

Legal Privilege & Professional Secrecy 2021

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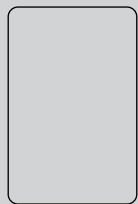
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Matthew T Reinhard and Dawn E Murphy-Johnson
Miller & Chevalier Chartered

Lexology Getting The Deal Through is delighted to publish the sixth 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.

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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 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

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Trying to make any 'year of' assessment of legal developments in 2020 seems a bit of a fool's errand. The impact of the covid-19 pandemic, which is ongoing (but seems to be improving) as of this writing, resulted in shockwaves across all industries, including the legal profession. In the United States, and around the world, much of the judicial system came to a near-complete halt in the spring of 2020, and only started to slowly resume operations as courts instituted remote or distanced proceedings and the related parties became comfortable using the technology. In many ways, there are several 'lost months' of legal developments that will presumably come bounding back when we move beyond the pandemic.

That said, 2020 was not without its developments when it comes to legal privilege law. In the United States, the debate over how prosecutors do (or do not) respect the privilege continues to rage, with prosecutors and policymakers looking to implement some standardised procedures. And, in white-collar cases, there are several challenges as to when and how executives being prosecuted can claim privilege over legal materials and advice provided to their employers.

While there was undoubtedly a 'pause' in cross-border investigations and prosecutions in 2020, we expect such matters to slowly increase in 2021 and perhaps exceed earlier levels as law enforcement plays 'catch up' post-pandemic. As such, we continue to highlight the application of legal privilege in cross-border legal disputes and multi-lateral law-enforcement investigations. In 2020, we did not see the same level of high-profile cross-border investigations that raised unique privilege questions as we did in 2019 (Airbus) or 2018 (Volkswagen). Again, we expect this is a pandemic-induced pause, not an indication of a shift in trends.

In 2019, we noted the issues surrounding the raid of the offices of the then-US President's long-time personal attorney, Michael Cohen, in connection with ongoing investigations into President Trump's dealings in New York before the 2016 presidential elections and the issues

surrounding the search and seizure of potentially privileged materials. We also highlighted a decision by the United States Court of Appeals for the Fourth Circuit, which ruled that the use of a federal '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. Fearing its ability to investigate and prosecute white-collar and financial crimes would be jeopardised if courts continued to question the procedures used by prosecutors to review potentially privileged materials, the US Department of Justice was proactive in 2020 in implementing new guidelines for such reviews, in an apparent attempt to placate an increasingly sceptical judiciary. These guidelines are discussed in the United States chapter.

Lawyers continue to find themselves in the crosshairs of international investigations and litigation – putting at risk the secrets they are professionally and legally bound to keep. This publication 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. Nevertheless, this guide is just that: a guide. Complex privilege questions should always be put to qualified local counsel.

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