

# Legal Privilege & Professional Secrecy 2020

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Miller & Chevalier Chartered

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Legal Privilege & Professional Secrecy*, which is available in print and online at [www.lexology.com/gtdt](http://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 a new chapter on Germany.

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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.

Lexology 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 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**  
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Looking back on 2019 and into 2020, the United States undoubtedly saw a decrease in the investigation and prosecution of 'white collar' and financial crimes, cases that regularly raise issues of applicable attorney-client privileges. Nonetheless, as we have highlighted in previous editions of *Legal Privilege & Professional Secrecy*, cross-border legal disputes and multilateral law enforcement investigations continue to increase. For example, the recent *Airbus* resolution involving France, the United Kingdom and the United States arguably announced the arrival of the French authorities on the world stage as financial crime enforcers. Such cross-border investigations and enforcement actions will only continue to highlight the conflicts between various privilege regimes, particularly those based on common law as opposed to a civil code.

In addition to *Airbus*, it is worth revisiting other recent investigations and prosecutions of note. 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 Volkswagen 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.

Outside of the *Cohen* case, the use of 'taint teams' in such situations has been commonplace in US law-enforcement investigations. In such instances, prosecutors who are not assigned to the underlying investigation review potentially privileged materials to decide which, if any, are subject to seizure under a search warrant. However, the days of taint teams may be numbered. In late 2019, the United States Court of Appeals for the Fourth Circuit ruled that the use of a 'taint team' to review documents during the execution of a search warrant on a lawyer's office 'inappropriately assigned judicial functions to the executive branch' and found that because the team of prosecutors on the taint team had the sole discretion to determine whether the materials were privileged or subject to production, the process was inherently unfair. For now, this ruling is limited to the jurisdiction of the Fourth Circuit and certain other factual considerations may constrain its ultimate impact. Nonetheless, the unanimous decision of the three-judge panel may serve as a clarion call to other litigants seeking to question the impartiality of 'taint teams' used to review legal records.

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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