officers.

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

A client’s express or implied waiver statement or submission of work product by a client lawyer on behalf of a client.

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

Clients have a right to access their files without waiving work product and accessibility by third parties to the extent legally possible.

However, this exposes the files to the risk of being seized if they are not suspects or personally entitled to decline adducing evidence.

32 Under what circumstances is an inadvertent disclosure of work product excused?

Because of the absence of any regulation akin of the US work-product doctrine, inadvertent disclosures result in admissibility of work product and accessibility by third parties to the extent legally possible.

Disclosure is excused if a lawyer objectively violated his or her duty to secrecy and is thus obliged to reduce the detrimental impact of the disclosure to the client as far as possible (eg, seeking for the recipient to treat the work product as confidential and only using it for the recipient’s own purpose).

33 Describe your jurisdiction’s main exceptions to the protections for work product.

The main exceptions are:

- If materials are prepared in furtherance of a crime;
- If work product is considered as an object used to commit a crime; and
- If work product is prepared volitionally because the lawyer is subject to criminal proceedings.

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

Yes. When a client files a claim of inadequate assistance of counsel or malpractice, and where an attorney’s representation of his or her client is a central issue, the work product protection will not apply. In addition, if work product is created in furtherance of a crime, then it is not protected.

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

The work product protections are considered to constitute a procedural rule. Thus, work products that enjoy protection under German law and are created by lawyers who are granted privilege (admission in Germany or in WTO member states) are protected.

Common issues

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

In the event of a disagreement, the body responsible for the final adjudication of the underlying substantive dispute (usually a judge or arbitrator) evaluates whether the protections of the attorney–client privilege or the work product doctrine apply.

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?

Yes. This would not lead to a loss of protection, but each member could waive without asking the others, unless the approval of more than one member is needed (eg, more than one director of a company is needed according to statutes of association).

‘Common interest’ or ‘joint defence’ agreements are alien to German law. Hence, clients being party to an agreement of this kind can use any work product without consent of others. The evidence is considered admissible, but may trigger claims of damages against the disclosing party. If lawyers infringe such agreements this could constitute a violation of lawyer’s duties and may result in sanctions by the German Chamber of Lawyers.
38 Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How?

The waiver can be limited to be effective only towards a defined authority. However, it needs to be taken into account whether another agency or third party could access the file without requiring the waiving party’s approval.

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 other policies apply specifically to attorney–client communications or to work product. However, other specific privileges often apply in litigation.

The spousal privilege, for example, protects from compelled disclosure communications between married spouses.
Domestic legislation

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

Overview

While Japan has not adopted the attorney–client privilege that directly protects attorney–client communications from compulsory disclosure, Japanese law recognises some substantially equivalent rights to protect attorney–client communications, such as:

- the right of refusal against confiscation, particularly based on the lawyer’s duty of confidentiality; and
- the right of refusal against production of documents on the grounds of ‘internal use’ in civil proceedings.

We will refer to these rights of refusal collectively as ‘Protection’.

Civil proceedings

Under Japanese law, in principle, each party is responsible for the collection of evidence. Compulsory disclosure of a broad range of information akin to ‘discovery’ in the US legal system is not available. Therefore, issues surrounding Protection do not often surface in civil proceedings.

The Code of Civil Procedure sets forth some proceedings for the collection of information such as an Order to Submit Documents and Duty to Testify in the process of the examination of witness. The Protection issue would come up when examining the existence of the grounds for the exemption of the disclosure or testimony obligation in these proceedings.

First, in relation to the lawyer’s duty of confidentiality, the facts known to the lawyer (including registered foreign lawyers in Japan) during the course of his or her professional engagement that should be kept confidential are exempted from production by the Order to Submit Documents and Duty to Testify in the examination of witness.

Second, documents prepared exclusively for the ‘internal use’ are exempted from the Order to Submit Documents.

Criminal and administrative investigations

On the other hand, in criminal and administrative investigations, the government has the power to order the compulsory collection of evidence. Under criminal investigations, the police or prosecutor’s office may conduct searches and seizures. Under administrative investigations, the Japan Fair Trade Commission (JFTC) may conduct on-site inspections (ie, dawn raids), the Tax Office may conduct tax investigations and the Securities Exchange and Surveillance Commission may conduct on-site inspections.

In criminal investigations, a lawyer, for example (see question 9 for other examples), may insist on Protection and refuse the confiscation of goods obtained in the course of his or her professional engagement that contain another’s confidential information. For reference purposes, the suspect has the right to refuse to make a statement against his or her will, and refuse to communicate with the criminal defender without any officials present.

In administrative investigations, the aforementioned rights to protect confidentiality are not explicitly set forth in the laws, although, in practice, an attorney’s office is rarely investigated for the purpose of the collection of evidence by the government.

Under criminal trial proceedings subsequent to a criminal investigation, similar to civil proceedings, a lawyer has the right to refuse to testify in the examination of a witness. Under the administrative case litigation subsequent to an administrative investigation, the parties are given rights equivalent to those in civil proceedings and can utilise Protection such as the right of refusal to testify and the right of refusal against the disclosure of documents for internal use.

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.

Japanese law does not distinguish between in-house counsel and a private practitioner. Thus, a lawyer registered as a Japanese qualified lawyer can utilise Protection regardless of whether he or she is in-house counsel or a private practitioner. Further, even if he or she is not a Japanese qualified lawyer, documents may be protected as documents for ‘internal use’ under civil proceedings. However, when a company is inspected under a criminal investigation, its legal department may also be subject to inspection. In such case, whether or not the company can resist the confiscation of documents is a difficult question and depends on the specific circumstances.

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.

In Japan, because there are no rules that particularly focus on the issue of work product, it can be an issue whether or not such work is protected under the rules (see question 1). Thus, regardless of whether they were prepared in anticipation of litigation, documents drafted by lawyers are protected from compulsory production as long as they are under the scope of Protection as documents for internal use or subject to a lawyer’s duty of confidentiality in civil proceedings and, in a criminal investigation, as long as they are exempted from confiscation.

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

In the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) case (Decision of Tokyo High Court dated on 12 September 2013), the JFTC obtained JASRAC’s counsel’s legal opinion that had been prepared several years before the investigation into JASRAC, and minutes of meetings that counsel had attended, and submitted them as evidence in the JFTC’s administrative proceedings. The competitors of JASRAC then filed a petition to the JFTC requesting copies of documents including such legal opinion and minutes as ‘interested parties’ of the administrative proceedings based on the Antitrust Act. The JFTC issued an order accepting the competitors’ request (JFTC’s Disclosure Order). JASRAC filed an action to the Tokyo District Court to seek an order to invalidate JFTC’s Disclosure Order. JASRAC argued that the JFTC’s Disclosure Order was in violation of the attorney–client privilege and work-product doctrine. However, the Tokyo District Court dismissed JASRAC’s claim, and the Tokyo
High Court upheld the Tokyo District Court’s decision, ruling that such alleged privilege and doctrine are not recognised under current Japanese law. JASRAC filed a final appeal to the Supreme Court, which was subsequently dismissed by the Court.

Attorney–client communications

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

Civil proceedings

Protection based on the duty of confidentiality is recognised when the following requirements are met:

(i) the client is a lawyer or former lawyer;
(ii) information was obtained in the course of his or her professional engagement;
(iii) such information should be kept confidential; and
(iv) duty of confidentiality has not been exempted.

With respect to (iii), information must be kept confidential (ie, not known to the public), and there must be objectively reasonable grounds to keep it confidential. For example, even if the information is the investigation report prepared by the lawyers, it is not protected after it is disclosed to the public. Even a report prepared by the lawyers at the request of the client may not satisfy requirement (iii), depending on the contents of the report.

Protection based on the documents for internal use is recognised when the following requirements are met:

(i) the purpose of the document is for internal use;
(ii) the production of the document would be detrimental to the document holder; and
(iii) non-existence of a special circumstance to determine otherwise.

Requirement (ii) is judged categorically by the nature of documents, and is considered to be met, for example, in the case where production of the document would hamper the free decision-making process inside the company and where production of the document would infringe on the document-holder’s privacy or trade secrets. Requirement (iii) allows the court’s discretion to order the production of documents in exceptional cases even if the requirements (i) and (ii) are met. For example, review of a bank’s internal documents by superiors to approve its lending to a debtor basically meets requirements (i) and (ii), but requirement (iii) is denied when a third party obtains the document after the bankruptcy of the bank.

Criminal and administrative investigations

Under criminal investigations, as explained in question 1, a lawyer or former lawyer may refuse confiscation of goods:

- that he or she retains or possesses during the course of his or her professional engagement; and
- that contain the confidential information of others (typically, the clients).

On the other hand, under administrative proceedings, equivalent Protection is not explicitly set forth in the law (see question 1).

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

The biggest difference between Protection in Japan and attorney–client privilege in other jurisdictions is, in the case of criminal investigations in Japan, Protection is a right given to the lawyer and, therefore, such documents may be seized if the client possesses the document in which the attorney–client communications is written. This also applies to administrative investigations that do not have explicit provisions for such Protection.

In civil proceedings, the client is able to rely on Protection on the grounds of documents for internal use as long as the requirements are met. On the other hand, it is debatable whether the client who possesses the document in question may invoke Protection based on the lawyer’s duty of confidentiality.

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

Under civil proceedings and criminal investigations, a lawyer may not utilise Protection if the client accepted the request to produce documents.

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

Under civil proceedings, although little is discussed as to the distinction between facts and advice or opinion, Protection on the ground of the duty of confidentiality or documents for internal use would be recognised regardless of which contents are related to the facts, advice or opinion.

The same applies to Protection on the ground of duty of confidentiality in criminal investigations.

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?

Under civil proceedings, communications with professionals such as patent attorneys and medical doctors are expressly recognised under the Code of Civil Procedure as being protected. Communications with certified public accountants and judicial scriveners may be protected on the ground that they owe a duty of confidentiality under the regulatory laws. Outside investigators who are not qualified and do not owe the statutory duty of confidentiality cannot utilise Protection on the ground of confidentiality, but their work product may be protected from compulsory production on the ground of documents for internal use.

Under criminal proceedings, Protection on the ground of the duty of confidentiality is given only to those professionals expressly recognised under the Code of Criminal Procedure such as lawyers, patent attorneys, medical doctors and notary publics. In contrast, certified public accountants and outside investigators cannot utilise this Protection.

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

A corporation that is the client of the lawyer can control Protection on the ground of duty of confidentiality, and a corporation can also control Protection on the ground of documents for internal use through the management of the document retention. In criminal and administrative investigations, a corporation may not refuse the submission of the documents it retains.

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

Under civil proceedings, communications between outside counsel who conducted investigation and interviewed employees are likely to be protected on the ground of the outside counsel’s duty of confidentiality and on the ground of documents for internal use. In addition, in criminal and administrative investigations such communications will be protected on the ground of duty of confidentiality as long as they are retained by the outside counsel. Under administrative investigations (see question 6), while a lawyer’s office is rarely subject to on-site inspection in practice, no explicit regulations are set forth in the laws.

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

Whether the counsel is in-house counsel or outside counsel is irrelevant to Protection under Japanese law, and thus such communications will likely be protected as documents for internal use in civil proceedings. However, in criminal and administrative proceedings (see question 2) a company’s legal department may be inspected by the search warrant and subject to the on-site investigation.
Update and trends
As discussed herein, Japan does not possess a system equivalent to the attorney–client privilege recognised in other jurisdictions. In recent years, scholars and practitioners have actively discussed the introduction of such a system, but arguments in opposition remain strong. In the particular area of antitrust law, a study group hosted by the JFTC is discussing this issue as one among many surrounding the introduction of the discretionary administrative surcharge system.

13 To what degree do the protections for attorney–client communications extend to communications between counsel for the company and former employees?
Under civil proceedings, communications between outside counsel who conducted investigation and former employees are likely to be protected on the ground of the outside counsel’s duty of confidentiality and on the ground of documents for internal use. Also, under criminal and administrative investigations, such communications will be protected on the ground of duty of confidentiality as long as they are retained by the outside counsel.

14 Who may waive the protections for attorney–client communications?
Under civil proceedings, with respect to Protection for the benefit of the client (such as documents for internal use and the duty of confidentiality imposed to the professionals), the client may waive Protection. Counsel may not waive Protection ignoring the client’s intention (see question 18 for exceptions). The same is applicable to criminal proceedings.

15 What actions constitute waiver of the protections for attorney–client communications?
Under civil proceedings, where a party disclosed the contents of the communications to the other party, the party is not able to prevent the contents from being produced by the other party. Where the contents of the communications were cited in a party’s brief, the party owes a duty to produce them as evidence (if requested). Where a party disclosed the contents of the communications to third parties, the party may owe a duty to produce them as evidence (if requested) on the ground that such documents lost the nature of internal use, and where the other party obtained such documents, the party may not raise objection to the other party’s submission of such documents as evidence. Under criminal and administrative investigations, where such communications are inadvertently divulged to the governmental authorities, it is practically impossible to prevent the governmental authorities from utilising such information in their investigation.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?
See question 15.

17 Can attorney–client communications be shared among employees of an entity, without waiving the protections?
How?
Under civil proceedings, the nature of ‘internal use’ of the documents is not lost even if they are shared among multiple employees. Under criminal and administrative proceedings, if the documents containing communications with the counsel are possessed by the client, such client may not refuse the seizure by search warrant, regardless of whether such documents are shared or not.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.
A lawyer may not refuse production of documents based on the duty of confidentiality if the client waived Protection. Other examples of exceptions are:
• when the client obviously commits a crime; and
• when the lawyer is involved in the dispute against his or her former client and has to disclose the confidential information in order to defend himself or herself.

19 Can the protections for attorney–client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?
Protection on the ground of the lawyer’s duty of confidentiality is not overcome unless it is waived by the client (see question 14) or in exceptional cases (see question 18) in both civil and criminal proceedings.

20 In what circumstances are foreign protections for attorney–client communications recognised in your jurisdiction?
Japanese law does not explicitly recognise attorney–client privilege from foreign jurisdictions and protections are afforded according to Protection under Japanese law. Foreign lawyers registered in Japan owe a duty of confidentiality that is equivalent to the duty owed by a Japanese lawyer and have the right of refusal against seizure, etc, based on such duty.

21 Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained.
As explained in question 6, in case of seizure under criminal and administrative investigations, the client may not refuse the seizure of documents that contain attorney–client communications if the client possesses such documents. Thus, it would be worth considering keeping such documents only in the possession of outside counsel. Under civil proceedings in Japan, attorney–client communications in the possession of the client are basically protected as documents for internal use.

Work product

22 Describe the elements necessary to confer protection over work product.
As stated in question 3, since Japan does not have a rule that applies only to work product, whether the documents are protected from production or not would be determined on the examination of the requirements described in question 5.
In this regard, work product is highly likely to be protected as documents for internal use under civil proceedings. Under criminal and administrative investigations, as stated in question 6, work product possessed by the client is not protected.

23 Describe any limitations on the contexts in which the protections for work product are recognised.
As stated in question 3, since Japan does not have rules that apply only to work product, whether the documents are protected from production or not would be determined only on the examination of the requirements described in question 5. Thus, the same limitation for attorney–client communications as explained in question 6 is applicable to work product.
In this regard, work product is highly likely to be protected as documents for internal use in civil proceedings. Under criminal and administrative investigations, as stated in question 6, work product possessed by the client is not protected.

24 Who may invoke the protections for work product?
Under civil proceedings, the holder of the document at issue may invoke Protection. A lawyer is not allowed to waive Protection against his or her client’s wishes because Protection is granted to protect the secrets of the client.
Under criminal proceedings, a lawyer who has been entrusted in the course of the attorney’s duties and retains or possesses the work product may invoke Protection against confiscation.

25 Is greater protection given to certain types of work product?
The level of protection does not differ depending on the content or nature of work product. The only issue is whether protection should be granted or not.

26 Is work product created by, or at the direction of, in-house counsel protected?
See question 12. Under civil proceedings, the work product is likely to be protected on the ground of documents for internal use.
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? See question 9. Under civil proceedings, the work product is likely to be protected on the ground of documents for internal use.

28 Can a third party overcome the protections for work product? How? A third party is not allowed to obtain the work product by overcoming Protection on the ground of documents for internal use in civil proceedings, or a lawyer’s right to refuse confiscation under criminal investigations.

29 Who may waive the protections for work product? See question 14. There is no rule applicable only to work product.

30 What actions constitute waiver of the protections for work product? See question 15. There is no rule applicable only to work product.

31 May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product? Under civil proceedings, the client may still invoke Protection on the ground of documents for internal use even after the client receives the file from his or her attorney. Under criminal and administrative investigations, if the work product is possessed by the client, the client is not allowed to refuse confiscation or production.

32 Under what circumstances is an inadvertent disclosure of work product excused? See questions 15 and 16. There is no rule applicable only to work product.

33 Describe your jurisdiction’s main exceptions to the protections for work product. See question 18. There is no rule applicable only to work product.

34 Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred? See question 19. There is no rule applicable only to work product.

35 In what circumstances are foreign protections for work product recognised in your jurisdiction? See question 20. There is no rule applicable only to work product.

Common issues

36 Who determines whether attorney–client communications or work product are protected from disclosure? Under civil proceedings, the court in charge of the case determines whether or not the document holder may invoke Protection. Under criminal investigations, the court issues the search and seizure warrant and, in practice, hardly considers such Protection in issuing it.

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? Under civil proceedings, although little is discussed about such a case, a client may be obliged to produce the shared work product on the ground that it is no longer regarded as for internal use, depending on the nature of the work product and people or entities who shared the product. If it is work product possessed only by the attorney, and shared with the third parties through their attorneys whose clients share a common interest, such work product will be protected based on the lawyer’s duty of confidentiality. Under criminal and administrative investigations, a client or third parties who share a common interest are not allowed to refuse confiscation or production.

38 Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How? Under civil proceedings, the disclosure of attorney-client communications and work product to government authorities is basically not relevant to the fulfilment of the requirements described in question 5. One caveat is that the work product may lose the purpose of internal use if it was produced in anticipation of such disclosure.

Under criminal and administrative investigations conducted by governmental authorities, the location of work product is important. If the work product is possessed by the client, it may be seized.

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? There are no privileges or protections other than those explained in this article. As stated in question 1, while Japanese law does not directly protect attorney–client communications and work product, it recognises Protection (right of refusal against production or confiscation) based on documents for internal use (only in civil proceedings) and a lawyer’s duty of confidentiality (in both civil and criminal proceedings).
Domestic legislation

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

Article 16 of the Mexican Constitution recognises the right to the protection of personal data and the inviolability of private communications.

The Regulatory Law of article 5 of the Constitution, Regarding the Practice of Professions in Mexico City, requires professionals to maintain strict secrecy on the matters confided to them by their clients.

The Mexico City Civil Code obliges a legal representative or counsel who reveals the secrets of his or her client to his or her opposing party to pay a fine for the damages caused by such disclosure.

Special laws regulating legal professionals, such as public notaries, also state their obligation to maintain professional secrecy.

The Mexico City Civil Procedures Code, the Federal Code of Civil Procedures, the Federal Code of Criminal Procedures and several procedural provisions establish that persons who have received information through their job, position, trade or profession by virtue of which they must maintain professional secrecy are not obligated to testify as witnesses against their clients.

Different state criminal codes consider the violation of professional secrecy to be a crime.

Regarding professional rules, the Code of Ethics of the Mexican Bar Association also requires legal professionals to keep strict secrecy on matters confided to them by their clients. This is only soft law as Mexican law does not mandate that a lawyer belong to a bar association in order to be authorised to practise law. Typically, the only requirement to practise law in Mexico is a law degree, which should be filed with the Federal Ministry of Education who will in turn issue a professional licence authorising its holder to practise law in all 32 states in Mexico.

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.

Several rules impose a general professional secrecy obligation on attorneys and on all professionals. As there is no specific attorney–client privilege under Mexican law, in principle the same general obligations regarding professional secrecy apply to private practitioners and in-house counsel. However, as explained below, the latest non-binding precedent stated that professional secrecy does not apply to in-house counsel due to the employment relationship.

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.

In Mexican procedures, there is no discovery or pretrial stage, so the parties are not obliged to disclose or produce all the evidentiary materials in their possession. Following from that, if a person owes professional secrecy to another party, the Mexico City Civil Procedures Code releases them from the obligation to file with court documents in cases involving evidence against said party.

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

A recent non-binding decision regarding professional secrecy derives from a matter in which the Third Collegiate Court on Civil matters for the First Circuit (Mexico City), ruled by means of an amparo constitutional claim that a professional who had been ordered by a lower court to produce information and documentation protected by professional secrecy does not have any obligation to produce the protected information either by testimony or by means of documentary filing. (Non-binding precedent No. 11ºC 698 issued by the Third Civil Collegiate Court on Civil matters for the First Circuit, published in the Federal Judicial Weekly Report and its Gazette, Volume XXVIII, September 2008, p.1411.)

The Court held that:

...under professional secrecy, which establishes that certain persons (doctors, lawyers, financial institutions, priests, among others) are obligated not to disclose the information, which has been obtained in the practice of their professional activities, with respect to others, no one who acquires certain information as a result of professional practice can be obligated to render testimony on such information, unless the owner of such information authorises him to do so.

The latest non-binding precedent regarding professional secrecy comes from the First Collegiate Court on Antitrust, and Telecommunications Matters for the First Circuit (Mexico City). In this non-binding precedent the Court determined that attorney–client communications are protected by ‘professional secrecy’ and therefore cannot be used in antitrust investigations or any other administrative or criminal proceedings, unless there is evidence that the attorney acted, not as counsel, but as a co-participant in an offence. It is also important to mention that this decision excluded in-house counsel from the scope of the professional secrecy protection, due to the employment relationship with the entity being investigated. (Non-binding precedents No L10.A.E.193 A (104) and L10.A.E.194 A (104) issued by the First Collegiate Court on Antitrust, and Telecommunications Matters for the First Circuit (Mexico City), published in the Federal Judicial Weekly Report and its Gazette, Volume XXXVIII, January 2017, pp 1475 and 2721.

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

In Mexico, instead of attorney–client privilege there is a general obligation for all professionals (including attorneys) to maintain professional secrecy.

Professional secrecy in the legal profession involves both a right and a duty: a right to refuse disclosure of clients’ information; a duty not to testify, produce documents, or disclose any information against clients’ interests. Lawyers cannot be compelled to testify against their clients.

Mexico

Diego Sierra and Pablo Fautsch
Von Wobeser y Sierra, SC
6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.
See question 5.

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, who may invoke the professional secrecy obligation to refuse disclosing client’s information. However, the client may release the attorney from such duty.

8 To what extent are the facts communicated between an attorney and a client protected, as opposed to the attorney–client communication itself? See question 5.

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? As agents of the attorney or agents of the client would receive the information as a result of their job or profession, communications with such agents would fall under the professional secrecy protection and would have the same scope of protection.

10 Can a corporation avail itself of the protections for attorney–client communications? Who controls the protections on behalf of the corporation? Yes, since a corporation could be the client and the owner of the information. The corporation’s legal representative controls the protections on behalf of the corporation and has the duty to act in the corporation’s best interest.

11 Do the protections for attorney–client communications extend to communications between employees and outside counsel? Yes, the professional secrecy obligation includes and protects all information acquired during the execution of a professional’s job (here, the attorney’s) including communications between employees and outside counsel.

12 Do the protections for attorney–client communications extend to communications between employees and in-house counsel? Yes, in principle in-house counsel have the same professional secrecy obligation as any other professional and their communications are protected by such duty of secrecy. However, the latest non-binding precedent stated that professional secrecy does not apply to in-house counsel due to the employment relationship. (See questions 2 and 4.)

13 To what degree do the protections for attorney–client communications extend to communications between counsel for the company and former employees? The scope of protection derived from professional secrecy is the same because the law does not distinguish between employees and former employees.

14 Who may waive the protections for attorney–client communications? See question 4. The client may waive the protections for professional secrecy.

15 What actions constitute waiver of the protections for attorney–client communications? Since waiving the protections of professional secrecy implies a renunciation, under article 7 of the Mexico City Civil Code, such renunciation should be done in clear and precise terms, in such a way that leaves no doubt as to the renouncing party’s intention to waive. Hence, the written form will always be favoured for a waiver of the protections for attorney–client communications.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused? There is no regulation or case law in this regard. Hence, the particular circumstances would have to be analysed on a case-by-case basis, and the general torts regulation (non-contractual civil liability) would be applicable.

17 Can attorney–client communications be shared among employees of an entity, without waiving the protections? How? Yes. There is no specific regulation regarding employee sharing of attorney–client communications. However, those communications would be protected by the professional secrecy obligation regardless of the sharing among employees.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications. Rules regulating professional secrecy do not provide any exceptions. However, criminal defences include necessity, or self-defence if disclosing the communications is necessary to avoid a harm to society that would exceed the harm caused by disclosing the communication. These defences have to be evaluated on a case-by-case basis.

19 Can the protections for attorney–client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred? No, because if the information or documents are not obtained through lawful channels they will be considered as illicit evidence in the process, and consequently will lack probative value in court. The only case where it would be possible, as stated in the non-binding precedent mentioned above, would be if the attorney acted as a co-participant in a crime.

20 In what circumstances are foreign protections for attorney–client communications recognised in your jurisdiction? There is no regulation or case law in this regard. Hence, the particular circumstances would have to be analysed on a case-by-case basis and the general torts regulation (non-contractual civil liability) would be applicable.

21 Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained. Best practices range from the boilerplate labelling of written communications as privileged and confidential to raising employee awareness to maintain confidential information restricted to only key participating individuals and keeping an attorney copied (in-house counsel or external counsel). However, as there is no discovery or obligation from outside counsel or in-house counsel to produce communications requested by opposing counsel in court, preservation of attorney–client communications protection is seldom an issue with practical concerns under domestic Mexican litigation.

Work product

22 Describe the elements necessary to confer protection over work product. There is no work product doctrine in Mexico. However, materials prepared in anticipation of litigation of trial, are considered to be protected by professional secrecy. Work product doctrine has not been developed in Mexico because there is no discovery or pretrial stage to compel generic production of documents or other evidentiary materials.

23 Describe any limitations on the contexts in which the protections for work product are recognised. See question 22.

24 Who may invoke the protections for work product? The protections may be invoked by the person obliged to keep professional secrecy at the moment of an information or document request.
25. Is greater protection given to certain types of work product? See question 22.

26. Is work product created by, or at the direction of, in-house counsel protected? See question 22.

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? Since agents of the attorney or agents of the client create the materials through their profession, all such materials fall under the professional secrecy protection and have the same scope of protection.

28. Can a third party overcome the protections for work product? See question 22. There is no work-product doctrine in Mexico.

29. Who may waive the protections for work product? As noted in question 14, the client or the owner of the information may waive the protections for professional secrecy.

30. What actions constitute waiver of the protections for work product? Delivery of information to someone who is not bound by professional secrecy may be found to be a waiver of the protections for work product. Furthermore, wide dissemination of the protected information, such as journal or newspaper publication, will also be typically considered a waiver of professional secrecy.

31. May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product? Yes, clients may demand their attorney’s files relating to their representation. The owner of such files is the client, not the attorney. There is no work product doctrine in Mexico. However, materials prepared in anticipation of litigation or in anticipation of trial are considered to be protected by the professional secrecy obligations.

32. Under what circumstances is an inadvertent disclosure of work product excused? No regulation exists in this regard, hence it would have to be analysed on a case-by-case basis.

33. Describe your jurisdiction’s main exceptions to the protections for work product. There is no work product doctrine in Mexico; hence there are no exceptions.

34. Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred? See question 19.

35. In what circumstances are foreign protections for work product recognised in your jurisdiction? See question 20.

Common issues

36. Who determines whether attorney–client communications or work product are protected from disclosure? Both attorney–client communications and work product are protected by professional secrecy, but in case of a request for information the court will determine the admissibility of the request and whether the documents are protected. Under Mexican law, courts may only order document production if the requesting party specifically identifies the requested document, if it shows that it is unable to obtain the document on its own and if it shows that the document is necessary to prove its action or defence.

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? If the information is being shared exclusively between clients and no attorney is involved in the flow of work product, the clients risk losing the professional secrecy protection since, in such a scenario, there would be, in principle, no professional involved in the exchange of communications.

38. Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How? This would depend if the information disclosed is going to be treated as confidential, classified or public. If the government authority has a legal obligation to make the information it received public, then any protection may be deemed to be waived.

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? Yes. Besides professional secrecy, the existence of fiduciary secrecy, banking secrecy and tax secrecy is also recognised.
Netherlands

Enide Perez
Sjöcrona Van Stigt Advocaten

Domestic legislation

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, the confidentiality and thus the protection of client–attorney communications has its basis in the Counsel Act and the Rules of Professional Conduct 1992. Article 10a paragraph 1 under e of the Counsel Act provides that the attorney is a confidential adviser who must maintain confidentiality within legal limits. Article 11a paragraph 1 and 2 of the Counsel Act provide that the attorney must maintain confidentiality with regard to 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 and continues to exist after termination of the professional activity of the attorney.

Rules 6 and 10 of the Rules of Professional Conduct 1992 also stipulate that the attorney is obliged to maintain confidentiality with regard to all information about his or her clients and the cases he or she has conducted of, regardless of how this information was shared or of who shared this information. Furthermore, the attorney has his or her own responsibility with regard to 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 to not give information and to not 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 1, 98, 104 paragraph 2, 105 paragraph 3, 110 paragraph 3, 125i and 125f of the Code of Criminal Procedure; article 8(3) of the General Administrative Law Act; and article 53a of the State Taxes Act.

Pursuant to 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 in relation to 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 in relation to information that he or she received in his or her professional capacity.

Articles 96a paragraph 1 under b and 105 paragraph 3 of the Code of Criminal Procedure offer, with reference to 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 does not have to 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 that fall within the scope of client–attorney confidentiality can only be seized at the attorney’s office with his or her permission. Furthermore, 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 the purpose of copying data that are saved on a data carrier there (article 125i in conjunction with article 98, and article 125f of the Code of Criminal Procedure). See question 6.

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 Regulations 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, as referred to above, 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 Regulations), 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, as set out in question 1.

The judgment of the European Court of Justice in Akzo Nobel Chemicals Ltd and Akcros Chemical Ltd v Commission of the European Communities (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 European Court of Justice, 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 judgment of the European Court of Justice is applicable 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 (Supreme Court of the Netherlands, 15 March 2013, ECLI:NL:HR:2013:8Y6101).

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

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, but a work product doctrine where protection from disclosure is concerned. Documents created in anticipation of litigation fall within the scope of legal privilege on the grounds that 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.

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:ACg066), 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 any 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 (for example, Supreme Court of the Netherlands, 29 June 2004, ECLI:NL:HR:2004:AQG070 and 24 January 2006, ECLI:NL:PHR:2006:AU4666).

The Supreme Court furthermore 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 those 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 (Supreme Court of the Netherlands, 22 November 1991, ECLI:NL:HR:1991:ZCQ422 and Supreme Court of the Netherlands, 30 November 1999, ECLI:NL:HR:2002:AQG297).

See questions 5 and 9.

Attorney–client communications

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.

Not too long ago, 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 Hague District Court’s interlocutory judgment of 14 January 2015. 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 handed over 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.

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, considered in their nature, are to 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 this criteria, a handwritten note that said ‘preparation interrogation’, as well as 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.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

As indicated above, it is important that the information is entrusted to the attorney (or the attorney communicates with his or her client) because of the attorney’s professional capacity; the information thus falls within the scope of receiving or giving advice, support or representation. Information shared outside 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 clearly 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 whether or not documents qualify as corpora et 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 furthermore ruled that the judge who has to decide on the applicability of the client-attorney confidentiality must observe the necessary caution (28 June 2016, ECLI:NL:HR:2016:1324).

In case law that has existed since 1991, the Supreme Court furthermore 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 question 4). See, for example, Supreme Court of the Netherlands, 22 November 1991, ECLI:NL:HR:1991:ZCQ422 and Supreme Court of the Netherlands, 5 July 2011, ECLI:NL:PHR:2011:BR608.

Moreover, since the entry into force of the Dutch Prevention of Money Laundering and the Financing of Terrorism 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 in: buying or selling real estate; administering financing or valuables; incorporating or managing companies; buying, selling or acquiring companies; and activities of a fiscal nature.

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

The 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.

Consequent to the aforementioned, 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 that are 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, in case
it was not necessary that the investigating judge was present, by the
Public Prosecutor) and then sent to the investigation judge’s offices,
in order to enable the attorney in question to have (an)other look at
the documents at the judge’s offices and share his or her point of view
with regard to the privileged nature of the documents, before the
investigating judge decides. The investigating judge decides, prefer-
ably 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
(ECLI:NL:HR:2010:BJZ262). 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 (Supreme Court of the
Netherlands, 22 December 2015, ECLI:NL:HR:2015:3714). The attor-
ney can file a written complaint against the examining judge’s decision
within 14 days, that will be decided on by the Court.

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 attor-
nery in his or her professional capacity is protected (see question 1).
Therefore, this should also concern facts that are communicated
between an attorney and a client.

However, the Hague District Court 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. It is not yet clear whether this decision
will be appealed. It is also unclear whether higher courts will uphold
this decision. Furthermore, 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 (see question 5).

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 that are assigned by the attorney
to give the defence (expert) advice on matters that are 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 (Supreme Court of the Netherlands, 29 March 1994 and

In line with growing concerns among several authorities about 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 (Supreme

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

Yes, that is possible. The same protections for attorney–client commu-
nications apply for a corporation (the client) as for an individual.

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 normal practice.

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 on the basis of their
professional legal privilege in the same way that outside attorneys
can invoke this privilege. For further information see question 11.
Therefore, as is the case for outside counsel, a convincing argument
may waive 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 profes-
sional 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 with regard to ‘per-
sonal’ communications between them.

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 there-
fore no longer connected to the client. However, the attorney–client
privilege extends to all confidential information exchanged in the past.
Furthermore, the standpoint could be taken that former employees
could (from the moment they cease to be employees) be considered
as third parties (see question 9). 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 down in writing the
engagement between the third party and the attorney, and the reason
why the defence needs the input of the third party.

14 Who may waive the protections for attorney–client
communications?

The attorney decides whether or not legal privilege applies
(see question 7). Because an attorney has a duty to maintain confiden-
tiality 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 informa-
ion falls within the scope of legal privilege, if a client acts on his or
her own and shares privileged information with a third party, this
does not automatically mean that he or she altogether waives confi-
dentiality with regard to this information (Opinion Advocate-General,
ECLI:NL:PHR:2013:BV3004, not disputed by the Supreme Court of
the Netherlands, 12 February 2013, ECLI:NL:HR:2013:BV3004). In that
specific matter, information was given to 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 with respect to this infor-
mation in court.

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. As mentioned in question
5, the Court in 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.

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.
16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

An inadvertent disclosure of attorney–client communication constitutes a violation of the obligation to maintain confidentiality and is, therefore, not excused. Only in the case that this communication is clearly the object of, or has been shared with 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 inadvertent disclosure, and no procedure exists that could prevent a third party from using information disclosed inadvertently.

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, as mentioned in question 7, the attorney decides whether communications fall within the scope of his or her legal privilege. Furthermore, as far as we know, there is no case law which determines whether communications fall within the scope of the fiscal client–attorney privilege. Additionally, there is no legal privilege that could prevent a third party from using information disclosed inadvertently.

As an additional safeguard, one could establish in writing that the attorney can communicate with multiple persons within the company, as long as the communication is clearly the object of, or has contributed to the commission of, a criminal offence. The attorney–client communication among these persons could affect the privileged nature of the attorney–client communication.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

See questions 6 and 16. The main exceptions to the protections for attorney–client communications are the following:

- Documents that are clearly 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. These documents can therefore be seized (article 98 paragraph 5 of the Code of Criminal Procedure). Because in most cases there will be discussion about whether or not communications are privileged, these communications should be sealed by the investigating judge.
- Based on the law of the Supreme Court, 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 1 of the Prevention of Money Laundering and the Financing of Terrorism Act, attorneys are obliged to notify authorities when unusual financial transactions are encountered in the situations mentioned in question 6.
- The District Court in The Hague judged that governance reports and information out of the seizure.
- An attorney–client communication excused?

Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

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.

As explained in questions 6 and 16, corpora et instrumenta delicti can be seized, as well as documents that can help to reveal the truth, but only if exceptional circumstances demand that the search for truth prevails over the legal privilege.

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). Based on article 11 of this Convention, the witness may refuse to give evidence in so far 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 the Council Regulation on cooperation between the courts of member states in the taking of evidence in civil or commercial matters (No. 1206/2001 – 28 May 2001). In accordance with article 4(5)(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.

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:

- It is advisable for the attorney and client to always indicate clearly that the correspondence between them is confidential by labelling it as such (for example, ‘client–attorney privileged’).
- Do not misuse the legal privilege for communications that clearly do not fall under the scope of the privilege.
- An attorney should not voluntarily cooperate with the authorities or give permission to seize confidential documents. The attorney should always invoke his or her legal privilege. Also, see the Manual for Attorneys to Ensure Confidentiality and Professional Legal Privilege with regard to External Investigations, published by the Netherlands Bar in March 2013. This manual offers practical guidance for attorneys on how to act in criminal investigations and investigations by other government authorities.
- The decision about 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, in order to enable the attorney to question his or her point of view about the privileged nature of the documents. The attorney’s standpoint should be respected by government authorities when they investigate a matter, except if there is no reasonable doubt about the attorney’s standpoint 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.

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

In the Netherlands, we are not familiar with the notion of ‘work product’ as a separate component of legal privilege. However, as explained above, legal privilege extends to all documents that are written to or by an attorney or documents that are given or sent to...
an attorney in his or her professional capacity (giving advice, support and representation). In a Supreme Court case of 24 January 2006 (ECLI:NL:PHR: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 on the grounds that 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 below concerning work product will, therefore, mainly refer to the answers above concerning legal privilege and attorney–client communications.

23 Describe any limitations on the contexts in which the protections for work product are recognised.

Since we do not recognise the ‘work product’ distinction in the Netherlands, reference is made to the limitations that apply to attorney–client communications. These limitations are explained in question 6.

24 Who may invoke 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 document that is protected by it, 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 that are instructed by the defence to render advice and who are in possession of documents or work products received from the defence (attorney).

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

See question 4, where a Supreme Court case is discussed in which the Court decided that a governance report only containing facts did not fall within the scope of legal privilege.

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. See question 2.

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 that are 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. See question 9.

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

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 very special circumstances overcome protections of legal privilege, no third party can overcome these protections. See questions 7, 9, 14 and 17.

29 Who may waive the protections for work product?

The attorney decides whether or not legal privilege applies. Because an attorney has an obligation to maintain confidentiality and is even criminally liable when he or she does not, the attorney should not waive legal privilege. See questions 7, 9, 14 and 17.

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

See question 15.

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 8 of the Rules of Professional Conduct 1992). However, this does not waive protections. See question 7.

32 Under what circumstances is an inadvertent disclosure of work product excused?

Not applicable.

33 Describe your jurisdiction’s main exceptions to the protections for work product.

These are the same exceptions that apply to attorney–client communications. See questions 15 and 18.

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

See question 15.
In what circumstances are foreign protections for work product recognised in your jurisdiction?
See question 20.

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 is of the opinion that the communications or work product fall within the scope of legal privilege. See question 7. 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.

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?
See questions 7, 9, 14 and 17.
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 clients did not mean to waive the confidentiality depends on the circumstances. We are unaware of any case law on this specific situation.

Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How?
No clear answer can be given to this question. On the 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.
See questions 7, 9, 14 and 17.

Are there other recognised privileges or protections in your jurisdiction that permit attorneys and clients to maintain the confidentiality of communications or work product?
In the Netherlands we only know the legal privilege protections as discussed above.
Domestic legislation

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

The main laws that regulate attorney–client communication in Nigeria are the Rules of Professional Conduct (2007), particularly Rule 19 thereof, which imposes a fiduciary duty of confidentiality on attorneys as follows: ‘all oral or written communication made by a client to his or her attorney in the normal course of professional employment are privileged,’ thereby preventing disclosure of same to third parties.

In addition to the above, attorneys are bound by section 192 of the Evidence Act (2011), which prevents attorneys from disclosing any communications with their client made in the course of their professional employment, without having obtained the express consent of the client:

No legal practitioner shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment...or to state the contents of documents which he has become acquainted in the course of his professional employment... or to disclose any advice given by him to his client

Section 16 of the Freedom of Information Act (2011) also recognises attorney–client privilege as an exception to disclosure of information: ‘a public institution may deny an application for information that is subject to the following privileges - (a) legal practitioner-client privilege.’

Nigerian law also recognises the privilege ascribed to attorney–client communication under English common law as laid down in decisions such as in Horn v Ricard (1975) 61 Cr App R 128 and R v Special Commissioner & Anor ex parte Morgan Grenfell & Co Ltd (2002) UKHL to the effect that a client, in the process of obtaining sufficient advice, should feel safe in making disclosures to his or her attorney and such safety would be undermined if the client felt the attorney could readily disclose matters that are to be treated as confidential.

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.

The duty of confidentiality and non-disclosure is pervasive and widely applied. As such, every attorney is subject to this duty regardless of whether they are private practitioners or in-house counsel.

Under the Rules of Professional Conduct, the expression 'lawyer' is used, which is given a similar meaning to a ‘legal practitioner’, as defined under the Legal Practitioners Act (2004) as ‘a person entitled... to practise as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings’.

Under the Evidence Act, the attorney owes this duty when acting ‘in the course of his professional employment’. So far as they are acting within their professional capacity as an attorney, any communication with a client they represent is considered privileged communication.

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.

Under Rule 19(i) of the Rules of Professional Conduct (2007), ‘all oral or written communication made by a client to his attorney in the normal course of professional employment are privileged,’ therefore both tangible and intangible material created by an attorney under his or her engagement as an attorney is privileged.

Under section 192(1) of the Evidence Act (2011), client confidentiality extends to the contents or condition of documents the attorney becomes acquainted with in the course and for the purpose of his or her professional employment, as well as any advice given by him or her to clients in this regard.

Likewise, section 36 of the Corrupt Practices and Other Related Offences Act (2000) protects the disclosure of any attorney–client privileged information or communication that came to the attorney’s knowledge for the purpose of prosecuting any pending proceeding (litigation).

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

The doctrine of privileged communication is primarily enshrined in the English common law principle that clients must be entitled to give information freely to their attorney without having to concern themselves with the implications of making such disclosures.

The Supreme Court ruling in Musa Abubakar v E I Chuks SC 184/2003 held that, where litigation is concerned, any documentation that has as its contents information that is secret in nature and is caught by section 192 of the Evidence Act cannot be disclosed as the document will be considered as being subject to confidentiality, as long as such communications are not made in furtherance of illegal activities.

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

The general rule is that all attorney–client communication made in the normal course of professional employment is privileged, whether made in private or in the presence of third parties. This protection is, however, only conferred when the communication is required for purposes of obtaining legal assistance, opinions, advice or services from the attorney.

The wording of the Rules of Professional Conduct suggests that only communication from the client to the attorney is privileged: ‘all oral or written communications made by a client to his lawyer in the normal course of employment are privileged.’

However, under the Evidence Act, the communication from attorney to client is also subject to confidentiality and non-disclosure:

no legal practitioner shall at any time be permitted, unless with his client’s express consent, to disclose... any advice given by him to his client in the course and for the purpose of such employment.
6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

Under the Rules of Professional Conduct (2007), the Evidence Act (2011) and the Freedom of Information Act (2011), the following limitations apply to attorney–client communications:

- where the express consent of the client has been obtained;
- where permitted by law or acting in compliance with a court order;
- where the acts of the client constitutes a crime or fraud or other illegal acts;
- to establish or collect legal fees;
- to establish the attorney’s defence (or his or her employees’) against allegations of professional misconduct; and
- where an application for disclosure of information is made pursuant to the Freedom of Information Act (2011) and such information is under the control of a public institution, the court may examine such information and determine that it be disclosed to the court.

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

Privileged communication is a benefit that belongs to the client and the client reserves the right to waive this privilege by consenting to the attorney’s disclosure of attorney–client communication. The protection therefore belongs to the client.

Confidentiality and non-disclosure are, however, duties entrusted to the attorney, who is required by law to keep all attorney–client communication secret and confidential and not to disclose same to any third parties without the express consent of the client, subject to few exceptions under the law.

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

The Rules of Professional Conduct (2007) make attorney–client communication itself privileged. However, under the Evidence Act, the facts communicated between an attorney and client are also protected as it widely covers:

the contents or conditions of any document with which he [the attorney] has become acquainted in the course and for the purpose of his professional employment or . . . any advice given by him to his client in the course and for the purpose of such employment.

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?

Under Rule 19(4) of the Rules of Professional Conduct (2007) and section 193 of the Evidence Act (2011), the duty of confidentiality and non-disclosure is also imposed on agents of the attorney (including his employees, associates and others whose services are utilised by him) and the attorney is required to exercise reasonable care in ensuring this requirement is not breached by any persons occupying these or similar positions.

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

The law does not distinguish between individual and corporate clients. As such, it is presumed that the law, as it relates to attorney–client communication, will apply in the same manner to both provided the attorney has been engaged for purposes of his or her professional employment.

Where a corporation is the client, just like any other client, it can expressly waive the attorney’s duty relating to confidentiality and non-disclosure of attorney–client communication that would otherwise be privileged.

Where the duty of confidentiality and non-disclosure is contractual in nature, it is typical for such corporations to indicate who is authorised or permitted to disclose or receive information under the contract. If, for example, a retailer exists between the attorney and the corporation, the retailer may indicate the extent of disclosure that the attorney is authorised to make in respect of the communication with and by the client. Where the agreement is with a third party and the attorney is not specifically authorised to disclose confidential information under same, any communication relating to the contract shall for all intents and purposes remain privileged unless expressly waived by the corporate client.

Where in-house counsel is concerned, they are also considered as acting in the course of their professional employment and as such are bound by the same duty of confidentiality and non-disclosure, which can only be waived by express consent of the client.

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

The duty of confidentiality and non-disclosure is one that applies within and throughout the legal profession. As such, it does not matter whether the counsel is outside or in-house, they continue to be bound by the rules of professional ethics and conduct by virtue of the fact that they are legal practitioners. As an attorney is required to exercise reasonable care and skill in the dispatch of his or her professional duties, this duty will apply at all times and in every respect throughout the course of their professional employment.

Furthermore, an employee is typically considered an agent of the company. Accordingly, any communication with such employee in the course of the attorney’s professional employment will be tantamount to privileged communication.

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

See question 11.

In the case of in-house counsel, however, in addition to being bound by the Rules of Professional Conduct and the Evidence Act, they may also be bound by contract to confidentiality and non-disclosure.

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

Attorney–client communications extend to the employees and colleagues of the attorney whether in-house, external or former employees, and the duty of confidentiality and non-disclosure extends beyond the period for which the attorney is engaged in professional employment by the client.

Section 192(3) of the Evidence Act (2011) states that ‘the obligation ... continues after employment has ceased.’

Under the Rules of Professional Conduct (2007), the attorney is required to exercise reasonable care and skill in ensuring that his or her ‘employees, associates and others whose services are utilised by him’ do not breach the duties of confidentiality and non-disclosure to the client.

Where a company is concerned, the duty of confidentiality may also be contractual so that, in addition to the provisions of the law, the employee (whether incumbent or former) must adhere to provisions relating to confidentiality, and these are typically drafted to survive the employment contracts.

14 Who may waive the protections for attorney–client communications?

Waivers can only be granted by the client.

Under the Evidence Act, such waiver has to be by express consent of the client.

The Rules of Professional Conduct state that attorneys may reveal or disclose privileged communication ‘with the consent of the client or clients affected’, and this suggests that consent may be both express and implied. It is, therefore, arguable that implied conduct may include words or actions of the client that suggest that the protection has been waived. For example, where, in the course of dealing with a third party, a client divulges information that would otherwise be privileged communication between the attorney and the client, or where the client does not take additional steps essential to keeping the communication privileged.
15 What actions constitute waiver of the protections for attorney–client communications?

The following actions constitute a waiver:

- The client expressly authorising the attorney to disclose any communications made to him or her in the course and for the purpose of his or her professional employment.
- Under the Rules of Professional Conduct, where a client brings a disciplinary action against an attorney, the attorney–client communication protections are waived as the attorney may need to rely on this in his or her defence.
- The client, through their conduct, could be considered as having waived the protections for attorney–client communications; if, for example, they enter into a contract with a third party where certain matters are disclosed prior to or within the contract or they willingly disclose certain matters on their own to third parties, explicitly through words or in writing or implicitly through their conduct.
- Where the information is already in the public domain, it will not be considered as privileged communication.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

Inadvertent disclosure by an attorney or his or her employees is not excused and will amount to professional negligence for which the client can bring an action in damages against the attorney. Section 9, Legal Practitioners Act (2004): 'a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner.'

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

It is expected that attorneys may, in the course of their professional employment, utilise the services of others and, therefore, authorise certain employees or associates to have access to attorney–client communications by virtue of the fact that they work alongside them on the client's matter. Where this is the case, the attorney must ensure that these employees maintain the duty of confidentiality and non-disclosure required by the legal profession and exercise reasonable care in preventing them from disclosing or abusing the confidence of the client – Rule 19(4) Rules of Professional Conduct (2007).

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

Under the Rules of Professional Conduct, the Evidence Act and the Freedom of Information Act, the following exceptions apply:

- where such communication is made in furtherance of illegal activity;
- where such communication suggests elements of fraud or crime on the part of the client, while revealing that the same is necessary to prevent this;
- to establish a defence in a disciplinary action brought by the client, against the attorney or his or her employees (Rule 19(3)(d), Rules of Professional Conduct 2007);
- where such communication is necessary to establish or collect fees from the client (Rule 19(3)(d), Rules of Professional Conduct 2007); and
- where a court finds that the interest of the public in having information disclosed is ‘greater and far more vital’ than protecting the attorney–client communication (section 25(1)(c) Freedom of Information Act 2011).

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

Under Rule 19(3)(d) of the Rules of Professional Conduct, an attorney may reveal attorney–client communication 'when permitted under the rules or required by law or court order'. Where the need to protect the client is outweighed by the interests of the public in the proper administration of justice, then the court may permit that attorney–client communication is secondary to this.

Also, if there is a court order to this effect, the attorney who is considered an officer of the court is bound by the court order and will be held in contempt of court for failure to comply with same.

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

The law does not distinguish between foreign and local clients, provided they engage a Nigerian attorney within the jurisdiction of Nigeria. Such attorneys are bound by the Nigerian laws relating to attorney–client communication.

Where a foreign client is involved, provided an attorney acts on behalf of a client within the Nigerian jurisdiction, such attorney is bound by the same duties of confidentiality and non-disclosure.

Where a foreign attorney is involved, the relevant protection will be dictated by the laws regulating attorney–client communication in the jurisdiction in which the attorney practises law.

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

Regulation

Regulation is ensured by the existence of the laws regulating attorney–client communication, and also the professional conduct of the attorneys: the Legal Practitioners Act (2004), the Rules of Professional Conduct (2007), the Evidence Act (2011) and the Freedom of Information Act (2011).

Enforcement

The Legal Practitioners Disciplinary Committee was first established under section 10 of the Legal Practitioners Act (1975), and its functions have been constantly reviewed in subsequent amendments to the law. Its main function is to investigate any allegations of misbehaviour or misconduct against attorneys whose names are entered on the roll. Where such attorneys are found guilty of misconduct, the Committee is empowered to impose sanctions that include, among other things: fines, suspension and completely striking their name off the roll.

Breach of contract

Given that most attorney–client relationships are contractual, the client can always sue the attorney for breach of contract. If confidentiality is not an express term of the contract, the client can sue for breach of an implied term of the contract, in other words, professional negligence, under section 9 of the Legal Practitioners Act (2004).

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

Under the Evidence Act (2011), the material must have been communicated or disclosed to the attorney 'in the course and for the purpose of his professional employment'. In addition, under the Rules of Professional Conduct, all oral and written communication between the attorney and his or her client, in the course of professional employment, are privileged.

23 Describe any limitations on the contexts in which the protections for work product are recognised.

Work product is limited to oral and written communication from the client to the attorney (and vice-versa) in the course of normal professional employment, and includes documentation and advice. Any communication outside the course of professional employment is unlikely to be regarded as work product.

24 Who may invoke the protections for work product?

Mainly the client, however the attorney may also choose to rely on this protection when he or she is required to disclose information that may result in a breach of the duty of confidentiality and non-disclosure to the client.

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

All forms of attorney–client communication are treated alike, and the protection applies generally. Under the Evidence Act, work product
31 May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product?

Nothing in the law regulates this particular concern. However, given that under the Evidence Act, the information in the file will amount to ‘contents or condition of any document with which [the attorney] has become acquainted in the course of his professional employment’, it may be said that provided the control of the work product remains between the client and attorney, the protection has not been waived. It appears work product shall not include the contents of the files concerning representations and appearance in court (particularly endorsements on the file) as the Supreme Court held in the case of *Obahinrinde v Akande* (1996) 6 NWLR Part 455 at page 387 that the contents of a file jacket does not come under the protection of the provisions of the Evidence Act as privileged communication.

32 Under what circumstances is an inadvertent disclosure of work product excused?

Inadvertent disclosure is not excused and will, at the very least, amount to professional negligence for which the client can bring an action for damages against the attorney. Section 9, Legal Practitioners Act (2004): ‘a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner.’

Where there is an express confidentiality agreement with the client, the attorney can also be sued for breach of contract.

33 Describe your jurisdiction’s main exceptions to the protections for work product.

The main exceptions are as follows:

- where such communication is made in furtherance of illegal activity;
- where such communication suggests elements of fraud or crime on the part of the client, and revealing same is necessary to prevent this;
- to establish a defence in a disciplinary action brought by the client, against the attorney or his or her employees;
- where such communication is necessary to establish or collect fees from the client; and
- where a court finds that the interest of the public in having information disclosed is ‘greater and far more vital’ than protecting the attorney–client communication (section 25(1)(c) Freedom of Information Act 2011).

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

Protection may be overcome where the need to protect the client is outweighed by the public interest in the proper administration of justice. Also, if there is a court order to this effect, the attorney who is considered an officer of the court is bound by the court order and will be held in contempt of court for failure to comply with same.

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

Foreign protections for work product will only be binding on attorney–client relationships in Nigeria if they are in line with Nigerian laws regulating same or if there is case law in support of same. Basically, what would meet the criteria of protected work product under a foreign jurisdiction will not simply, by virtue of that, be treated similarly in Nigeria unless it falls within the category of what the Nigerian laws specify to be attorney–client privileged communication.

Common issues

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

This is a determination of the main laws regulating attorney–client communication and the courts are vested with the responsibility of interpreting and applying these laws: Rules of Professional Conduct (2007), the Evidence Act (2011), the Freedom of Information Act (2011) and the Money Laundering Prohibition Act (2011).
There are, however, existing laws that confer, but at the same time, limit the extent of privilege applicable to attorney–client communication, such as the Corrupt Practices and Other Related Offences Act (2000) and the Economic and Financial Crimes Commission Act (2004). For example, section 36 of the Corrupt Practices and Other Related Offences Act (2000) empowers a judge to compel an attorney:

\[
\text{to disclose information on any transaction or dealing relating to any property which is liable to seizure ... provided that no court shall require an advocate or solicitor to disclose any privileged information or communication which came to his knowledge for the purpose of prosecuting any pending proceeding.}
\]

This appears to limit the privilege to circumstances involving litigation or pending litigation only. Likewise, under section 30 of the Economic and Financial Crimes Commission Act (2004): 'The Commission shall seek and receive information from any person, authority, corporation or company without let or hindrance in respect of offences it is empowered to enforce under this Act' and being such a broad classification, could arguably include attorneys. Notwithstanding the above, an attorney is always bound by the duty to act with reasonable care and skill in the course of his or her professional employment, which includes keeping secret and confidential communication with his or her client.

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?

Privileged communication is between a particular client and the attorney. The express consent of that particular client will, therefore, be required to disclose the communication to any third party, regardless of whether these have a common interest or not. Rule 19(2)(c) of the Rules of Professional Conduct (2007) specifically prohibits an attorney from using ‘a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure’.

According to rule 19(3)(a) of the Rules of Professional Conduct, ‘A lawyer may reveal confidences or secrets with the consent of the client or the clients affected, but only after a full disclosure to them’. This suggests that the consent of the particular client is required.

The right to confidentiality and non-disclosure belongs to the particular client and cannot be waived by another. It will, therefore, be the duty of the attorney to obtain the express consent of the client in this regard.

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

Yes. Where a court order exists compelling the attorney to disclose certain communication, this will be an exception to the requirement for a waiver by the client prior to making such disclosure.

In addition, there may be other circumstances where the law permits disclosure without the consent or waiver of the client, for example, for the proper administration of justice or in the greater interest of the general public – section 25(1)(c) Freedom of Information Act 2011.

Under the Freedom of Information Act, the court may require a public authority to disclose information that would typically be exempted from disclosure, including attorney–client communication, where it finds that the basis for non-disclosure is unreasonable or such public authority has acted outside its authority.

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?

In addition to attorney–client communication, deliberative processes are in place that guarantee confidentiality and confer privileged status on the communication between certain parties. Where attorney–client communication touches on any of these areas, or where the attorney or client personally falls into any of the following categories, the protection will also apply:

- spousal communication, between husband and wife, where each satisfy the legal definition of husband and wife (section 187, Evidence Act 2011) is privileged subject to the consent of the affected spouse to waive the right to disclosure of same;
- magistrates, police officers and other investigating authorities cannot be compelled to disclose the source of the information they have in relation to the commission of an offence (section 189, Evidence Act 2011);
- no-one can be compelled to give evidence, or disclose any matters of the state relating to unpublished official records relating to the state, without the prior consent of the governor or president (section 190, Evidence Act 2011);
- health-workers client privilege (section 16 (b) Freedom of Information Act (2011)); and
- journalism confidentiality privileges (section 16 (c) Freedom of Information Act (2011)).
In Switzerland, attorney–client communications are protected by attorney–client privilege. This privilege is enshrined in the professional rules governing the conduct of attorneys admitted in Switzerland. In addition, attorney–client privilege is protected under Swiss criminal and procedural law as well as under the contract governing the attorney–client relationship: specifically, article 13 of the attorneys’ act (BGFA) provides that an attorney admitted to practise in Switzerland must keep all information that has been entrusted to him or her by the client confidential. A violation of this obligation may lead to professional sanctions.

In addition, pursuant to article 321 of the Swiss Criminal Code, the intentional breach of the professional secrecy by an attorney is subject to a monetary penalty or a custodial sentence of up to three years.

Pursuant to Swiss procedural law governing civil, criminal and administrative proceedings (cf. eg. articles 160, 163 and 166 Swiss Civil Procedure Code, articles 171 and 174 Swiss Criminal Procedure Code, articles 13, 16 and 17 Swiss Federal Act on Administrative Procedure), a party to the litigation (as well as third parties) have the right to refuse to produce correspondence between such party and an attorney, provided that the correspondence relates to the attorney’s work product that were clearly related to rendering legal advice. However, if such third party is not obliged to produce it, the attorney–client privilege is lost. However, if such third party is not obliged to produce it, the attorney–client privilege is lost.

Finally, under Swiss law an attorney also has a contractual confidentiality obligation towards the client (article 398 of the Code of Obligations).

Under Swiss law, attorney–client privilege is limited to communications exchanged with independent attorneys (outside counsel) who are admitted to the bar and are permitted to professionally represent parties. However, privilege does not extend to communications exchanged between a client and in-house counsel (irrespective of whether in-house counsel would be qualified for bar admission).

Under Swiss law, attorney–client privilege is limited to communications exchanged with independent attorneys (outside counsel) who are admitted to the bar and are permitted to professionally represent parties. However, privilege does not extend to communications exchanged between a client and in-house counsel (irrespective of whether in-house counsel would be qualified for bar admission).

Under Swiss law, there is no distinction between the protection of attorney–client communications and the protection of work product. Both are protected by attorney–client privilege. Therefore, like attorney–client communications, under Swiss law, work product prepared by an attorney (outside counsel) is protected pursuant to the professional rules governing attorney conduct, as well as under criminal, procedural and contract law (see question 1). The protection from disclosure in Swiss civil, criminal and administrative proceedings also extends to work product prepared by the client or third parties (such as experts, investigators, accountants, employees, etc.) at the direction of an attorney in connection with his or her typical professional activity.

In a recent decision of 20 September 2016 (case number 1B_85/2016), the Swiss Federal Supreme Court ordered the production of certain documents stemming from an internal investigation of suspicious banking relationships, which was conducted by a law firm on behalf of a bank. The Supreme Court held that parts of the law firm’s work products (certain sections of the investigation report and the minutes regarding the interrogation of bank employees) were not protected by attorney–client privilege. According to the Supreme Court’s reasoning, the conduct of such investigation (and the disclosure of the results to regulators and prosecutors) was the bank’s own obligation under Swiss anti-money laundering regulations, and the bank could not avail itself of the protection of attorney–client privilege by delegating this task to a law firm and having an attorney conduct the investigation on the bank’s behalf. In this context, the Court held that the conduct of such internal investigation by an attorney went beyond an attorney’s typical professional activity, to which the protection of attorney–client privilege is limited. However, the Court confirmed that the parts of the attorney’s work product that were clearly related to rendering legal advice remain protected from disclosure. The Supreme Court’s decision has drawn widespread criticism from attorneys as its broad language may be read as relativising attorney–client privilege in the context of internal investigations or fact-finding conducted by an attorney.

In a number of decisions rendered in 2016 and 2017 (eg. ATF 142 II 307, 2C_704/2016), the Swiss Federal Supreme Court clarified the criteria for the granting of a waiver of attorney–client privilege by the attorney supervisory authority in order to enable an attorney to enforce claims for unpaid fees against a former client (see questions 14 and 29). The Court stressed that due to the importance of attorney–client privilege from the client’s individual perspective as well as from an institutional point of view, such waiver should not be granted lightly.

To be protected, a communication between a client and an attorney must relate to the attorney’s typical professional activity, which is legal representation and legal advice. In contrast, communications with an attorney that relate to business advice, asset management or other activities (such as the attorney’s acting as board member or escrow agent) are not protected. If the communication relates to the attorney’s typical professional activity, then attorney–client privilege applies irrespective of whether the communication originates from the client or from the attorney. Moreover, for the purposes of attorney–client privilege it is irrelevant when the communication took place and where the record of such communication is located. The involvement of third parties in attorney–client communications is generally not considered a waiver of privilege. However, if such third party is not obliged to maintain attorney–client privilege and discloses the communication, privilege is lost.
6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

The protections of attorney–client privilege are generally recognised in all Swiss civil, criminal and administrative proceedings, provided the communication in question relates to an attorney’s typical professional activity. However, privilege cannot be invoked in criminal proceedings if the attorney is also charged in the same context.

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

Under Swiss law, the professional secrecy is an obligation incumbent on the attorney. The client may release the attorney from this confidentiality obligation. However, since attorney–client privilege is considered a cornerstone of the rule of law, an attorney may refuse to disclose protected information despite a release (cf article 13 BGPA).

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

Under Swiss law, attorney–client privilege also covers the communication of factual information between a client and an attorney in the context of the attorney’s typical professional activity. Therefore, the attorney and the client may refuse to disclose any factual information exchanged between them. However, it is not legally possible to shield existing facts (which are otherwise discoverable) from discovery by transmitting them to an attorney (eg, by handing over documents containing factual information to an attorney).

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?

Communications by the client with agents of the attorney and communications by agents of the client with an attorney also fall within the scope of attorney client-privilege under Swiss law, provided these communications relate to the typical professional activity of the attorney (ie, the instruction of an investigator or forensic accountant must occur within the context of representing or advising a client).

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

Yes. If a corporation retains an attorney (outside counsel) to render legal representation or legal advice, the corporation is considered the client and the communications of its agents (directors and officers) with the attorney are protected by attorney–client privilege. The directors and officers who are authorised to legally represent the corporation also control the protections and may waive these protections on behalf of the company.

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

Yes, as long as the employee communicates with outside counsel in the employee’s capacity as the client-corporation’s agent.

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

No, because communications with in-house counsel are not protected by attorney–client privilege under Swiss law (see question 2).

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

As part of his or her professional secrecy obligation an attorney (outside counsel) is prohibited from disclosing communications he or she conducts with former employees on behalf of a company. However, since former employees are not considered agents of the client, communications with them do not, in principle, qualify as attorney–client communications and may not be shielded from disclosure by invoking attorney–client privilege. Moreover, former employees generally do not have a confidentiality obligation and may disclose communications with the company’s attorney at their discretion.

14 Who may waive the protections for attorney–client communications?

The beneficiary of the protection, that is, the client. In addition, in specific circumstances an attorney may seek a waiver from the attorney supervisory authority if a waiver cannot be obtained from the client (eg, because of the client’s death or the former client’s refusal to waive attorney–client privilege to prevent the attorney from bringing claims against the client).

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

In addition to an express waiver of the attorney–client privilege or a public disclosure of protected information by the client, the client’s communication of privileged information to third parties who are not bound by the professional secrecy obligation may lead to the (public) disclosure of this information and the loss of the protection afforded by attorney–client privilege. However, the mere fact that a third party is included in a privileged communication does not amount to a general waiver of the privilege.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

The inadvertent disclosure of an attorney–client communication is not considered a waiver of the privilege but may, nonetheless, lead to the loss of the protection if the person receiving the protected information is not bound by the professional secrecy obligation and discloses the information to other parties or to the public.

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

Yes. In general, employees are considered the client’s agents and their internal sharing of an attorney–client communication does not result in a waiver. However, the employees’ internal discussion of the (protected) legal advice received from outside counsel is not protected. To avoid inadvertent disclosure of protected attorney–client communications by employees, it is advisable to expressly mark such communications privileged and confidential.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

Attorney–client communications are only protected if they relate to the attorney’s typical professional activity, that is, if they are exchanged in the context of the client’s representation in proceedings or for purposes of rendering legal advice. Moreover, attorney–client privilege cannot be invoked by the client or the attorney in criminal proceedings if the attorney is also charged within the same context.

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

No, unless in criminal proceedings in which the attorney is also charged within the same context.

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

It is generally recognised that article 321 of the Swiss Criminal Code, pursuant to which the intentional breach of the professional secrecy by an attorney is a punishable offence, also applies to foreign attorneys irrespective of their nationality or of the jurisdiction in which they practice (provided the breach of their confidentiality obligation occurs within Swiss jurisdiction). To this extent, foreign protections for attorney–client privilege are fully recognised in Switzerland.

In contrast, the professional rules governing attorney conduct (and the professional secrecy obligation) are, in principle, only applicable to attorneys admitted to practise in Switzerland. This includes attorneys
who are citizens of an EU or EFTA member state and are admitted to
practise in their home state but does not apply to foreign attorneys who
are not citizens of an EU or EFTA member state.

The provisions protecting attorney–client privilege under the Swiss
procedural laws governing criminal and administrative proceedings
in part expressly refer to the professional rules governing conduct of
admitted attorneys. A literal understanding of these provisions could,
therefore, convey the impression that an attorney–client communica-
tion is, in principle, only protected from disclosure in such proceedings
if it is exchanged between a client and an attorney who is admitted to
practise in Switzerland. According to this view, communications with
foreign attorneys (who are not citizens of an EU or EFTA member state
and are not admitted to practise in Switzerland) would in principle
not be protected in criminal or administrative proceedings (unless the
foreign attorney is retained or instructed by an attorney admitted in
Switzerland). Many commentators agree that this literal understand-
ing of the pertinent provisions does not correspond to the legislator’s
intention of broadening and harmonising the protection afforded by
attorney–client privilege in Swiss proceedings. Their view is supported
by the fact that in civil proceedings the protection of attorney–client
communication from disclosure also extends to communications with
foreign attorneys (who are not citizens of an EU or EFTA member state
and are not admitted in Switzerland). However, until the legislature
amends the procedural laws governing criminal and administrative
proceedings accordingly or until the Federal Supreme Court clarifies
its understanding of the existing provisions, there remains ambiguity
regarding the extent of protection afforded to communications with,
or work product prepared by, foreign attorneys in these proceedings.

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

While not required to maintain privilege, in order to avoid inadvertent
disclosure, it is advisable to label any attorney–client communication ‘privileged and confidential’. Moreover, it is standard practice to have
an attorney’s employees or agents sign a confidentiality undertaking,
reminding them of their professional secrecy obligation and the pun-
ishment in case of intentional breach.

In case of seizure of privileged communication in criminal pro-
ceedings, it is best practice for the client or the attorney, respectively, to
immediately request the sealing of such information. In this case, the
prosecutor may only review such communication if a court concludes
that the sealed information is not protected by attorney–client privilege.

Work product

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

The necessary elements to confer protection over work product are the
same as for attorney–client communications. In particular, work prod-
uct must relate to the attorney’s typical professional activity, which
comprises legal representation and legal advice (see question 5). To
this extent it is required that work product has a connection to legal
representation or legal advice. However, it is not necessary that work
product is specifically prepared in anticipation of litigation or specific
procedural steps such as trial. Moreover, if work product relates to the
attorney’s typical professional activity, the protection applies irrespec-
tive of whether work product has been prepared by the attorney or by
the client or third parties (such as experts, investigators, employees, etc) at the direction of the attorney.

23 Describe any limitations on the contexts in which the
protections for work product are recognised.

Work product is only protected if it relates to the attorney’s typical
professional activity, that is, if it is prepared in the context of the cli-
ent’s representation in proceedings or for purposes of rendering legal
advice. Moreover, the protection of work product cannot be invoked by
the client or the attorney in criminal proceedings if the attorney is also
charged in the same context.

24 Who may invoke the protections for work product?

The client, the attorney and any third party with custody or control of
protected work product.

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

Conceptually all types of work product relating to an attorney’s typical
professional activity are equally protected. However, the less that work
product reflects the rendering of legal advice or legal representation
by an attorney, the higher the likelihood that such work product is not
considered related to an attorney’s typical professional activity (and is,
therefore, not protected). Note the recent decision by the Swiss Federal
Supreme Court according to which certain fact-finding by an attorney
in the context of an internal investigation was not afforded protection
(see question 4).

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

No, unless the work product is created by in-house counsel at the direc-
tion of external counsel.

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?

The protection applies also to work product that has been created by
others (such as experts, investigators, employees, etc) at the direction
of an attorney (outside counsel) or at the direction of the client, pro-
vided such work product relates to the rendering of legal advice or legal
representation by an attorney.

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

No, unless work product is voluntarily or inadvertently disclosed or, in
criminal proceedings, the attorney is also charged in the same context.

29 Who may waive the protections for work product?

The beneficiary of the protection, namely, the client. In addition, in
specific circumstances an attorney may seek a waiver from the attor-
ney supervisory authority if a waiver cannot be obtained from the client
(eg, because of the client’s death or the former client’s refusal to waive
attorney–client privilege to prevent the attorney from bringing claims
against the client).

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

In addition to an express waiver of the protection or a public disclosure
of protected work product by the client, the client’s communication of
work product to third parties who are not bound by the professional
secrecy obligation may lead to the (public) disclosure of this informa-
tion and the loss of the protection afforded to work product. However,
the mere fact that work product is disclosed to a third party does not
amount to a general waiver of the protection.

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

Clients may demand documents they handed over to the attorney as
well as files received by the attorney from third parties in the context of
advising or representing the client. However, an attorney is not obliged
to hand over his or her internal files (personal notes, drafts) to the cli-
ent. Legally, the transmission of work product from the attorney to the
client does not impact upon the protection for work product since it is
protected irrespective of where it is located.

32 Under what circumstances is an inadvertent disclosure of
work product excused?

The inadvertent disclosure of work product is not considered a waiver
of the protection (as long as there is no public disclosure) but may,
nonetheless, lead to the loss of the protection, if the person receiving
the protected information is not bound by the professional secrecy obli-
gation and discloses the information to other parties or to the public.

33 Describe your jurisdiction’s main exceptions to the
protections for work product.

Work product is only protected if it relates to the attorney’s typical
professional activity, that is, if it is prepared in the context of the client’s
representation in proceedings or for purposes of rendering legal advice. Moreover, the protection of work product cannot be invoked by the client or the attorney in criminal proceedings if the attorney is also charged in the same context.

34 Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?
No, unless in criminal proceedings in which the attorney is also charged in the same context.

35 In what circumstances are foreign protections for work product recognised in your jurisdiction?
Foreign protections for work product are recognised in Switzerland to the same extent as foreign protections for attorney–client communications, that is, work product prepared by foreign attorneys may not be protected from disclosure in certain Swiss proceedings (see question 20).

Common issues

36 Who determines whether attorney–client communications or work product are protected from disclosure?
The courts in charge of the civil or administrative proceedings in which disclosure is being sought decide if and to what extent attorney–client communication or work product is protected. In case of criminal proceedings, the prosecutor in charge of the investigation decides if and to what extent attorney–client communication or work product may be seized. However, the client, the client’s attorney or the person who has custody or control of such attorney–client communication or work product may ask that the seized communication or work product may be sealed and that the prosecutor may review such information only if authorised by a court (see question 21). Therefore, in case of criminal proceedings it is ultimately the criminal courts that decide on the extent of the protections.

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?
Attorney–client communications or work product may be shared among clients who are represented by separate attorneys without waiving the relevant protections. Nonetheless, each client may in principle choose to disclose such information at his or her discretion. To protect such information from disclosure, it is, therefore, generally advisable to enter into a confidentiality agreement among several clients if attorney–client communications or work product are shared among them.

Update and trends

The lack of protection for communications exchanged with, or work product created by, in-house counsel under Swiss law may cause problems if a Swiss corporation is involved in litigation in foreign countries. This is the case, in particular, for some common-law jurisdictions in which the extent of protection for attorney–client communication or work product afforded to foreign parties is determined by taking into account the legal protections (or lack thereof) at such party’s domicile. The lack of protection for communication or work product of in-house counsel under Swiss law, thus, may lead to a situation in which the Swiss corporation has to disclose such communication or work product whereas its foreign opponent may successfully invoke privilege or work product protection. There have been several legislative efforts in Switzerland in the past few years to introduce professional rules and a legal privilege for communications or work product of in-house counsel. To date, however, none of these efforts have been successful.

In the wake of the Federal Supreme Court decision limiting the protection of attorney–client privilege with respect to the results of internal investigations in relation to anti-money laundering regulations (see question 4), the extent of protection afforded to internal investigations by attorneys will remain a hot topic and will likely lead to further controversy and litigation.
38 Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How?

The disclosure of attorney–client communications or work product to government authorities is not considered a general waiver of the relevant protections. However, such disclosure may result in the loss of the protections if the government authority is not obliged to maintain confidentiality and may disclose the work product to other authorities, third parties or the public.

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?

Under Swiss law, attorney–client privilege broadly protects the confidentiality of both attorney–client communications and work product that relate to an attorney’s typical professional activity. There are no additional privileges or protections that specifically aim at maintaining the confidentiality of attorney–client communications or work product.
United States

Matthew T Reinhard, Dawn E Murphy-Johnson and Sarah A Dowd
Miller & Chevalier Chartered

Domestic legislation

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 United States, the protection governing attorney–client communications is called the ‘attorney–client privilege.’ Attorney–client privilege, which seeks to protect the confidentiality of the attorney–client relationship, first developed as a common law privilege to prevent compelled disclosure of certain attorney–client communications during litigation. Although attorney–client privilege is a rule of evidence, it applies beyond issues of admissibility in court and reaches other matters including pretrial discovery, subpoenas and internal investigations. Even though attorney–client privilege is not constitutionally protected, it is an absolute privilege that other public policy concerns cannot overcome.

In the federal courts, the protections for attorney–client communications are embodied in part in Federal Rule of Civil Procedure 26, Federal Rule of Criminal Procedure 16 and Federal Rules of Evidence 501 and 502.

Federal Rule of Civil Procedure 26 governs attorney–client privilege in the context of civil discovery. Rule 26(b)(1) allows civil pretrial discovery for non-privileged materials. Rule 26(b)(3) provides procedures for claiming that materials are privileged and are, therefore, not discoverable.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases. Rule 16(b)(2) protects from disclosure any statements made by the defendant to his or her attorney.

Federal Rule of Evidence 501 provides that attorney–client privilege applies in federal court proceedings. Federal Rule of Evidence 502 limits the scope of waiver of attorney–client privilege when a disclosure is made in a federal proceeding, to a federal office or agency, in state proceedings or when the disclosure is inadvertent.

This chapter focuses largely on federal law, which applies in the federal courts. However, practitioners must be aware that each of the 50 US states has developed its own rules governing attorney–client privilege, and those rules apply in state courts. State privilege rules are often very similar to the federal rules, but there can be important distinctions, depending on the circumstances.

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.

Attorney–client privilege can apply equally to communications to and from in-house lawyers, just as it can apply to communications to and from private practitioners. Generally speaking, for privilege to attach to communications to or from in-house counsel, the in-house lawyer must be engaged in providing legal advice, not business advice. The limits on privilege for in-house attorneys’ communications are discussed further in question 12.

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.


Federal Rule of Civil Procedure 26(b)(3) provides that ‘a party may not discover documents and tangible things that are prepared in anticipation of litigation for trial by or for another party or its representative.’ However, such materials may be discovered if ‘they are otherwise discoverable’ and ‘the [requesting] party shows that it has substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means.’ In addition, Rule 26(b)(3) requires courts to ‘protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation’.

Pursuant to Federal Rule of Criminal Procedure 16(b)(2), a defendant in a criminal case is not required to produce to the government any ‘reports, memoranda, or other documents made by the defendant, or the defendant’s attorney or agent, during the case’s investigation or defence’. And, with certain exceptions, the government is not required to produce to the defendant any ‘reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case’, or any ‘statements made by prospective government witnesses except as provided in 18 USC § 3500 [relating to the production of non-testimonial statements by government witnesses in criminal proceedings].’

Federal Rule of Evidence 502 limits the scope of waiver of work product protections when a disclosure is made in a federal proceeding, to a federal office or agency, in state proceedings or when the disclosure is inadvertent.

Again, practitioners must be aware that each of the 50 US states has developed its own rules governing protections for work product, and those rules apply in state courts. State work product protections are often very similar to the federal rules, but there can be important distinctions, depending on the circumstances.

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

*Upjohn v United States*, 449 US 383 (1981) is the seminal United States Supreme Court case on attorney–client privilege with regard to communications between counsel to corporations and individual employees. The Court held that attorney–client privilege protected certain communications made between in-house counsel and non-management employees during an internal investigation.

In *Hickman v Taylor*, 329 US 495 (1947), the Supreme Court established the work product doctrine for federal courts. Because attorneys play an essential role in the adversarial system, the Court held that an attorney’s mental processes must be protected from discovery during litigation.

More recently, a federal appellate court in *In re Kellogg Brown & Root Inc*, 756 F3d 754 (DC Cir 2014), extensively reviewed the
attorney–client privilege and the work product doctrine in the context of corporate internal investigations, and overturned a lower court’s ruling that the investigation materials in question were not privileged. First, the Court of Appeals held that for attorney–client privilege to attach, outside counsel does not have to conduct the internal investigation; such investigations may be led by in-house counsel. Second, privilege still attaches when non-attorney agents conduct an internal investigation at the direction of counsel. Third, for privilege to attach to an investigator’s interview of a company employee, if other indicia of privilege are present, then the investigator does not have to inform the employee that the conversation is privileged. The Court of Appeals also held that even when a company has a regulatory duty to investigate, attorney–client privilege can still attach. With regards to work product, the Court held that documents are protected from disclosure when they incorporate an investigator’s mental impressions.

Attorney–client communications

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

Attorney–client privilege attaches to a communication between privileged persons, made in confidence, for the purpose of seeking or obtaining legal advice.

Generally, the communication must occur between a client and lawyer who have established an attorney–client relationship – or between a potential client and a lawyer, when the potential client seeks to establish an attorney–client relationship for the purpose of obtaining legal advice.

The primary purpose of a communication must be to seek or provide legal advice, though an implicit request for legal advice is generally sufficient to meet the standard. Attorney–client privilege does not apply to business advice. Distinguishing between legal advice and business advice is a fact-intensive, case-by-case inquiry. Advice on the legal or tax consequences of a business decision is legal advice; however, a communication in which an attorney evaluates a business decision is not privileged. So, for example, simply copying in-house counsel on an email regarding a business matter does not confer the communication privileged unless it is clear that the communication was sent to counsel so that he or she could then provide legal advice.

The privilege protects against disclosure of the particular facts a client shares with his or her attorney, the legal questions the lawyer asks his or her client and the fact-based questions the lawyer asks or his or her client. In most jurisdictions, a lawyer-to-client communication is protected, but it must relate to a prior confidential communication the client made to the lawyer. Legal advice is protected by attorney–client privilege only when the advice reflects a confidential client-to-lawyer communication. The privilege also protects internal lawyer memos memorialising privileged communications. Lawyer-to-lawyer conversations among lawyers in the same firm and representing the same client are also considered privileged communications.

Because attorney–client privilege is intended to protect the expectation of confidentiality, it will not attach to a communication if a non-agent third party is present.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

Attorney–client communications made during the course of an internal investigation can be privileged, but only when the communication meets the usual standard for privilege – a confidential communication for the purpose of seeking or giving legal advice. Privilege does not attach simply because an attorney is conducting the investigation; privilege attaches only when the attorney conducts the investigation as a legal adviser for the purpose of providing legal advice.

Companies often use outside counsel to conduct internal investigations to ensure that privilege attaches to attorney–client communications made during the investigation. But privilege can also attach when in-house counsel directs an internal investigation for the purpose of providing legal advice. In-house counsel can direct other, non-legal departments to conduct the investigation, and privilege will attach so long as the fruits of the investigation are for legal advice. If in-house counsel directs another department to conduct the investigation, then that department becomes the lawyer’s agent and can meet the standard for a privileged communication.

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

Privilege belongs to the client, not the lawyer. A lawyer’s duty of confidentiality is a separate ethical duty rather than an evidentiary rule. A client can demand that an attorney waive privilege on his or her behalf.

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

Facts are not privileged. However, a client cannot be compelled to disclose which particular facts were relayed to his or her lawyer, or which facts the lawyer asked him or her to relay for the purpose of providing or seeking legal advice.

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?

As a general rule, communications with a client’s agents fall outside the scope of privilege. In contrast, communications with a lawyer’s agents fall inside the scope of privilege.

A client’s agent is only within the scope of privilege, such that it will attach to the confidential communication, when the agent is necessary to the communication between the client and lawyer. Some jurisdictions use a ‘reasonableness’ standard for evaluating whether the client agent was necessary. Examples of client-agents found to be within the scope of privilege include translators, co-counsel, independent auditors and consultants. However, the issue is analysed on a case-by-case basis, so an accountant might be within the scope of privilege for one client but not for another. Courts have concluded that friends, former personal lawyers and union representatives are generally outside the scope of privilege. Family members and spouses can fall within privilege depending on the circumstances.

Lawyers’ agents can be within the scope of privilege, such that it attaches to a confidential communication with the agent. Courts have regularly held that members of a lawyer’s regular staff, such as secretaries and paralegals, are within the scope of privilege. But not all lawyers’ agents are within the scope. When a lawyer uses irregular staff members, privilege may be destroyed unless the lawyer takes care to ensure privilege attaches, for example, by engaging the person directly, in writing, with a contract stating that the services are for the purpose of providing legal advice.

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

Yes, a corporation can avail itself of the protections for attorney–client communications. Both in-house counsel and outside counsel represent the corporation, institution, not its employees or directors. Within the corporate structure, separate entities can retain their own counsel. The lawyer represents the corporate entity that hired him or her – such as a board, an audit committee or a pension plan.

Generally, only high-level executives can waive the company’s privilege. That said, some courts allow any employee who has access to the privileged communication to waive privilege. In addition, the company’s lawyer can waive privilege when authorised.

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

Yes, communications between an employee and outside counsel can be privileged – as long as the communication is for the purpose of providing legal advice and the employee is discussing matters related to his or her employment.

To assess whether the employee-lawyer communication is privileged, federal courts and many states use the ‘functionality test’ articulated in Upjohn v United States, 449 US 383 (1981). Upjohn requires the court to evaluate the role the employee played in the conduct at issue and the facts the employee possessed.
The minority rule, used by a handful of states, allows only the company’s ‘control group’ to engage in privileged communications with company counsel. The control group consists of high-ranking employees who are responsible for corporate decision-making.

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

Yes, communications between employees and in-house counsel can be privileged as long as they meet either the Upjohn test or the ‘control group’ test, depending on the jurisdiction.

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

Attorney–client privilege extends to a communication between company counsel and a former employee as long as the communication meets the Upjohn standard or the control group test. The communication between the former employee and company counsel must also be for the purpose of providing legal advice, rather than business advice.

A communication between company counsel and a former employee is not privileged, however, when company counsel provides information to the former employee regarding developments that occurred after the employee left the company.

14 Who may waive the protections for attorney–client communications?

The client and the client’s successors in interest may waive their own privilege. When an attorney jointly represents more than one client, a client can waive privilege only as to his or her own communications with the lawyer. For any communication involving other jointly represented clients, all of the clients must unanimously consent to any waiver of privilege. In the context of a joint defence or common interest agreement, the power to waive privilege is treated largely the same way as joint representations.

A lawyer, as an authorised agent, can also waive privilege on his or her client’s behalf—but only with a client’s authorisation.

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

Two kinds of waiver can occur: express and implied. An express waiver occurs through any intentional disclosure of a privileged communication, and an express waiver can occur despite a confidentiality agreement or disclaimer. Express waivers must also be voluntary; a thief cannot destroy privilege by disseminating stolen privileged documents.

An implied waiver occurs without an actual disclosure of a communication. When a party relies on the fact of a privileged communication or affirmatively raises an issue that implicates privileged communications, an implied waiver occurs.

Either type of waiver—whether express or implied—can trigger a subject-matter waiver. A subject-matter waiver requires disclosure of additional privileged communications regarding the same subject matter. This prevents litigants from selectively waiving privilege for materials; all materials concerning that subject must be disclosed if privilege is waived for any single related communication.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

Inadvertent disclosure in civil pretrial discovery is governed by Federal Rule of Civil Procedure 26(b)(5)(B), which provides that if privileged information is inadvertently disclosed during discovery, then the party claiming privilege has an opportunity to prevent waiver. First, the party claiming privilege must notify the party that received the information. Then, the recipient of the privileged information must promptly return, sequester or destroy the information. The recipient cannot make use of the information until the claim of privilege is resolved.

Under Federal Rule of Evidence 502, inadvertent disclosure in a federal proceeding or to a federal agency does not constitute waiver if:
- the disclosure was inadvertent;
- the privilege holder took reasonable steps to prevent disclosure; and
- the privilege holder promptly took reasonable steps to rectify the error.

In this context, ‘inadvertent’ means ‘accidental.’ The federal courts have generally adopted the same standard in non-litigation proceedings. Recently, parties have begun entering into confidentiality agreements with ‘clawback’ provisions, which provide that an inadvertent disclosure does not constitute waiver when certain remedial steps are taken. Courts generally require parties to abide by the terms of such agreements.

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

Attorney–client communications can be shared among employees of an entity without waiving privilege only when the employees who receive the information are those who ‘need to know’ a lawyer’s legal advice. When the lawyer’s communication is shared beyond those who ‘need to know,’ attorney–client privilege is destroyed. Generally, courts define those who ‘need to know’ to mean agents of the organisation who reasonably need to know the contents of the communication to act on behalf of the organisation. However, courts have noted that company-wide dissemination of advice may implicate business advice as opposed to legal advice, which means that attorney–client privilege did not attach to the communication in the first instance.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

The US legal system recognises two primary exceptions to the attorney–client privilege: the crime-fraud exception and the fiduciary exception.

Under the fiduciary exception, a fiduciary cannot claim the protections for attorney–client privilege when a third-party beneficiary seeks fiduciary–attorney communications concerning legal advice sought by the fiduciary in exercising the fiduciary’s duties and responsibilities. This is because the attorney owes the beneficiary a duty of full disclosure when he or she gives advice to a client acting as a fiduciary for that beneficiary.

While technically not an exception, when a litigant uses ‘advice of counsel’ as an affirmative defence, he or she cannot then withhold from discovery his or her lawyer’s communications concerning that advice.

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

No, it is an absolute privilege.

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

Traditional choice-of-law principles generally apply. First, the court determines whether the potentially applicable US privilege rule conflicts with the potentially applicable foreign rule. If the rules do not conflict, then the court applies the consistent standard. If they do conflict, then the courts generally apply a ‘touch base’ test, which assesses whether the attorney–client communication sufficiently touched base with the United States to justify applying the US privilege rule. If the communication fails the touch base test, the foreign rule applies—unless other choice-of-law principles foreclose its application.
21 Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained.

Lawyers should carefully protect confidential communications. When a communication loses its confidentiality, through negligence or purposeful conduct, it can lose its privilege. Lawyers should use secure computer networks for client communications and lawyers should also refrain from engaging in confidential communications in public.

Additionally, simply copying a lawyer on a written communication does not make the communication privileged. Moreover, doing so can cause lengthy battles concerning whether the communication is privileged and can unintentionally trigger a subject-matter waiver.

Lawyers should also carefully label documents and provide privilege logs when producing documents to an adversary or to a government agency. Under Federal Rule of Civil Procedure 26(b)(3)(A)(ii), failure to provide a detailed and accurate privilege log to ‘enable other parties to assess the claim’ of attorney–client privilege can result in waiver.

With respect to document production, clawback agreements allow parties to disclose privileged materials without waiving privilege under certain circumstances. Courts usually give effect to such agreements.

In the context of internal investigations, company lawyers often give an ‘Upjohn warning’ to company employees before interviewing each employee. The warning explains that the lawyer represents the company rather than the individual employee, that the communication is privileged and that the privilege belongs to the company. Providing such a warning helps preserve privilege by notifying the employee that the conversation is confidential.

Work product

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

Under Federal Rule of Civil Procedure 26(b)(3), work product protection applies to two categories of documents: tangible work product and mental impression work product. Tangible work product includes documents and other tangible items prepared in anticipation of litigation or for trial by or for another party or that party’s representative. A lawyer need not be involved to create tangible work product. For example, a client’s own notes on strategy in preparation for trial could constitute work product.

Mental impression work product includes materials that incorporate an attorney’s mental impressions, conclusions, opinions or legal theories. For example, an attorney’s ‘working file’ where he or she organises otherwise non-privileged materials in a specific order may constitute mental impression work product.

Under Federal Rule of Criminal Procedure 16(b)(2), a defendant in a criminal case is not required to produce to the government any ‘reports, memoranda, or other documents made by the defendant, or the defendant’s attorney or agent, during the case’s investigation or prosecution’. And, with certain exceptions, the government is not required to produce to the defendant any ‘reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case’, or any ‘statements made by prospective government witnesses except as provided in 18 USC § 3500’.

23 Describe any limitations on the contexts in which the protections for work product are recognised.

The work product doctrine applies only to materials created in ‘anticipation of litigation’. This definition varies widely by jurisdiction. While Federal Rule of Criminal Procedure 16 and Federal Rule of Civil Procedure 26 apply in federal criminal and civil proceedings, respectively, the work product doctrine stretches beyond those contexts. As a doctrine first established at common law, it can apply to grand jury proceedings, internal investigations, arbitration, pretrial proceedings, trials and post-trial proceedings.

24 Who may invoke the protections for work product?

The client or the lawyer may invoke the protections. The lawyer has independent standing over his or her work product.

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

Yes, an attorney’s mental impressions are distinct from ordinary work product. Work product incorporating mental impressions – such as drafts of motions and briefs, assessments of litigation, evaluations of options and attorneys’ notes – is granted greater protection, bordering on the absolute. To overcome the work product protection for mental impression work product, a litigant must meet a higher standard of need than for ordinary work product.

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

Yes, where materials created by or at the direction of in-house counsel otherwise meet the criteria of ‘work product’, those materials are protected.

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?

Materials created by others are protected if the materials were created at the direction of the client or lawyer and if the materials otherwise meet the criteria for work product. If the materials were created by a paid outside agent, it is irrelevant who compensates the outside agent.

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

Yes, a third party can overcome the protections of the work product doctrine, because it is not an absolute privilege. Different tests apply to tangible work product and mental impression work product.

Under Federal Rule of Civil Procedure 26(b)(3)(A), a litigant can overcome the tangible work product protection by demonstrating that he or she has a substantial need for the work product material and has hardship in obtaining the work product material by other means. For example, courts commonly find a litigant has met the standard of substantial need when a witness has become unavailable after the adverse party had an opportunity to interview the witness. If work product is likely going to be disclosed at trial, a litigant can also meet the substantial need standard in pretrial discovery. A litigant must articulate his or her need with sufficient specificity.

For mental impression work product, the protection is nearly absolute. Federal Rule of Civil Procedure 26(b)(3) uses absolute terms, stating that if the court requires discovery of tangible work product ‘it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representatives concerning the litigation.’ Courts generally examine the extent of the attorney’s mental processes in the work product, the effect the disclosure would have, and the necessity of disclosure to a fair result.

In addition, if work product is a key issue in litigation, such as when an advice of counsel defence is asserted, then the work product loses its protected status.

29 Who may waive the protections for work product?

Either the client or the attorney can waive work product protections. Where a client and his or her attorney have divergent interests on waiver, some courts have found that a client cannot waive work product protection for materials incorporating his or her attorney’s mental impressions.

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

Voluntary disclosure of work product to an adversary waives work product protection.

Federal Rule of Civil Procedure 26(b)(3)(B) allows a party to claim work product protections for materials that were inadvertently disclosed. Also, see question 16 for further information regarding inadvertent disclosure in a federal proceeding or to a federal agency.
31 May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product?

Clients have a right to access their files, without waiving work product protections. Neither the federal courts nor the state courts recognise attorney client privilege over client files.

An attorney cannot assert work product protection over materials when his or her interests and a former client’s interests have become adversarial. However, some courts have allowed an attorney to maintain protections for mental impression work product under such circumstances.

32 Under what circumstances is an inadvertent disclosure of work product excused?

Inadvertent disclosure in civil pretrial discovery is governed by Federal Rule of Civil Procedure 26(b)(6). If information produced in discovery is protected by the work product doctrine, then the party claiming protection must notify the party that received the information. The recipient must then promptly return, sequester or destroy the protected information and cannot use the information until the claim is resolved.

See question 16 for further information regarding inadvertent disclosure in a federal proceeding or to a federal agency.

33 Describe your jurisdiction’s main exceptions to the protections for work product.

Materials related to expert witnesses who plan to testify at trial are discoverable. Under Federal Rule of Civil Procedure 26(b), a party can discover, without a showing of need, the identity of experts who will be called at trial, the facts and opinions on which the experts will testify and the grounds for the experts’ opinions. If a party does not plan to have its expert testify at trial, then the expert’s work product must be disclosed only to the extent it would otherwise be discoverable.

If an attorney’s representation of his or her client is at issue in the case, then the attorney’s work product is not protected. Any surveillance tape a party makes of an adversary is not protected. Surveillance tapes are commonly used in personal injury cases to demonstrate the extent of a plaintiff’s injuries (or the lack thereof).

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

Yes, when a client files a claim of inadequate assistance of counsel or malpractice, which makes an attorney’s representation of his or her client a central issue, the work product protection will not apply. In addition, if work product is created in furtherance of a crime, then it is not protected.

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

This issue has not been explored by many courts, but the usual conflict-of-law analysis likely applies. When work product protections are considered to constitute a procedural rule, such as under the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure, then the court will apply the forum’s rule. However, if a court were to find the work product protections to be a substantive rule, then the court would apply its jurisdiction’s conflict-of-law analysis.

Common issues

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

The body responsible for the final adjudication of the underlying substantive dispute evaluates whether the protections of attorney–client privilege or the work product doctrine apply – usually a judge or arbitrator.

Update and trends

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?

Yes, parties with a common legal interest or joint defence can agree to share privileged communications and work product. Attorney–client confidentiality attaches within the group, with the assumption that all communications are still made in confidence. Work product shared within the group likewise remains protected. Some courts have upheld the protections of attorney–client privilege and the work product doctrine even when a group of common-interest defendants did not explicitly enter into an express agreement.

Parties often execute a ‘common interest’ or ‘joint defence’ agreement stipulating which particular protected materials will be shared and agreeing that the materials must be kept confidential. If parties to a common interest agreement become adverse to each other, the materials remain protected from disclosure to third parties. However, if parties to a common interest agreement engage in litigation against each other and the litigation implicates joint defence materials, then the privilege and work product protections can be overcome.

Some courts hold that if one member of a common interest group unilaterally discloses a privileged communication or work product, then the protections of attorney–client privilege and of the work product doctrine are waived for all purposes for the particular communication or materials disclosed. Other courts have held that one member’s disclosure of a privileged communication or work product only effects a waiver for that party.

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

Generally, courts have found that disclosing privileged communications to the federal government, such as to the US Securities and Exchange Commission or to the US Equal Employment Opportunity Commission, waives attorney–client privilege and work product protection. Federal Rule of Evidence 502, however, can limit the scope of a waiver.

In the context of voluntary disclosure to the government, the scope of the waiver is governed by Federal Rule of Evidence 502. When a party
discloses information in a federal proceeding or to a federal agency, the disclosure waives protection for undisclosed material only if:

- the waiver is intentional;
- the disclosed and undisclosed communications concern the same subject matter; and
- in fairness they should be considered together.

If the government compels disclosure of work product then work product protections are not necessarily waived. However, when a party voluntarily discloses work product to the government, for example, to prevent prosecution, work product protections are waived.

Some courts have found that if a party has entered into a confidentiality agreement with the government, then disclosing otherwise protected communications and materials does not constitute a waiver.

In addition, some statutes and regulations allow for disclosure to the government without waiving privilege, such as the regulations governing suspicious activity reports for financial institutions.

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 other policies apply specifically to attorney–client communications or to work product. Other specific privileges often apply in litigation, however.

The spousal privilege, for example, protects from compelled disclosure communications between married spouses.

Additionally, the deliberative process privilege protects government documents from compelled disclosure when the documents reflect the government’s decision-making process for formulating policies. The deliberative process privilege includes advisory opinions, recommendations and deliberations that are part of the decision-making process. However, post-decisional memoranda are not protected, including post-decision memoranda justifying a past decision.

Finally, pursuant to the presidential communications privilege, the President of the United States may refuse to produce materials to Congress or in judicial proceedings when the materials reflect confidential presidential deliberations. To fall within the scope of the privilege, the documents must reflect presidential decision-making and they must be authored or solicited and received by the President or his immediate advisers in the White House.
## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Automotive  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Commercial Contracts  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

## Also available digitally

Online  
www.gettingthedealthrough.com

© Law Business Research 2017