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CLIENT ALERT

New Judicial Standard on Attorney-Client Privilege in Antitrust Investigations

KEY TAKEAWAYS

(a) The new judicial standard confirms that not every communication involving a lawyer is automatically protected by attorney-client privilege.

(b) Protection depends on the existence of genuine legal advice or consultation and on the lawyer providing independent legal judgment with functional autonomy.

(c) The Second Specialized Collegiate Court rejected the view that a lawyer's status as in-house or external counsel, standing alone, automatically determines whether a communication is protected by privilege.

(d) The analysis must be conducted on a case-by-case basis, considering the content, context and purpose of each communication.

(e) For companies and legal departments, the new standard reinforces the importance of clearly distinguishing and documenting communications involving legal advice from those that are operational, commercial, administrative or managerial in nature.

On August 7, 2026, Mexico's Federal Judicial Weekly (*Semanario Judicial de la Federación*) published a new non-binding judicial precedent (*tesis aislada*) issued by the Second Collegiate Court Specialized in Competition, Broadcasting and Telecommunications ("**Second Court**"), clarifying the requirements for communications between an economic agent and its lawyers to be protected from disclosure in an investigation by the competition authority.

The new standard starts from an important premise: a lawyer's participation in a communication is not, by itself, sufficient for privilege to apply. There must be a genuine request for or provision of legal advice, and the lawyer must exercise independent legal judgment with functional autonomy within a client-lawyer relationship understood in functional terms.

The decision underlying the new precedent, however, addresses an additional question of particular importance to in-house legal departments and external counsel: does an employment relationship between a lawyer and the company, by itself, preclude privilege?

BACKGROUND

In 2018, the First Specialized Collegiate Court ("**First Court**") recognized that the confidentiality of attorney-client communications is essential to effective legal advice and is linked to the rights of defense and privacy. It also held that privileged information improperly obtained by the authority must be excluded from the investigation and may not be used.

The new standard arose from an inspection conducted by the former Federal Economic Competition Commission ("**COFECE**"), during which various electronic communications were obtained. The company requested that certain information be excluded on the grounds that it constituted privileged legal advice. The Review Committee protected some documents but rejected others, including numerous internal communications, finding that the company had failed to establish that they constituted legal advice provided in the context of independent professional services..

IN-HOUSE OR EXTERNAL COUNSEL?

In deciding the case, the Second Court considered two international approaches to privilege. On the one hand, the European approach developed in *Akzo Nobel Chemicals Ltd v. Commission*, which links privilege in competition matters to the independence of external counsel. On the other, the U.S. approach stemming from *Upjohn Co. v. United States*, which recognizes protection for communications with in-house counsel where genuine legal advice, confidentiality and professional autonomy are present.

In this context, "independence" does not necessarily mean the absence of an employment relationship, but rather the functional autonomy with which the lawyer provides legal advice in the specific communication. The Second Court did not adopt either model wholesale. Instead, it held that the analysis cannot be reduced to whether counsel is "in-house" or "external" and that, for purposes of privilege, independence should be understood in functional terms: the lawyer's actual ability to exercise autonomous legal judgment in response to the legal issue presented.

THE STANDARD ESTABLISHED BY THE SECOND COURT

According to the decision, privilege does not arise merely because a lawyer participates in a communication.

The decision indicates that the context, content and purpose of each communication must be assessed to determine whether:

(a) There is a genuine request for or provision of legal advice;

(b) The lawyer is effectively acting as legal counsel;

(c) The legal judgment is provided with functional autonomy; and

(d) There is a reasonable expectation of confidentiality within an attorney-client relationship.

Accordingly, communications that are predominantly administrative, commercial, strategic, operational or managerial in nature may fall outside the scope of privilege, even where a lawyer participates. The lawyer's position within the organizational structure may also be relevant in assessing functional autonomy, particularly where the lawyer participates as an ordinary part of the reporting hierarchy or performs management functions.

The Second Court rejected, however, the notion that these circumstances automatically exclude privilege. An employment relationship is a contextual factor; the key remains whether, with respect to each communication, there is a genuine legal advisory relationship and whether the lawyer acts with functional autonomy.

PRACTICAL IMPLICATIONS

The new standard makes the way companies structure and document their legal communications particularly important. In-house legal departments should not assume that all communications will be protected merely because lawyers are involved. Legal functions should be clearly distinguished from those relating to operations, administration or commercial strategy.

In addition, a party seeking protection will need to establish the legal nature of the communications on an individualized basis. The mere involvement of a lawyer, or labeling a document as "privileged," is not sufficient.

Both in-house and external counsel should therefore seek to ensure that requests for legal advice, their purpose and the capacity in which the lawyer is acting can be clearly identified, particularly in matters that may be subject to review by competition authorities.

The new precedent does not establish a binary rule between in-house and external counsel. The central question is whether, in each communication, genuine legal advice was provided with functional autonomy. The employment relationship forms part of that analysis, but does not determine the outcome by itself.

OUR ANTITRUST PRACTICE

Nader Hayaux Goebel advises clients on all aspects of Mexican competition law, including merger control, investigations into anticompetitive conduct, special proceedings, compliance strategies, and the assessment of competition risks arising from commercial and regulatory decisions. Where a matter has implications in other jurisdictions, we work closely with foreign counsel to integrate the Mexican perspective into a coherent and aligned global strategy.