

Attorney-Client Privilege in the Americas: Professional Secrecy of Lawyers

One of the major challenges facing the legal profession today is how to adapt and apply the concept of attorney-client privilege (or professional secrecy) in an increasingly globalised world. Rules on attorney-client privilege differ significantly from country to country. This book explores such differences within 32 jurisdictions in North, Central and South America and the Caribbean. Together with its complementary volume *Professional Secrecy of Lawyers in Europe* (2013), this book explores the creation of a common definition for attorney-client privilege that can be accepted by a wide variety of countries and international institutions. Practice and interpretation within each jurisdiction are mapped and explored, including reference to local laws, ethical rules and case law. This book is a useful resource for those working on transactions or litigation which involve several countries.

This book is the second volume in a project intended to provide an overview and better understanding of professional secrecy (also known as the attorney-client privilege) around the world. The first volume examined professional secrecy in the member states of the European Union, the member states of the European Economic Area and Switzerland.

The book is written by representatives of bar associations and law firms in the relevant countries. James R. Silkenat and Dirk Van Gerven are respectively past president of the American Bar Association and the Bar of Brussels and in this capacity are professionals who have a good knowledge of attorney-client privilege or professional secrecy, as they have been asked to solve issues and reply to queries with respect to professional secrecy during their mandate as President of the Bar.

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Frontmatter
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Attorney-Client Privilege in the Americas

Professional Secrecy of Lawyers

The Countries of North, Central and South America
and the Caribbean

Edited by

JAMES R. SILKENAT AND DIRK VAN GERVEN



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Preface

Every lawyer is bound by a duty of professional secrecy. Professional secrecy is not only a duty but also a right, to ensure that everyone receives the best legal advice and, consequently, the best legal representation, be it before or outside a court of law. Communications between lawyers and their clients benefit from the attorney-client privilege. To ensure the best advice or defense, a client must be able to speak freely to his or her lawyer, which will only be possible if the lawyer can, under no circumstances, disclose the information received from the client to the authorities or to other parties to the proceedings. If the lawyer could be forced to do so, the information could be used against the client. This fear often makes people reluctant to seek legal advice, and we all know that the worst defense is one mounted without the advice and assistance of a lawyer.

The attorney-client privilege ensures the confidentiality of discussions between lawyers and their clients so that no third party can gain access to the information exchanged. Lawyers are not entitled to disclose information provided by their clients and should never be forced to do so. The information exchanged is privileged. In general, the authorities and the courts should not be able to access information protected by the attorney-client privilege and should refuse to take privileged information into account if it is disclosed in violation of the professional secrecy rules. This is essential to ensure that everyone enjoys the same rights, is bound by the same obligations and is able to defend himself or herself adequately.

This book examines how the attorney-client privilege and professional secrecy are applied in the various jurisdictions in North, Central and South America and the Caribbean. In most (civil law) European countries, the term professional secrecy is used. In common law countries, however, this concept is known as the attorney-client privilege or legal professional privilege. In general, these terms refer to the same concept.

Lawyers and law associations are obliged to work together to make the world a better place by ensuring that all individuals can exercise their rights, including the right to assistance in understanding and defining rights and obligations. Legal assistance will be effective, however, only if clients can speak freely with their

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lawyers. This means the lawyer cannot disclose (or be obliged to disclose) information provided by the client. Because people are traveling more than ever before and engaging in international relations, they should be able to obtain legal advice (and benefit from the attorney-client privilege) anywhere in the world. Hence, a proper understanding of how professional secrecy and the attorney-client privilege operate in other countries is necessary.

It is hoped that this volume, as well as related books on other geographical regions, will help to define a common definition of professional secrecy that can be accepted by all countries and international institutions. Such a definition is indeed necessary in an increasingly globalized world, where people cross borders with increasing frequency and can be virtually present in several countries simultaneously, through electronic means. Adapting the concept of professional secrecy and attorney-client privilege to meet the realities of this new world, while safeguarding the rights of citizens, is one of the major challenges facing the legal profession.

We wish to thank Bianca Porcelli and Michele Thompson for helping us to put the different chapters in the appropriate format.

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