Legal Privilege & Professional Secrecy

Contributing editors
Matthew T Reinhard and Dawn E Murphy-Johnson

2016
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Croatia

Ana Tudorić Mejošek, Marina Kovač Krka, Daniela Marasović and Lea Mužić
Divjak Topic Bahtijarevic

Domestic legislation

1 Identify and describe your jurisdiction’s laws, regulations, professional rules and doctrines that protect communications between an attorney and a client from disclosure.

Protection of attorney–client communications in Croatia is regulated by the Legal Profession Act (Official Gazette No. 9/1994 as amended), the Criminal Procedure Act (Official Gazette No. 152/2008 as amended), the Attorneys’ Code of Ethics and the Civil Procedure Act (Official Gazette No. 4/1977 as amended).

The Civil Procedure Act stipulates that the witness (client’s proxy or attorney) may refuse to testify about facts learned from the client in the capacity of proxy or attorney.

The Legal Profession Act and the Attorneys’ Code of Ethics provide that everything the client tells the attorney, or anything the attorney finds out in some other way while representing the client, should be classified as being under the attorney–client privilege.

The Criminal Procedure Act provides that a defendant's attorney cannot be examined as a witness unless the defendant requests so. Further, it stipulates that attorneys are exempted from the obligation to testify about matters learned from the defendant. However, this exemption does not apply, and they will be obliged to testify, in criminal proceedings related to protection of children (apart from the defendant’s attorney, who will be exempted from the obligation to testify).

2 Describe any relevant differences in your jurisdiction between the status of private practitioners and in-house counsel, in terms of protections for attorney–client communications.

The attorney–client privilege described above is based on the Legal Profession Act and The Attorneys’ Code of Ethics, and is applicable only to lawyers in private practice. In other words, under Croatian law, in-house counsels are not attorneys and consequently law referring to attorneys is not applicable to them. However, in-house counsel may act in a capacity as the employer’s attorney is protected in the sense that the in-house counsel can refuse to testify as witnesses in civil proceedings regarding that information.

As an exception, advice given by in-house lawyers to their employers will be disclosable in an EU Competition Commission or Croatian Competition Agency investigation, as such advice will not be protected by privilege.

3 Identify and describe your jurisdiction’s laws, regulations, professional rules and doctrines that provide protection from disclosure of tangible material created in anticipation of litigation.

Any confidential information that becomes known by an attorney, from his or her client or otherwise, while rendering legal assistance, particularly during representation (litigation) or defence, is protected. The attorney must conscientiously determine what the client deems to be confidential and wishes to be protected by the legal privilege.

The work product refers to all documents, recordings, electronic documents, pictures and other materials in which information of any description is recorded, as well as client deposits, that are kept in the attorney’s office.

4 Identify and summarise recent landmark decisions involving attorney–client communications and work product.

Most of the case law from the past few years refers to the exemption of attorneys to testify in court. However, one of the most recent decisions (from 2014) refers to the question of client–attorney privilege disclosure. The attorney filed a claim to the Constitutional Court in Croatia, claiming the responsibility of the tax authorities for disclosure of the client–attorney privilege. In other words, in order to determine whether the attorney complied with its tax duties, the tax authorities conducted a search of the attorney’s office. The attorney claimed that the authorities gained insight of confidential documentation, and thus the attorney–client privilege was violated. The Constitutional Court decided that there was no violation of the attorney–client privilege since the tax authority had not gained insight into the merits of the cases or files that contained the documentation required for the assessment of the tax liability.

Attorney–client communications

5 Describe the elements necessary to confer protection over attorney–client communications.

The Legal Profession Act defines the attorney–client privilege as everything the client told to the attorney or what attorney found out by itself in some other way while representing the client. Consequently, not all attorney–client communication falls under the attorney–client privilege, but only that which has the purpose of representing client’s interests. Attorney–client privilege is also extended to other persons working or who have worked in the attorney’s office.

Croatian law does not explicitly provide that certain third parties are not allowed to participate in the communication, or that they are obliged to keep the content learned as confidential, although the Criminal Act provides that non-authorised disclosure of a business secret is a criminal offence. Therefore, other third parties that have participated in the attorney–client communication should keep its content in secrecy. This may also be ensured by execution of a confidentiality agreement or a statement given by such third party.

6 Describe any limitations on the contexts in which the protections for attorney–client communications are recognised.

Attorney–client privilege applies not just to the period of providing a legal assistance to the client but also afterwards, for as long as its disclosure could cause damage to the client. An attorney not complying with the stated obligation may face a disciplinary proceeding.

7 In your jurisdiction, do the protections for attorney–client communications belong to the client, or is secrecy a duty incumbent on the attorney?

Secrecy is a statutory obligation of the attorney, although the client may release the attorney from that obligation. It is up to the attorney to conscientiously assess what the client wants to keep in secrecy. In other words, the attorney may reveal a secrecy only:

- upon the explicit consent given by the client;
- if it is necessary for the defence of the attorney; or
- if it is necessary to justify the attorney’s decision on cancellation of the client’s defence.

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8 To what extent are the facts communicated between an attorney and a client protected, as opposed to the attorney–client communication itself?

See question 7. In order to preserve the client’s secret, the attorney must not disclose any information about the matters entrusted to him or her, even upon the completion of the case.

9 In what circumstances do communications with agents of the attorney or agents of the client fall within the scope of the protections for attorney–client communications?

As previously stated, attorney–client privilege applies to all persons who have worked or still work at the attorney’s office. Moreover, it is the attorney’s obligation to expressly state in the employment contract that the violation of the attorney–client privilege is a ground for termination of employment. The attorney and his or her employees are obliged to keep all facts related to providing legal assistance to the client as confidential.

Even communication that the attorney has with third parties that relates to providing legal assistance to the client is encompassed by the attorney–client privilege.

Since protection is awarded not only to information acquired by the attorney directly from the client, but also from other sources, information acquired from others that becomes known to the attorney in the course of rendering any kind of legal assistance to the client would be protected.

10 Can a corporation avail itself of the protections for attorney–client communications? Who controls the protections on behalf of the corporation?

Attorney–client privilege applies to individual clients and clients that are legal entities (ie, natural persons and corporations). It is up to the corporation to determine the person in charge of controlling protection for attorney–client communications.

11 Do the protections for attorney–client communications extend to communications between employees and outside counsel?

The protections awarded to attorney–client communications are granted extensively due to the fact that the provisions of the Legal Profession Act, defining the attorney–client privilege, also designate any information the attorney learned in the representation of a client as attorney–client privilege, thus granting it protection. In this regard, communication between employees and outside counsel, if related to the attorney’s representation of the client, would be protected as attorney–client privilege.

12 Do the protections for attorney–client communications extend to communications between employees and in-house counsel?

The protection provided to the attorney–client communication as attorney–client privilege pursuant to the Croatian Attorneys’ Code of Ethics (Official Gazette No. 64-1999/2007 as amended) and the Legal Profession Act is applicable only to lawyers in private practice. Nevertheless, in-house counsel may act as an attorney pursuant to a power of attorney granted by the client or employer, in which event the information they acquire, as well as the pertaining communication, would be protected depending on the law provisions governing certain procedures (civil, criminal proceedings, etc) and the protection awarded by such provisions to the attorney–client communications.

Additionally, in the event of an EU Competition Commission or Croatian Competition Agency investigation, the protection granted to the attorney–client communication would not apply to any communication with the in-house counsel.

13 To what degree do the protections for attorney–client communications extend to communications between counsel for the company and former employees?

The extent of the protections for attorney–client communications will depend on the internal rules and bylaws of the company (those governing the internal sharing of attorney–client communications among its employees) and the stipulations contained in the agreements executed between the client and its employees (a possible confidentiality clause, executed non-disclosure agreement, etc).

14 Who may waive the protections for attorney–client communications?

Pursuant to the Croatian Attorneys’ Code of Ethics, both the attorney and the client may waive the protections for attorney–client communications (ie, attorney–client privilege).

A client may waive the protections for attorney–client privilege by giving express and clear consent for disclosure of information, while the attorney may waive the protections for attorney–client privilege in the event such disclosure is necessary for the attorney’s defence or if it is necessary for the justification of the attorney’s decision to withdraw from defending his or her client.

15 What actions constitute waiver of the protections for attorney–client communications?

See question 14.

16 Under what circumstances is an inadvertent disclosure of an attorney–client communication excused?

Not applicable.

17 Can attorney–client communications be shared among employees of an entity, without waiving the protections?

In the event of the client being a legal entity, the practices regarding sharing attorney–client communications are usually determined by the client’s internal rules and by-laws. It is useful to mark the attorney–client communications as ‘privileged and confidential’ and to incorporate a confidentiality clause in agreements executed between a client and its employees.

18 Describe your jurisdiction’s main exceptions to the protections for attorney–client communications.

The Legal Profession Act provides that a search may be conducted in an attorney’s or lawyer’s office pursuant to the provisions of the applicable Criminal Procedure Act. Such search is limited to those documents and matters related to the criminal offence that was grounds for the initiation of the said procedure.

Additionally, see question 19.

19 Can the protections for attorney–client communications be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

The law provisions governing civil proceedings (Civil Procedure Act, Official Gazette No. 53/1991 as amended) provide that attorney–client communications under attorney–client privilege may be disclosed by an attorney while testifying as witness in the course of a civil proceeding.

The law provisions governing criminal proceedings (Criminal Procedure Act, Official Gazette No. 152/2008 as amended) prescribe that the attorney of the defendant may not testify as witness unless the client or defendant requests it. Also, in criminal proceedings, attorneys are released from the duty to testify with regard to the information they learned while performing their profession.

Exceptions are provided with regard to certain criminal offences (eg, those for the protection of children). In relation to such criminal offences a witness may not withhold his or her testimony.

20 In what circumstances are foreign protections for attorney–client communications recognised in your jurisdiction?

Foreign protections for attorney–client communications are not recognised in Croatia, but protection may be granted under certain circumstances pursuant to Croatian law.

Furthermore, when practising across borders, a lawyer from another member state may be bound to comply with the professional rules of the host member state in which event the protections granted by Croatian law would apply.

21 Describe the best practices in your jurisdiction that aim to ensure that protections for attorney–client communications are maintained.

All communications in relation to obtaining legal advice should be marked as ‘privileged and confidential’. Although labelling communications in this way is not determinative of a communication’s privileged status, it makes
it clearer to the recipient and may also be helpful in an argument that the communication is privileged.

If privileged advice is discussed with or disclosed to third parties, ensure this is done under a confidentiality agreement and try not to document the discussions. If that cannot be avoided, these additional documents should also be marked as 'privileged and confidential'.

Circulation and dissemination of legal advice should be limited. This is especially important in relation to sending and forwarding emails as the use of emails enables documents to be circulated more widely than intended. All emails should be reviewed before being forwarded, and if they contain legal advice or communication with attorneys, they should be sent as separate emails and only on a need-to-know basis.

**Work product**

22 Describe the elements necessary to confer protection over work product.

Any confidential information that became known to an attorney, from his or her client or otherwise, while rendering legal assistance, particularly during representation (litigation) or defence, is protected. The attorney must conscientiously determine what the client deems to be confidential and wishes to be protected by the legal privilege.

23 Describe any limitations on the contexts in which the protections for work product are recognised.

There are no contexts in which information that becomes known to the attorney in the course of his or her professional activity would not be protected.

24 Who may invoke the protections for work product?

Lawyers in private practice and in-house counsel, when acting in their capacity as attorneys (see answers 12 and 13).

25 Is greater protection given to certain types of work product?

No. See question 22. Protection is given to all information that became known to the attorney in the course of his or her professional activity, both from the client and otherwise.

26 Is work product created by, or at the direction of, in-house counsel protected?

The attorney–client privilege is based on the Legal Profession Act and the Attorneys’ Code of Ethics, and is applicable only to lawyers in private practice. However, in-house counsel may act in a capacity as attorneys, meaning they may be authorised by a power of attorney to represent their employer. The information they acquire from their employer while acting in their capacity as the employer’s attorney is protected in the sense that the in-house counsel can refuse to testify as witnesses in civil proceedings regarding that information.

As an exception, the advice given by in-house lawyers to their employers will be disclosable in an EU Competition Commission or Croatian Competition Agency investigation, as such advice will not be protected by privilege.

27 In what circumstances do materials created by others, at the direction of an attorney or at the direction of a client, fall within the scope of the protections for work product?

Since protection is awarded not only to information acquired by the attorney directly from the client, but also from other sources, materials created by others that become known to the attorney in the course of rendering any kind of legal assistance to the client would be protected.

28 Can a third party overcome the protections for work product?

No.

29 Who may waive the protections for work product?

The client may waive the protections by giving express and clear consent to the attorney for the disclosure of protected work product. The attorney may disclose the protected work product if disclosure is necessary for the defence of the attorney or for the justification of the attorney’s decision to withdraw from defending his or her client.

30 What actions constitute waiver of the protections for work product?

See question 29.

31 May clients demand their attorney’s files relating to their representation? Does that waive the protections for work product?

The client may at any time request the files from his or her attorney. In addition, pursuant to the Croatian Legal Profession Act, the attorney shall return to the client, upon his or her request, all the client’s files and documents, upon the cancellation of representation. Furthermore, in accordance with the Croatian Attorneys’ Code of Ethics, an attorney shall maintain an orderly and timely record of all cases, develop a storage system and accurate files of all dates and hearings, so that both the attorney and the client are always able to check the files for any data on a particular case.

Release of the files to the client does not waive the protection for work product. In accordance with the Croatian Attorneys’ Code of Ethics, waiver of the attorney’s secret is permitted only with the clear consent of the client.
32 Can work product be disclosed to government authorities, without waiving the relevant protections? How?

It is not permitted to disclose attorney’s work product to government authorities without waiving the relevant protections. Pursuant to the Croatian Civil Procedure Act, until the competent authority releases a person from his or her obligation, they would be violating a legally binding confidentiality obligation by giving a statement.

33 Under what circumstances is an inadvertent disclosure of work product excused?

Not applicable.

34 Describe your jurisdiction’s main exceptions to the protections for work product.

Croatian law does not differentiate work product from attorney–client communication. See questions 18 and 19.

35 Can the protections for work product be overcome by any criminal or civil proceedings where waiver has not otherwise occurred?

Croatian law does not differentiate work product from attorney–client communication. See question 19.

36 In what circumstances are foreign protections for work product recognised in your jurisdiction?

Foreign protections for work product are not recognised in our jurisdiction, but protection may be granted by Croatian law under certain circumstances pursuant to Croatian law.

Furthermore, when practising across borders, a lawyer from another member state may be bound to comply with the professional rules of the host member state in which event the protections granted by Croatian law would apply.

Common issues

37 Who determines whether attorney–client communications or work product are protected from disclosure?

The attorney. Pursuant to the Croatian Attorneys’ Code of Ethics, an attorney must conscientiously determine what the client wants to be preserved as the attorney’s secret.

38 Can attorney–client communications or work product be shared among clients with a common interest who are represented by separate attorneys, without waiving the protections? How may the protections be preserved or waived?

Not applicable.

39 Can attorney–client communications or work product be disclosed to government authorities without waiving the protections? How?

No, attorney–client communication or work product cannot be disclosed to government authorities without waiving the protections. See question 32.

Other privileges or protections

40 Are there other recognised privileges or protections in your jurisdiction that permit attorneys and clients to maintain the confidentiality of communications or work product?

There are no other privileges.
Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
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Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
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