

Legal Privilege & Professional Secrecy

Contributing editors

Matthew T Reinhard and Dawn E Murphy-Johnson



2016

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Legal Privilege & Professional Secrecy 2016

Contributing editors

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

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First edition
ISSN 2397-7892

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2016, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	5	Japan	33
Matthew T Reinhard and Dawn E Murphy-Johnson Miller & Chevalier Chartered		Tsuyoshi Suzuki, Rin Moriguchi and Mariko Sumiyoshi Momo-o, Matsuo & Namba	
Argentina	6	Mexico	37
Maximiliano D'Auro and Tadeo Leandro Fernández Estudio Beccar Varela		Diego Sierra and Pablo Fautsch Von Wobeser y Sierra, SC	
Brazil	12	Netherlands	40
Carlos Ayres, Fernanda Ferrer Haddad and Ricardo Quass Duarte Trench, Rossi e Watanabe Advogados		Enide Perez and Stéphanie Heinerman Sjöcrona Van Stigt Advocaten	
Croatia	16	Nigeria	45
Ana Tudorić Mejovšek, Marina Kovač Krka, Daniela Marasović and Lea Mužić Divjak Topic Bahtijarevic		Babajide Oladipo Ogundipe and Morenikeji Osilaja Sofunde, Osakwe, Ogundipe & Belgore	
England & Wales	20	United States	50
Clarissa Coleman, Kate Menin and Tim Vogel Addleshaw Goddard LLP		Matthew T Reinhard, Dawn E Murphy-Johnson and Sarah A Dowd Miller & Chevalier Chartered	
France	26	Venezuela	56
Thomas Baudesson and Matthieu Juglar Clifford Chance Europe LLP		Eugenio Hernández-Bretón Baker & McKenzie	
Germany	29		
Kai Hart-Hönig Dr Kai Hart-Hönig Rechtsanwälte			

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:

[n]obody 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 AR\$1,500 to AR\$95,000 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 232 provides that the court may order, wherever appropriate, the presentation of people or documents before it, but this order may not target people who can or should refrain from declaring as witnesses by reason of kinship, professional secrecy or state secrecy. Section 237 impedes the seizure of letters or documents sent or delivered to attorneys for 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.

The main regulations concerning attorneys' professional ethics are:

- Law No. 23,187, which rules the professional law practice in the City of Buenos Aires; and
- the Ethics Code of the City of Buenos Aires Bar Association.

Pursuant to section 6 of Law No. 23,187, lawyers have a specific obligation to preserve attorney-client privilege, unless this is waived by the interested party (the client). Likewise, section 7 provides for a lawyer's right to keep unrevealed information protected under the attorney-client privilege.

Section 10 of the Ethics Code sets forth, as lawyers' obligations, that they must strictly preserve the attorney-client privilege, refusing to answer questions, even from judges, law enforcement agencies (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; or
- it is necessary for their self-defence.

Section 10 also sets forth that lawyers must defend the privacy of their law firm's premises and of all documents that have been entrusted to them.

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.

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, except for confidential correspondence that cannot be used without the sender's consent. In addition, third parties cannot file confidential correspondence without the sender's and the recipient's consent.

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

There is no consistent case law regarding attorney-client communications and work product. However, there was an important landmark decision of the National Supreme Court of Justice in the *Halabi* case (*Halabi, Ernesto v National Executive Branch, Law No. 25,873 and Executive Order No. 1563/04*, dated 24 February 2009). Ernesto Halabi was a lawyer who felt affected by a federal regulation that allowed access to private phone communications without previous judicial order. Halabi obtained the declaration of unconstitutionality of the relevant regulations by invoking professional secrecy as a lawyer, among other arguments.

The Supreme Court stated that those provisions violate the rights set out in sections 18 and 19 of the Constitution and intervention in such telephone and internet communications violates the rights to privacy and professional secrecy that 'lawyers are obliged to keep and ensure'.

On 22 February 2008, the Supreme Court stated in the *Rossi* case (*Rossi, Domingo Daniel on illicit enrichment of public officials, resolution 330*) that a violation of professional secrecy occurs when lawyers raise facts or documents that have been entrusted to them by their clients on the occasion or in the exercise of their profession.

On the other hand, a recent decision of Chamber III of the Court of Criminal Cassation stated in the *Favale* case (*Favale, Cristian Daniel and others*, dated 10 September 2015) that procedural law does not protect any communications held by a defendant with any lawyer; the protection will only cover communications that the defendant maintained with his or her defence counsel and not another attorney.

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 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 10 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; or
- 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.

It was also stated that judges cannot release an attorney from professional secrecy. If a lawyer is called to a hearing as a witness, he or she should appear before court and refuse to answer questions that would entail a violation of the attorney–client privilege. This involves an eminently personal and individual decision, left to the judgment of the professional.

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 28(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. The reason for such argument is that both attorney and client have left behind the exclusivity and confidentiality of the information 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? How?

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?

Protections 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, as long as the requirements of question 5 are fulfilled, in the light of the regulations described in question 1. However, 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 326 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 35.

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 Can work product be disclosed to government authorities, without waiving the relevant protections? How?

Work product cannot be disclosed to government authorities without waiving the relevant protections.

33 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.

34 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 35.

35 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.

36 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

Update and trends

It is important to point out some of the conclusions made by the Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews of the OCDE, Combined: Phase 1 + Phase 2 published in 2012:

177. ...It is unclear whether professional secrecy (...) could be extended to other activities such as acting as a trustee, a settlor, a company director or under a power of attorney to represent the company in its business affairs. The Argentine tax authorities nonetheless indicated that trustees and 'fiduciarios' represent the entity before the AFIP (...) and therefore must provide all requested information independently from the fact that they may be lawyers. (...) 180. The Argentinean authorities indicate that in relation to both lawyers and accountants, professional secrecy is interpreted and applied in a restrictive manner which does not prevent tax authorities from accessing books, registries and other documentation held by lawyers and/or accountants where they exercise their information gathering powers (...). Professional secrecy cannot be claimed by an accountant or attorney where they act in the capacity of representative for a taxpayer (including legal entity); the professional who acts as representative will be subject to the same obligation to provide information as the taxpayer (...). Where an accountant or lawyer does not act as representative of a taxpayer, but nevertheless holds information (such as a taxpayer's accounting books), and the taxpayer failed to comply with an information request from the tax authority because they fail to request this information from the professional, the tax authority may obtain a search warrant to obtain such information from the premises of the accountant/attorney, and in such case, the relevant professional would not be able to claim professional secrecy to refuse to comply with the search warrant (...). Argentinean authorities referred to case law to indicate

that such a warrant can be obtained by the tax authority even in the context of non-criminal matters...

The Financial Action Task Force (FATF) and Financial Action Task Force of Latin America (GAFILAT) released a mutual evaluation report on Argentina on 22 October 2010. This was the FATF's third mutual evaluation of Argentina (and the second performed jointly with GAFILAT). According to the 2010 report:

...it should be noted that under section 244 of the [CPC], lawyers and notaries must not provide information relating to confidential acts that came to their knowledge through their office or profession. This wide exemption extends to all information gained by these professionals when exercising their functions. This raises serious concerns that authorities cannot obtain information from lawyers and notaries when they are not acting in defence of a client.

Lawyers are not covered by the AML/CFT Law. Section 20 of this Law enumerates all persons or entities that must report suspicious transactions to the UIF. This list does not include lawyers.

In 2004, a Bill was presented to the National Congress, which proposed to include lawyers as subjects to the reporting obligation. However, this Bill was not passed. The Congress enacted Law 26,683 (published in the Official Gazette on 21 June 2011), which amended the AML/CFT Law. Although lawyers were included in the first versions of the Bill, this amendment, as enacted, still does not include lawyers in the list of professionals that must report suspicious transactions to the UIF. Local experts have pointed out that, if this obligation were to be instated, a constitutionality question could be raised regarding the possibility that it contradicts certain principles, such as the inviolability of due process and the right against self-incrimination.

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.

Common issues

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

See questions 7, 14 and 35.

38 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.

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

In principle, attorney-client communications or work product cannot be disclosed to government authorities without waiving the protections.

Other privileges or protections

40 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 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.

ESTUDIO BECCAR VARELA

Maximiliano D'Auro
Tadeo Leandro Fernández

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

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

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

According to section 20 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;
- public notaries;
- capitalisation or savings entities;
- customs brokers;
- the Central Bank of Argentina, the federal tax authorities, the National Superintendence of Insurance, the Securities Exchange Commission, the General Inspection of Justice, the National 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 minibuses, 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.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
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
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
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 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



Legal Privilege &
Professional Secrecy
ISSN 2397-7892



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law