MEXICO

Fernando PEREZ CORREA CAMARENA

SCGPC Abogados
Mexico City :
Torre Mural, Av. Insurgentes sur # 1605 Piso Suite 3 Col.
San José Insurgentes. C.P. 03900
MEXICO D.F.

Phone: + (52) (55) 5062-0050
Fax : + (52) (55) 5062-0051

Email: fernando.perez@solcargo.com.mx

I. DEFINITION PRESENTATION

What attorney-client privilege is and what it is not.

Mexican Law does not regulate legal privilege as a figure *per se.* In this respect, Mexican Law is clearly antiquated.

In an attempt to fill this void, Mexican legal doctrine has defined attorney-client privilege,as in most jurisdictions, as the exclusive right by means of which the disclosure of any communication between a client and his lawyer is protected. This privilege is applied, also, to any document or information given by the client to the lawyer for the main purpose of litigation, or any other legal matter.

However, the obvious consequence of the legal omission regarding attorney-client privilege is that, to understand how it works in Mexico, one has to review several sources and bodies of law.

Under Article 16 of the Mexican Constitution, communications between a "detained" person and his/her attorney are protected. In addition, all communications of an electoral, tax, commercial, civil, labor, or administrative character cannot be intervened by the government. That, however, does not mean that such communications (of a commercial, civil etc. character) cannot be offered as evidence in a trial; it only means that the government cannot tap them.

The legal profession is scarcely regulated in Mexico (to the dismay of most of its inhabitants). As any other profession, the legal profession is regulated by state law. In this respect, the Constitution says that state law shall establish "which professions need title to be performed, the conditions to obtain the title and the authority with power to issue them." This constitutional provision has been interpreted that the only limitation in connection with professions (in general) is a requirement of a title, usually issued by a university.

Thus, under the Constitution, the State cannot require membership to a bar, additional examinations, continuous education, or anything in addition to having a title. This has the perverse consequence that once a person has a successfully finished law school he/she has the right for life (barring committing a crime that would suspend this right) to practice law.

The "Law of Professions" as it usually called in every state, including the Federal District, limits itself to list the professions that need a "title" to be practiced (professions not listed can be practiced by anyone, which has had the negative consequence that new professions that haven't been listed by the legislature are practiced freely, without any limits or controls).

In Mexico, the Law of Professions does not even list the professions that need a title, stating only that specialized laws dealing with specific economic activities shall determine whether a profession needs a title or not.

The main problem of the attorney-client privilege in Mexico is that the laws generally establish obligations for the attorney rather than "rights" of the client and his/her attorney. Thus, the privilege has to be derived from such obligations indirectly: it is argued that, since an attorney has the obligation not to reveal secrets of his/her client, therefore, he cannot be compelled to testify against him/her, under the general principle that one cannot be forced by an authority to commit a crime.

A study of the legal framework of each State is beyond the scope —and space allowed— of this work, so I will use the example of the Federal District (home in any case of most of the cases in Mexico); I will add the exception of the Federal Code of Criminal Procedure which was amended in June 2006 to exempt from the obligation to testify in federal criminal cases, among others, the attorneys that have confidential information regarding the matter at hand.

Even though, Mexican Law does not set a definition for "*legal privilege*" it can be said that there are two types of privilege:

Legal advice privilege:

Which protects disclosure of confidential communications between a legal advisor and his client provided that they are confidential and in relation to seeking or giving legal advice. Legal advice privilege will apply whenever a legal advisor is advising in a legal context.

Litigation privilege:

Protects all communications produced for the sole purpose of the litigation where litigation proceedings are contemplated or are in progress, including communications between the legal advisor and his client and also the legal advisor or client with an independent third party.

2. SOURCES

From which sources is the legal privilege derived in the Federal District?

It is derived from the Constitution, the Civil Code, and the Code of Civil Procedures.

Unauthorized disclosure of professional secrets and confidential information is regulated by the Law of Professions and the Criminal Code.

There are other sources for legal privilege such as the ethic codes of voluntary bars, colleges, and associations, but these rules are mandatory only for the bar/association

members and does not have any binding effects in legal practice (as mentioned before, membership to a bar or association cannot be mandated by law, so all theses associations are voluntary).

The Legal Advice Privilege is derived, in most of the cases, from private non-disclosure agreements entered by lawyer and his client in relation to a specific legal matter or advice, but Mexican Law does not set as an obligation for a lawyer to enter an agreement of this type.

2.1. Relevant statutes

- *Federal Constitution*

As mentioned above, the Federal Constitution protects communications between a "detained" and his/her lawyer, meaning that this specific protection only applies in criminal cases, and only after the client has been detained.

- *Civil Code*

Litigation Privilege arises from a verbal or written agreement called *Mandato Judicial* (power of attorney) whereby a person called *mandante* (principal) empowers another person called *mandatario* (attorney, agent) to take one or more legal actions for his or her account, with or without consideration. All lawful acts for which Mexican Law does not require the personal participation of the interested party may be subject to an agency agreement.

Powers of attorney must be granted before a notary public (*public deed*) or before the judge accompanied by two witnesses to identify principal (this form is very rarely used).

According to Article 2590, the attorney who reveals or discloses to the opposite party during the litigation the secrets of his client, or provides a document, information, or data that can inflict injury to his client, will be responsible for the total damages and loss caused by this misconduct, being as well responsible under the Criminal Code. This provision has been used to refuse to testify against attorney's client.

- *Code of Civil Procedures*

According to Article 288 of the Code of Civil Procedures for the Federal District, third parties are obliged, at all times, to provide assistance to the courts in the investigation of the truth. Accordingly, they must promptly display documents and things that they have in their possession, when it is required. The courts have the power and duty to compel third parties, for the most effective constraints, to ensure that they comply with this obligation.

However, the ascendants, descendants, spouse, and people who should keep a professional secret, are exempt of the said requirement.

- *Law of Professions*

Under article 36 *all* professionals must keep confidential all secrets revealed to them by their client (again, an obligation, not a privilege) with the exception of information that must be revealed as mandated by "respective laws". This of course does not add much to the privilege since, arguably, any law might rightfully establish an obligation to reveal secrets and thus trump article 36.

- *Criminal Code*

Unauthorized disclosure of secrets - any secret - acquired by any person (anyone) or revealed to him/her is crime (Article 213). If the disclosure is made by a professional the punishment is magnified. Obviously, attorneys are included.

- *Federal Code of Criminal Procedure*

In spite of not being applicable in local Federal District courts, it is worth mentioning that in June 2006, the Federal Code of Criminal Procedure was amended to include article 243-BIS, which exempts, among others, lawyers from the obligation to testify in federal criminal cases whenever the lawyer intervened in the matter and has confidential information that must be kept secret. If the lawyer wants to testify he/she must obtain a waiver from the client.

Also article 278 B states that all the communications between individuals may be provided voluntarily at the preliminary investigation or the criminal proceedings, when they have been obtained directly by one of the participants in the same. Communications obtained from one of the participants with the support of the authority, may also be provided to the inquirer or to process, provided the record in an irrefutable manner the request of the particular support for the authority.

In any case the public prosecutor or the judge will not admit communications which violate the duty of confidentiality required by law, nor will the authority provide the support referred to in the preceding paragraph when that duty is violated. It does not violate the duty of confidentiality when it becomes available with the express consent of the person who keeps the duty.

- *Voluntary sources*

As mentioned before, voluntary organizations issue codes or regulations dealing with the attorney-client privilege. The best known of them is the Ethics Code of the Mexican Bar Association.

Under article 10 of this code, the protection of secrets is both a duty and a right of any attorney, and remains even if the legal services are no longer provided, and if the lawyer receives a citation from the court to testify against his former or actual client, he must refuse to answer any question aimed to disclosure of confidential information.

The scope of the obligation to protect any secret includes the obligation of the counsel to keep secrets made by third parties to the counsel because of his charge and those which are a consequence of talks for a failed transaction.

The secrecy also covers the confidences of my colleagues since counsel should not get involved without consent from the client who entrusted him with a secret, in any matter on the occasion of which might be in the case of disclosure or take advantage of such secret.

The extinction of such obligation occurs when the lawyer is a subject of a serious and unjustified attack of his client. When a client informs his lawyer the intention of committing an offence, such confidence will not be covered by professional secrecy and the lawyer shall make the necessary disclosures to prevent any criminal act or protect people in danger.

As we mentioned before, the rules contained in this kind of Ethical Codes are not enforceable nor mandatory, and they have binding effects only for the members of said bar, therefore, the sanctions are, in example, the expulsion from the bar, the suspension of rights, etcetera.

2.2. Relevant Case Law

There is scarce legal precedent regarding this matter.

The most relevant precedent (P./J. 74/2001) was issued by the Supreme Court of Justice in 2001. In its ruling the Court determined the evidence offered in an *Amparo Indirecto* trial (constitutional action alleging the violation of rights committed by a court of law or government) that requires a revelation of a professional secret is considered damaging, and thus, its admission can be challenged.

3. SCOPE/LIMITS

Can the attorney-client privilege be waived? If Yes, how?
Is the privilege limited? Which documents/information are involved?

Since the privilege is not a “right” the attorney-client litigation privilege cannot be “waived” (technically speaking), as we are dealing with a duty of the lawyer to remain silent. Obviously, however, if the information has been made public by client, the lawyer cannot commit a crime of revelation of secrets, at least as far as the concrete piece of information concerned in the matter. My point here is that, in the absence of clear guidelines and rules regarding the attorney-client privilege, there is no rule, like in other jurisdictions, that once a client reveals anything then the whole subject matter becomes free of the privilege. In this respect, there is simply no rule in Mexico or any court precedent.

Consequently, the client can make all revelations he/she wants, but the duty remains for the attorney. Client may *authorize* disclosure by the lawyer. This is particularly evident in federal criminal cases, as a result of the 2006 amendment of the Code of Criminal Procedure, as discussed earlier.

The duty is limited to the documentation, information, data, and communications *provided to* the lawyer. For the non-disclosure private agreements entered by lawyers/clients, the scope of the legal privilege may be agreed by the parties, but it should be congruent with the limits settled in the Federal Civil Code.

3.1. Between lawyers

Is the correspondence between lawyers protected?

This is not regulated *per se*. As in the other areas we have seen, the protection extends only as far as the obligations or duties of the attorneys go. Thus, absent a specific agreement, communications made during negotiations with the other party are not protected.

3.2. Third parties

As mentioned, all persons are bound by the duty not to reveal secrets and thus fall under the coverage of article 213 of the Criminal Code.

4. IN-HOUSE LAWYERS

Which regulations regarding legal privilege apply to in-house lawyers?

They have the same duties as those applicable to outside counsel.

5. PROSPECTIVE

Does professional secrecy tends to be more or less protected?

Professional secrecy tends to be more protected (admittedly, we are parting from a very low and gray base); hopefully one day the privilege will be regulated as such (a right to have communications protected, rather than only a duty not to reveal).