

Legal Privilege & Professional Secrecy 2019

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Contributing editors**Matthew T Reinhard and Dawn E Murphy-Johnson**

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

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Russia.

Lexology 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.lexology.com/gtdt.

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.



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Switzerland

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DOMESTIC LEGISLATION

Attorney–client communications doctrine

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

In 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 laws as well as under the Swiss Federal Act on Attorneys (BGFA) and ultimately under the contract governing the attorney–client relationship.

Specifically, article 13 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 (see, eg, articles 160, 163 and 166 of the Swiss Civil Procedure Code, articles 171 and 264 of the Swiss Criminal Procedure Code and articles 13, 16 and 17 of the Swiss Federal Act on Administrative Procedure), a party to a litigation (as well as third parties) has the right to refuse to produce correspondence between such party and an attorney, provided that the correspondence relates to the attorney's typical professional activity (legal advice and legal representation). On the same basis, the attorney and the client may refuse to testify with respect to attorney–client communications.

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

In-house and outside counsel

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

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 before the Swiss courts. However, privilege does not extend to communications exchanged between a client and an in-house counsel (irrespective of whether in-house counsel would be qualified for bar admission).

Work-product doctrine

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

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) in connection with an attorney's typical professional activity.

Recent case law

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

In a decision of 20 September 2016 (Case No. 1B_85/2016), the Swiss Federal Supreme Court (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. Only the parts of the attorneys' work product that were clearly related to rendering legal advice remained protected from disclosure. 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 Supreme 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.

The Supreme Court's decision has drawn widespread criticism 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. Nevertheless, in a decision of 21 March 2018 (Case No. 1B_433/2017), again in a case concerning an internal investigation into a bank's business connected to potential money laundering and regulatory risks, the Supreme Court confirmed its view that work product stemming from an internal investigation is protected

only insofar as it relates to an attorney's typical professional activity (ie, providing legal advice). Whether a document or parts thereof are privileged must be decided on a case-by-case basis. Accordingly, the Supreme Court reversed an earlier decision of the Swiss Federal Criminal Court, which had held that the investigation report, as well as its annexes (including emails, interrogation minutes, recorded phone calls and documents relating to a bank's business relationships with suspicious customers), were fully protected by attorney-client privilege. On remand, the Federal Criminal Court held that the entire investigation report, including all annexes, is not covered by attorney-client privilege (Case No. BE.2018.3). Commentators have criticised this decision, arguing that it does not apply a case-by-case analysis as requested by the Supreme Court. However, the Supreme Court rejected the appeal filed by the bank (Case No. 1B_453/2018).

In a number of decisions rendered since 2016 (eg, Cases Nos. ATF 142 II 307, 2C_439/2017 and 2C_704/2016), the 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 Supreme Court stressed that, owing to the importance of attorney-client privilege from the client's individual perspective as well as from an institutional point of view, the waiver should not be granted lightly; in particular, if it would have been possible for the attorney to request a retainer from the client.

In the meantime, a few cantonal attorney supervisory authorities have clarified that they are still prepared to grant a waiver of the attorney-client privilege to enable an attorney to enforce unpaid fee claims irrespective of whether it had been possible to request a retainer from the client.

ATTORNEY-CLIENT COMMUNICATIONS

Elements

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

To be protected, communications 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.

Exclusions

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

Who holds the protection

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

Both. Under Swiss law, the protections for attorney-client communications belong to the client and secrecy is an obligation incumbent on the attorney. The client may release the attorney from this 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 (see article 13 of the BGFA).

Underlying facts in the communication

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

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).

Agents

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

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).

Corporations claiming protection

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

Yes. 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.

Communications between employees and outside counsel

- 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.

Communications between employees and in-house counsel

- 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).

Communications between company counsel and ex-employees

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

As part of his or her professional secrecy obligation, an attorney (outside counsel) is prohibited from disclosing, and may refuse to disclose, 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 with regard to information they have learned after the termination of their employment relationship and may disclose communications with the company's attorney at their discretion.

Who may waive protection

- 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).

Actions constituting waiver

- 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 communications 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.

Accidental disclosure

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

Under Swiss law, the accidental disclosure of an attorney–client communication is not considered a waiver of the privilege. However, factually, such accidental disclosure 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.

Sharing communications among employees

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

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 communication 'privileged and confidential'.

Exceptions

- 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.

Litigation proceedings overriding the protection

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

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

Recognition of foreign protection

- 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 practise (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 European Free Trade Association (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 communication 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 understanding

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 communications 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 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.

Best practice to maintain protection

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

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 punishment in case of intentional breach.

In case of seizure of privileged communications in criminal proceedings, 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 upon an application by the prosecutor a court concludes that the sealed information is not protected by attorney-client privilege (eg, because it does not relate to the attorney's typical professional activity).

WORK PRODUCT

Elements

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 product 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, for example, trial. Moreover, if work product relates to the attorney's typical professional activity, the protection applies irrespective of whether work product has been prepared by the attorney or by the client or third parties (such as experts, investigators, employees, etc).

Exclusions

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

Work product is not protected if it does not relate to the attorney's typical professional activity; that is, if it is not 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.

Who holds the protection

24 Who holds the protections for work product?

Like attorney-client privilege, the protections for work product belong to the client and secrecy is an obligation incumbent on the attorney from which the client may release the attorney (see question 7). To prevent disclosure in Swiss civil, criminal or administrative proceedings, the protections for work product may be invoked by the client, the attorney and any third party with custody or control of protected work product.

Types of 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 decisions by the 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).

In-house counsel work product

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

No, unless the work product is created by, or at the direction of, in-house counsel in connection with the typical professional activity of an attorney (outside counsel). There is a draft revision of the Civil Procedure Code pending, pursuant to which in-house counsels' work product would be protected under given circumstances in the context of civil proceedings. Given the results from the public consultation on this proposal, it may well be that this revision will be abandoned. (See 'Update and trends'.)

Work product of agents

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

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, provided such work product relates to the rendering of legal advice or legal representation by an attorney.

Third parties overcoming the protection

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.

Who may waive work-product protection

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 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).

Actions constituting waiver

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 information 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.

Client access to attorney files

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

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 (eg, personal notes, drafts) to the client. 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.

Accidental disclosure of work product

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

Under Swiss law, the accidental disclosure of work product is not considered a waiver of the protection (as long as there is no public disclosure). However, factually, such accidental disclosure 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.

Exceptions

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.

Litigation proceedings overriding the protections

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

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

Recognition of foreign protection

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).

OTHER ISSUES

Who determines what is protected

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 the 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 be sealed and that the prosecutor may review such information only if authorised by a court upon an application by the prosecutor (see question 21). Therefore, in the case of criminal proceedings, it is ultimately the criminal courts that decide on the extent of the protections.

Common interest

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

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.

Limited waiver

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.

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 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 are specifically aimed at maintaining the confidentiality of attorney-client communications or work product.

UPDATE AND TRENDS**Current developments**

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

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 communications or work product accorded 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 communications 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 communications 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 legal privilege for communications or work product of in-house counsel. The latest of these efforts aims at introducing a specific provision in the Swiss Civil Procedure Code that would protect communications with, or work product prepared by, in-house counsel from disclosure in the same manner that communications with, or work product prepared by, outside counsel are protected. Given the results of the public consultation regarding this proposal, it is currently uncertain whether it will be presented to the Swiss legislature.

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