

Legal Privilege & Professional Secrecy

Contributing editors

Matthew T Reinhard and Dawn E Murphy-Johnson



2018

GETTING THE
DEAL THROUGH

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Miller & Chevalier Chartered

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Preface

Legal Privilege & Professional Secrecy 2018

Third edition

Getting the Deal Through is delighted to publish the third 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 new chapters on India, Portugal, Spain and Ukraine.

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
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Mexico

Diego Sierra and Pablo Fautsch

Von Wobeser y Sierra, SC

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 that 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.

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 obligated 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 a constitutional review (amparo) that a professional who had been ordered by a lower instance 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. I3°C 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, p1411.)

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.

In June 2017, the Panel for Administrative Matters Specialized in Antitrust, Broadcasting and Telecommunications for the First Circuit issued a binding judicial precedent, establishing that an amparo can be filed against the extraction of information or documentation between an attorney and its client by the Federal Antitrust Commission while under investigation. According to the Panel, the constitutional review is admissible because outside counsel has a duty to defend and protect professional secrecy. Therefore, outside counsel can challenge the gathering of privileged information by the Federal Antitrust Commission. (Binding precedent PC XXXIII CRT J/12A, issued by the Panel for Administrative Matters Specialized in Antitrust, Broadcasting and Telecommunications for the First Circuit, published in the *Federal Judicial Weekly Report* and its Gazette.)

Attorney-client communications

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

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; and a duty not to testify, produce documents or disclose any information against clients' interests. Lawyers cannot be compelled to testify against their clients.

6 Describe any settings in which the protections for attorney-client communications are not 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 this 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 into 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 the duty of secrecy.

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 Does accidental disclosure of attorney–client privileged materials waive the privilege?

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 harm to society that would exceed the harm caused by not 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.

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 (in-house counsel or external counsel). However, the fact that 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 settings in which the protections for work product are not recognised.

See question 22.

24 Who holds 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? How?

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

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.

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

No regulation exists in this regard, hence it would have to be analysed on a case-by-case basis.

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

There is no work product doctrine in Mexico; hence there are no exceptions.

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

See question 19.

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

See question 20.

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?

Both attorney-client communications and work product are protected by professional secrecy but when there is 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.

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

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 scenario there would be, in principle, no professional involved in the exchange of communications.

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.



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