

Legal Privilege & Professional Secrecy 2019

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Miller & Chevalier Chartered

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.

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

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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Global overview

Matthew T Reinhard and Dawn E Murphy-Johnson

Miller & Chevalier Chartered

As we have highlighted in previous editions of *Legal Privilege & Professional Secrecy*, cross-border legal disputes have quickly become commonplace in the international legal community, and issues concerning legal privilege and professional secrecy are frequently front-page news. In recent months, the headlines have focused a spotlight on multiple raids conducted by law enforcement on the offices of attorneys – individual lawyers and multinational firms alike. These raids have tested the protections for communications between attorneys and clients, and they illustrate the ways in which certain materials may be protected in one location but not another.

In 2018, for example, Germany's highest court concluded that documents containing communications between a law firm and a subsidiary of its client were properly seized from the firm by law enforcement officials. Munich prosecutors had raided the offices of the international law firm hired by Volkswagen AG to conduct an internal investigation of the roots of the company's diesel emissions scandal. The firm examined many documents within the Volkswagen group and conducted interviews with employees throughout the group. The raid, however, related to an investigation of Audi AG, a subsidiary of Volkswagen, which itself did not employ the law firm. After a year of litigation, the high court held that under such circumstances, German law does not extend the protections of a parent company's lawyer-client relationship to subsidiary companies.

A few months earlier, United States law enforcement officials raided the offices of the US President's long-time personal attorney, Michael Cohen, in connection with ongoing investigations into the President's dealings in New York before the 2016 presidential elections. Media outlets widely reported that the Federal Bureau of Investigation seized privileged communications between Cohen and the now-sitting President. After the raid, federal prosecutors stated that they intended to use a specialised group of government lawyers, called a 'taint team', to identify and exclude privileged information from review by the prosecution team. Instead, after Cohen challenged the seizure of privileged

documents, a federal court appointed a 'special master' – in this case, a retired judge unrelated to the parties – to review the seized materials for privilege in lieu of the court conducting the privilege review itself.

In a 2016 decision, the French Supreme Court ruled that investigators were permitted to record conversations between Nicolas Sarkozy, the former president of France, and his lawyer. The phone taps were part of an investigation into allegations that Sarkozy's 2007 presidential campaign was illegally funded with a €50 million donation from Libyan dictator Muammar Gaddafi. The recorded conversations led to an entirely new investigation and corruption charges, which Sarkozy sought to have dismissed, arguing that the phone taps breached lawyer-client confidentiality. In its decision, the French high court held that the conversations in question did not pertain to the strict exercise of the right of the defence, because formal charges had not been brought against Sarkozy at the time of the conversations, and the attorney had not been formally appointed.

More and more often, lawyers are finding themselves in the cross-hairs of international investigations and litigation – putting at risk the secrets they are professionally and legally bound to keep. This volume intends to bring to light some of the major differences between the legal regimes featured herein, so that practitioners can best shape their approaches to communicating with their clients, effectively gather and use evidence when their work takes them outside their home country, and identify local counsel well-versed in the contours of local protections for attorney-client communications and attorney work product.

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

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