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"Privileged" Information for the World Citizen When Communicating with Tax Attorneys in Multiple Jurisdictions

By:
Raúl Villarreal Garza | 619.525.3874 | raul.villarrealgarza@procopio.com
Eric D. Swenson | 619.515.3235 | eric.swenson@procopio.com
Laura Benini Candido | laura@ssplaw.com.br

*Globalization has become a constant reality; capital, income, and individuals flow across borders every split second of every day and often require tax advice from attorneys in multiple jurisdictions. This article will: (i) analyze the general rules protecting confidential information provided by clients to their attorneys for the purpose of obtaining tax advice; (ii) discuss the reasons why attorneys are generally precluded from disclosing such information to tax authorities in the course of a tax audit; and (iii) provide a brief comparison of the privileges that may be asserted in the U.S., Mexico, or Brazil (together the "**Three Jurisdictions**") when tax authorities request certain confidential information.*

I. Constitutional Background

The Fourth Amendment to the U.S. Constitution, Article Sixteen of the Mexican Constitution, and Article 5 of the Brazilian Constitution, provide for a right against unreasonable searches and seizures by their respective government. These provisions have been interpreted by the Supreme Courts of such governments on multiple occasions, and the same basic principles apply to each.

Except in exigent circumstances, if the U.S. government intends to conduct a search in someone's home, the U.S. Constitution requires a judicial search warrant that must meet the elements of "particularity" and "specificity."[1]

Similarly, the Mexican and Brazilian governments require a search warrant issued by a competent authority. The search warrant itself must specify the statute in which the governmental authority bases its power, and the justification as to the application of such statute to the particular case.[2, 3]

In the event that the above formalities are not satisfied, certain evidence that is secured during the course of a governmental investigation may be excluded from evidence under the U.S. "Fruit of the Poisonous Tree Doctrine." Mexican and Brazilian law generally follows a similar principle.

II. Introduction – The Government's Need for Information vs. A Taxpayer's Right of Privacy

The principle of self-assessment stands for the proposition that the taxpayer, and not the tax authorities, will determine the taxpayer's own tax liability. This notion is applicable for the determination of income tax in each of the Three Jurisdictions. In order for a tax system with a self-assessment mechanism in place to properly function, tax authorities must have the ability to request certain information from taxpayers. In fact, in order for tax authorities to determine the correctness and accuracy of the items shown on a tax return, they must be vested with certain powers. In short, the government should be able to conduct a tax audit, including requesting information, in order to ensure the compliance of the taxpayer with the tax laws.

[1] The Fourth Amendment to the U.S. Constitution.
[2] Article 243 of the Brazilian Code of Criminal Procedure.
[3] Article 14 of the Mexican Constitution.

The power of a government to ensure the integrity of its public finances by virtue of conducting tax audits naturally clashes with the taxpayer's right of privacy which is constitutionally protected in each of the Three Jurisdictions. Consequently, the government power to ensure compliance with tax obligations must naturally be subject to limits.

This Article will explore one of these limits recognized in the U.S., Mexico, and Brazilian legal systems –the confidentiality of certain communications made in the context of obtaining tax advice.

III. The Basics of the Privileged Communications

A. United States

Generally, each state in the United States has independent bodies of laws which regulate confidential privileges. Notwithstanding "[b]ecause controversies with the IRS involve federal law, privilege issues in these cases are resolved under federal law. . .."[4]

In the United States, there are two concepts that are often misunderstood: (i) the attorney's duty of confidentiality; and (ii) the attorney-client privilege.

1. The Duty of Confidentiality – An Ethical Rule

The duty of confidentiality is an ethical rule that is encompassed in the Rules of Professional Responsibility in the state in which the attorney is admitted to practice law.[5] This ethical duty generally requires the attorney to keep in confidence everything that he or she learns related to the representation of the client. This duty is broader than the attorney-client privilege.

An attorney that discloses privileged information to third parties may be subject to discipline by the bar in which he or she is admitted to practice. The discipline could ultimately amount to disbarment to practice law, and/or the right to practice before the tax authorities. Additionally, the attorney may be subject to a claim of civil liability by their client.

2. Attorney-Client Privilege – An Evidentiary Rule

In contrast to the ethical duty of confidentiality, the attorney-client privilege is a rule of evidence that, generally, disallows an attorney from disclosing information provided to the attorney by the client. The holder of the privilege is the client and not the attorney. In other words, if the attorney-client privilege applies and is not waived by the client, the attorney cannot disclose the privileged information without being subject to discipline from the bar, potential civil liability, or both.

There are a number of requirements for the attorney-client privilege to apply which can be summarized as follows:[6]

1. The assertion of the privilege must be made by the client;

2. The person to whom the communication was made must be an attorney acting in that capacity at the time of the communication;

3. The communication must have been made in confidence;

4. The purpose of the communication must be to obtain either legal advice or assistance in a legal proceeding; and

5. The privilege must not have been waived (by the client).

[4] Lederan Leandra, Mazza Stephen. Tax Controversies: Practice and Procedure, 132 (Lexis Nexis ed., 2009).
[5] California Rules of Professional Conduct, Rule 3-100 (2004).
[6] United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3rd Cir. 1990).

In the field of tax law "[d]etermining the tax consequences of a particular transaction is rooted entirely in the law... [Therefore,] [c]ommunications offering tax advice or discussing tax planning… are 'legal' communications" which are generally protected by the privilege.[7]

3. Tax Practitioner (Accountant-Client) Privilege[8]

Prior to the enactment of the Federally Authorized Tax Practitioner privilege (the "accountant-client privilege"),[9] none of the communications between an accountant and their clients were privileged communications before the Internal Revenue Service ("IRS"). As a consequence, every communication, written or otherwise, had to be disclosed to the IRS without exception.

In contrast with the attorney-client privilege that may be absolute in certain circumstances, the accountant-client privilege is very limited in scope because it does not apply to: (i) criminal matters; (ii) non-tax matters or proceedings; (iii) state proceedings; (iv) certain written communications relating to tax shelters; and (v) the preparation of a tax return.

4. The Kovel Letter Arrangement

A taxpayer must make sure that the confidential communications with the taxpayer's advisors are privileged. As noted above, the accountant-client privilege cannot be asserted in criminal cases. Simply put; all of the information, written or otherwise, exchanged with a non-attorney in a criminal scenario (or civil) could be subject to compelled disclosure by the tax authorities and courts.

The Kovel case stands for the proposition that communications between a client (or an attorney) and an accountant could be covered under the attorney-client privilege provided that the attorney directly retains the services of the accountant for purposes of rendering legal advice.[10]

In Kovel, the Court in fact recognized that it was creating an arbitrary distinction between a case where a client communicates first with his accountant (and no privilege exists), versus where the client first communicates with her attorney and the attorney retains an accountant (where the privilege may exist).

In Kovel, the IRS was trying to obtain certain information from an accountant (Kovel) that was an employee of a law firm. The government recognized that "the privilege covers communications to non-Attorney employees with a 'menial or ministerial' responsibilities that involves communications to an attorney." Nevertheless, the government asserted that the client's communications involving the accountant should not be included in the scope of the privilege.

The court reasoned that the privilege could not be exclusively applied to those employees with 'menial or ministerial responsibilities' and concluded that "what is vital to the privilege is that communication be made in confidence for the purpose of obtaining legal advice from the Attorney. If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the Attorney's, no privilege exists."[11]

Based on the above, when the circumstances warrant it, tax attorneys prepare a letter (known as a Kovel letter) addressed to the accountants. In this letter, the attorney explains to the accountant that all of the work performed by the accountant is done for the purpose of aiding the attorney in rendering the attorney's professional legal advice. Some attorneys require accountants to label every communication as "Attorney-Client Privileged" or "Property of Attorney X, Y, Z = ZZ" in order to prevent inadvertent disclosures by the accountant.

Generally, accountant's work papers prepared at the request of an attorney for the determination of certain matters should be protected by the attorney-client privilege. Nevertheless, the privilege is waived when the work papers are used by the accountant to prepare and file the tax return.[12]

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[7] United States v. Chevron Texaco Corp, 241 F. Supp. 2d 1065, 1076 (N.S. Cal 2002) cited in *Lederan*, Footnote #1.
[8] See IRC § 7525.
[9] The "Federally Authorized Tax Practitioner Privilege" was enacted by the IRS Restructuring Reform Act of 1998.
[10] United States v. Kovel, 296 F.2d 918 (2nd Cir. 1961).
[11] See Olender v. United States, 210 F.2d 795, 805-806 (9th Cir. 1954).
[12] U.S. v. Cote, 326 F. Supp. 142 (Dist. Ct. Minn. 1971), affirmed, 456 F.2d 142 (8th Cir. 1972).

In summary, multiple variables should be analyzed in a particular case, but the general idea in a Kovel arrangement is that communications made with an accountant should generally be covered by the attorney-client privilege if the accounting services are necessary for adequate legal representation and the attorney retains such accountant.

5. The Work-Product Doctrine

The work-product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[13] The rule basically provides that the work product of an attorney is not discoverable in a proceeding when it is made in anticipation of litigation. The attorney work-product doctrine may apply even when the attorney-client privilege does not.

6. Circular 230[14]

Circular 230 is a set of Treasury Regulations that govern the practice of certain practitioners representing persons before the Department of the Treasury.[15]

The Office of Professional Responsibility is an office created pursuant to Circular 230 within the Internal Revenue Service.[16] Among other things, this office has the power to discipline and sanction practitioners that do not comply with the rules set forth in Circular 230. Penalties can be as harsh, including a permanent disbarment from practice before the IRS.[17]

Circular 230 imposes a duty on practitioners to furnish certain information to the IRS upon a "proper and lawful request."[18] Moreover, practitioners have a duty to, and should not interfere or attempt to interfere with a lawful effort by the IRS to obtain any record or information.[19] Circular 230, however, recognizes the privileges discussed in this Article. Thus, when practitioners do not disclose certain information by reason of a privilege, Circular 230 does not impose discipline.

Stated another way, Circular 230 exempts practitioners from the above requirements in the event that he or she "believes in good faith and on reasonable grounds that the records or information is privileged."[20]

In summary, the IRS recognizes the existence of the privileges enumerated above, including attorney-client privilege. Accordingly, the IRS should not sanction a practitioner for failing to properly disclose privileged information.

Importantly, only certain qualified individuals may practice before the IRS, including a lawyer licensed within a state in the U.S., a certified public accountant licensed within a state in the U.S. or an enrolled agent who has specifically obtained the right to practice before the IRS after completing various examinations and requirements before the IRS. Importantly, a Mexican tax advisor or a Brazilian tax advisor or for that matter anyone who is a tax lawyer or tax accountant from another country outside of the U.S. will not be permitted to practice before the IRS under the rules of Circular 230. This is also true for any foreign tax advisor who may have studied the taxation laws of the U.S., in a U.S. university or law school in the U.S. This tax professional, who may be very knowledgeable due to the taxation courses taken may not practice before the IRS if they do not have their license as a U.S. attorney, a licensed U.S. certified public accountant or the license as an enrolled agent.

B. Mexico

[13] "(A) Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if
(i) they are otherwise discoverable under Rule 26(b)(1); and
(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
(B) Protection Against Disclosure. If the court orders discovery of those materials, [it must protect against disclosure of the mental impressions], conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."
[14] Treasury Department Circular No. 230 (Rev. 8-2011), "Regulations Governing Practice before the Internal Revenue Service."
[15] Pursuant to § 10.0 of Circular 230, practitioners include "attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, registered tax return preparers, and other persons representing taxpayers before the Internal Revenue Service."
[16] *See* §10.1 Offices.
[17] 31 U.S.C. § 330(b) – "Practice before the Department."
[18] *See* Circular 230 §10.20(a)(1).
[19] *See* Circular 230 §10.20(b).
[20] Id.

1. The Duty of Confidentiality – The "Professional Secret"

The equivalent of the ethical duty of confidentiality in Mexico, is the obligation to keep the Professional Secret as provided by the Mexican Law of Professions. The application of this rule is not exclusive for attorneys. Every professional is obligated to strictly keep in confidence the matters entrusted by their clients, unless the information must be disclosed by law.

2. The "Attorney-Client" Privilege

The Mexican Code of Criminal Procedure provides that every person is required to tell the truth when acting as a witness.[21] Attorneys and other professionals obligated to keep the Professional Secret are not obligated to testify. This can be construed as the Mexican equivalent of the attorney-client privilege. Importantly, the holder of this privilege is the attorney and not the client. The attorney, therefore, may testify in a criminal proceeding. This, however, could subject that attorney to criminal exposure for violating the law as will be further explained below.

Presumably, this privilege should also be available in the Mexican Tax Court[22] by virtue of the application of the Mexican Code of Civil Procedure that exempts some relatives of the parties, as well as those who must keep the Professional Secret, from the "obligation to aid the courts in the discovery of the truth."

In the course of representing a taxpayer in an audit, the Mexican Tax Code does not provide any specificity as to the confidentiality of the communications that an Attorney must keep with his or her client. Likely, attorneys, accountants and other tax professionals may refuse to disclose confidential information to tax authorities under the Professional Secret duty provided in the Mexican Law of Professions. The Mexican Supreme Court, however, has yet to decide a case regarding the nature and extent of this duty/privilege.

The authors believe it would be appropriate, at minimum, to mention the Mexican Bar Association "Code of Professional Conduct" (the "Code") but not much detail will be provided as this Code is not mandatory in nature.[23] This Code briefly examines the Professional Secret for attorneys and defines it as a duty before the client and a right before judges and other authorities. It further provides that when an attorney is subpoenaed as a witness he or she must refuse to answer any questions if such line of questioning refers to confidences that were learned during the representation of a client. The Code has many interesting issues that the Mexican Law of Professions could adopt as positive law. At this point, these rules are not binding.

Notwithstanding, a person that "without just cause, in detriment of someone, and without consent from whom that could become affected" discloses a secret or privileged communication that he or she knows or has received because of his or her employment or position" should be punished by a maximum of 200 days of community service.[24]

If the disclosure is made by a person rendering professional services, however, the penalty can be of up to 5 years in prison, up to $50 dollars in fines, and the inability to practice the profession of law for up to one year.[25] This is a steep price to pay for any tax professional in Mexico who discloses confidential information about their taxpayer client.

3. The Accountant-Taxpayer Privilege – Already Exists

Pursuant to the Law of Professions, every professional is bound to the Professional Secret. Accountants (and any other profession), therefore, must keep in confidence all of the communications with the clients that are used for the purposes of providing professional advice and services.

As explained above, in the event that that a professional (including an accountant) reveals a secret obtained by virtue of the performance of his or her professional activity, he or she may be subject to criminal exposure.

[21] Mexican Code of Criminal Procedure. Article 243 Bis.
[22] Supplemented by the Federal Code of Civil Procedure.
[23] The practice of law in Mexico is regulated by the Ministry of Education and not by the Mexican Bar Association. The Mexican Bar Association has an important weight in Mexico, but attorneys need not be member of the bar to lawfully practice law in Mexico.
[24] Mexican Code of Criminal Procedure. Article 211.
[25] Mexican Code of Criminal Procedure. Article 211 Bis.

4. The Kovel Arrangement – Non Existent

Because accountants and every professional is bound by the Professional Secret, and are presumably exempt from testifying in civil and criminal proceedings, there should be no need of a Kovel-type arrangement in order to legally maintain the confidences of a client.

5. The Work-Product Doctrine

Confidential communications should also be protected under the Mexican Professional Secret standards. The fact that certain work-product is prepared in anticipation of litigation by an attorney (or potentially any other professional) should not create an additional protective layer as the U.S. work-product doctrine does.

6. Circular 230 – Nothing similar in Mexico

The Mexican Tax Administration Service ("SAT") does not have an equivalent of Circular 230. In practice, almost anyone can represent a taxpayer before the SAT as long as the person is designated by the taxpayer in a public instrument, or in writing in presence of two witnesses. [26]

This rule certainly creates an environment where some representatives of the taxpayer are not qualified in the tax or generally trained as tax lawyers or tax accountants or other tax professionals, yet have the legal right to represent the taxpayer before the government tax agency SAT. This is very different of course compared to the rules that exist in the U.S. Similarly, a Mexican tax professional would not be authorized to practice before the IRS.

C. Brazil

1. The Duty of Confidentiality – The "Professional Secret"

In Brazil, the protection of professional secrecy is provided by the Brazilian Constitution. As in Mexico, this is a general privilege that applies not only to attorneys but also to any professional. The Brazilian Constitution, however, specifically provides that the attorney is an essential actor in the administration of justice and thus the acts within his or her practice cannot be violated by law. An additional Professional Secret, therefore, is provided for by the Statute of the Brazilian Bar Association ("EAOAB").[27]

The Brazilian Constitutional provisions intend to ensure that the confidentiality of information and documents provided to the attorney by the client, in order to provide an adequate defense. The purpose of the Professional Secret is to protect the client in defense of his or her rights and from arbitrary actions, and current or potential violations committed by individuals, society, and the State.

The attorney is subjected to strict ethical, moral and a legal duty of confidentiality; especially in the criminal area. It is important to note that the scope of the confidential information includes the information provided by the client, as well as anything else related to the representation.

2. The "Attorney-Client" Privilege

Attorneys must keep the duty of confidentiality and thus have the right to refuse to testify as a witness in any proceedings in which the attorney worked or currently works, about facts related to clients or former clients, or about any fact entrusted by the client.

In addition, the Brazilian Code of Criminal Procedure states that "any person who should keep a Professional Secret due to her function, department, office or profession, are prohibited from testifying."[28] This provision intends to ensure the Professional Secret provided by the Constitution and, if violated without cause, may subject the attorney and other professionals to criminal liability. In this sense, this can be considered the Brazilian equivalent of the Attorney-Client Privilege.

[26] See Article 19 of the Mexican Tax Code.
[27] Law no. 8.906/94.
[28] Article 207 of the Brazilian Code of Criminal Procedure.

In the same way, the Brazilian Code of Civil Procedure also exempts relatives and professionals who have the duty to keep the Professional Secret from providing any documents to the court.[29] On the other hand, the Brazilian Tax Code does not have any disposition regarding this privilege. Nevertheless, by operation of the constitutional provision mentioned above, the privilege in question shall also apply to the tax procedures (judicial and administrative).

The violation of a Professional Secret is considered a crime under Brazilian law. The violation of professional secrecy consists in disclosing, without cause, information obtained as a result of the exercise of a profession that may harm others. This crime could be punished with imprisonment of three months to one year or a monetary fine.[30] The Brazilian Bar Association also can discipline attorneys for such violations.

3. The Accountant-Taxpayer Privilege – Already Exists

Every professional is bound to the Professional Secret. Professionals, therefore, including accountants have the duty to keep in confidence any information or documents provided by his client. In case of a violation of this duty, the accountant may be subject to criminal liability and to ethical discipline by the Council of Accounting.

4. The Kovel Arrangement – Non Existent

As mentioned above, the Brazilian Code of Criminal Procedure and Code of Civil Procedure prohibit professionals from testifying and from providing any document that can reveal confidential information obtained by virtue of the performance of her professional activity. No Kovel arrangement, therefore, is needed between an attorney and an accountant in order for communications to be privileged.

5. The Work-Product Doctrine

The duty of confidentiality to which the attorney is bounded covers not only the information and the documents provided by his client, but also all the communications, advice, drafts, notes, and anything else related to the exercise of his or her profession. Thus, the fact that certain work-product is prepared in anticipation of litigation does not provide any extra protection.

6. Circular 230 – Nothing Similar in Brazil.

As in Mexico, the Brazilian Internal Revenue Service ("RFB") does not have a Circular 230 equivalent. In practice, anyone can represent taxpayers before the RFB, as long as the person is designated by the taxpayer in a public instrument issued by a notary public.[31] In any case, the RFB does not have power to discipline or sanction the taxpayer's representative.

IV. The Tax Audit

As explained at the beginning of this Article, the government of each country has the power of ensuring that taxpayers comply with their corresponding tax laws. In the case of the U.S., the IRS has the authority to "examine any books, papers, records, or other data which may be relevant."[32] The Mexican SAT has the ability to request the taxpayer, a person who is jointly and severally liable with the taxpayer, and related third parties" to provide "the accounting records, as well as any data, documents or reports that may be required"[33] Brazilian law allows tax authorities to examine in a course of a tax audit "books, records, documents and papers" to ensure compliance with tax obligations.[34]

Without more, a literal interpretation of the above provisions would allow tax authorities the ability to request the advice attorneys provided to their clients, as well as any other communication among them. When tax authorities are dealing with a taxpayer's attorney, there are several privileges that can be asserted, and thus the revenue agents will not be able to collect all

[29] Article 363 of the Brazilian Code of Civil Procedure.
[30] Article 154 of the Brazilian Criminal Code.
[31] According to article 7, I, of Law no. 8.935/94.
[32] IRC §7602.
[33] Article 42, Section II of the Mexican Tax Code. Mexican tax authorities have the ability and means of ensuring that a taxpayer complies with the taxpayer's tax obligations, which will not be discussed here.
[34] Brazilian National Tax Code, Article 195.

of the information desired. The intricacies of these privileges are better understood under the examination of the following hypothetical.

Assume a U.S. citizen artist ("Lauren") who has performed several concerts in Mexico and Brazil. She has a special purpose vehicle (SPV) in Mexico to receive compensation from the performances she receives in Mexico. The Mexican SPV has a bank account with a current balance of $15,000 through which Lauren regularly receives payments for her performances in Mexico. Lauren usually uses this account for shopping in Mexico City.

As part of her performances in Brazil, Lauren needs to make several payments to other employees of her business in Brazil that under Brazilian law, Lauren must withhold and remit to the Brazilian tax authorities. Lauren decided to withhold the tax, but instead of turning it over to the Brazilian Tax Administration, she kept it for herself.

Lauren has retained counsel in each of the Three Jurisdictions. American counsel has informed Lauren of her obligation to file Form TD F 90-22. ("FBAR") for the bank account maintained in Mexico, as well as IRS Form 5471 to report her holding in the Mexican SPV. U.S. counsel retained an "Accountant" under a "Kovel Relationship" to assist with obtaining information of Lauren's foreign bank accounts. Accountant determined and provided attorney a list of all of Lauren's bank accounts. Lauren did not file these forms because she thought it would be too complicated. She prefers singing over trying to understand complicated tax rules.

Mexican counsel insisted on having Lauren not use the company's bank account for personal purposes, because it may trigger adverse tax consequences. Lauren did not follow the advice of Mexican counsel.

Brazilian counsel advised Lauren that her conduct in Brazil could constitute a criminal activity, and could have some unfortunate legal consequences in Brazil.

Incidentally, the IRS, the SAT and the RFB commenced three simultaneous tax audits. Lauren is nowhere to be found, so the revenue agents of each country contact Lauren's attorneys; American, Mexican and Brazilian Counsel. They have a conference call (the "Conference Call") to discuss the liabilities that Lauren may face in each country.

A. U.S. Audit

The U.S. tax authority has been made aware of Lauren's holdings in Mexico, and are seeking a criminal charge against Lauren due to her "willful" failure to file the FBAR. In building his criminal case, the Revenue Agent is requesting Lauren's attorney and the accountant turn over the records in which i) attorney advised Lauren of her obligation to file the FBAR; ii) the report sent from the accountant to the attorney detailing Lauren's account; and iii) the content of the Conference Call.

The attorney-client privilege should apply to each of the Revenue Agent's requests, because the following requirements seem to be satisfied:

A. The privilege would be asserted in this case by the Attorney on behalf of Lauren;

B. The communications regarding the FBAR requirements were made to an acting attorney;

C. The communication was made in confidence;

D. Lauren communicated with the attorney with the purpose of securing legal advice; and

E. There is no indication that the privilege has been waived. Thus, the privilege should apply.

Since the Attorney entered into a *Kovel* arrangement with the accountant, there is a good probability that most of the information in the hands of the accountant is protected from disclosure under the attorney-client privilege. As to the bank records, and as discussed further below, the law is not entirely settled whether they are subject to disclosure.[35]

Because the attorney-client privilege applies in this case, there is no need to resort to the work-product doctrine. This doctrine, however, would likely not be applicable in this case, because the tax advice provided by the attorney was not prepared "in anticipation of litigation."

On the face of this case, it may appear that the legal advice is protected regarding the Mexican bank account and may not be disclosed by any of Lauren's advisors. There are, however, a few Appellate Court cases in the U.S. that held that there is no fourth amendment right against self-incrimination in the event that a summons is issued to the U.S. taxpayer regarding their accounts outside of the U.S.[36] This is a separate problem for Lauren; those pesky Constitutional rights seem not to apply to her in this case.

B. Mexican Audit

The Mexican Revenue Agent wants to determine the nature of the acquisitions expensed by Lauren in Mexico. The auditor is implying that there may be some adverse tax consequences at the corporate level for the non-deductible expenses, and is requesting the attorney to turn over the records containing all the advice he has given to Lauren related to this issue, including a detailed report of the Conference Call.

In this situation, attorney can claim the Professional Secret obligation, and would likely not be subject to any liability. If this would rise to a criminal procedure and the attorney is called to the witness stand, the attorney could claim the Professional Secret obligation, or not. It is up to the attorney to decide whether he or she testifies before the court. If, however, the attorney decides to testify revealing confidential information from the client, he or she could likely be subject to criminal liability herself. Obviously, the tax advisor might have a great incentive to testify against her client under the threat of a criminal charge by the Mexican government authorities, such as co-conspirator or aiding and abetting, not unlike charges brought by the U.S. Justice Department against foreign advisers.

The information obtained from Brazilian and American counsel should also fall within the Professional Secret as is something that Mexican counsel learned through the course of representing Lauren.

C. Brazilian Audit

The Brazilian Revenue Agent is requesting the Attorney to hand over the written advice provided to Lauren in regards to the tax obligations that Lauren would be subject to in Brazil.

In this case, as in Mexico, the Brazilian attorney can claim the Professional Secret and should not be required to disclose this information to the Revenue Agent. In the event that the attorney violated the Professional Secret standard, he or she could potentially be subject to criminal liability under Brazilian criminal law.

The information obtained from Mexican and American counsel, should also fall within the Professional Secret as is something that Brazilian counsel learned through the course of representing Lauren.

V. Conclusions

1. Unlike Mexico and Brazil, the United States seems to have developed a sophisticated set of rules that covers in greater detail situations in which these privileges apply (*i.e.* work-product doctrine, *Kovel* arrangement, etc.)

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[35] Specifically, under the Bank Secrecy Act, 31 U.S.C. § 5311, et seq., individuals have an obligation to maintain bank account information for inspection. Moreover, "each person having a financial interest in or signature authority over" a foreign account must maintain records that must be made available to the government upon request. *See* 31 C.F.R. §§ 1010.350, 1010.420.

[36] In re Grand Jury Investigation M.H. v. United States, 648 F.3d 1067 (9th Cir. 2011);
In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011, 691 F.3d 903, 906 (7th Cir. 2012); In re Grand Jury Subpoena, 696 F.3d 428, 432 (5th Cir. 2012);
In re: Grand Jury Proceedings, No. 4-10, --- F.3d ----, 2013 WL 452768.

2. Unlike the U.S. attorney client privilege, the Professional Secret in Mexico and Brazil protects communications with all professionals, not just attorneys.

3. Communications between attorneys should be covered under the attorney-client privilege in the U.S. as well as under the Professional Secret standards in Mexico and Brazil.

4. The United States is the only one of the Three Jurisdictions that has developed rules regarding the application of the Attorney-Client Privilege in the course of a tax audit, while Mexico and Brazil adopt general principles of the professional secrecy standards.

5. Mexico and Brazil can imprison an attorney (or any other practitioner) for disclosing information protected under the Professional Secret. Presumably, the most severe punishment a U.S. attorney may face for disclosing information under the attorney-client privilege is disbarment and potential civil liability.

6. Circular 230 regulates practitioners acting before the IRS. Circular 230 can be used to discipline an attorney who does not provide certain information upon a lawful request of the IRS. Circular 230, however, recognize the existence of privileged information and would not subject a practitioner to discipline for not disclosing information when there are reasonable grounds to believe such information is privileged.

Raul Villarreal Garza is an attorney licensed in Mexico and New York and is a member of Procopio's International and Tax Practice Groups. As part of his practice, he focuses on cross-border transactions involving the U.S., Mexico and other Latin-American Countries, focusing in international tax planning and related legal matters. Prior to joining Procopio, Mr. Villarreal worked in Mexico as a tax attorney in the law firm of Margain Abogados, S.C. where he advised Mexican individuals and corporations on cross-border transactions with focus on the United States, as well as American clients doing business in Mexico. Likewise, Mr. Villarreal was an associate of the tax practice group of the law firm Basham, Ringe y Correa, S.C. where he participated as a tax advisor to clients involved in domestic and international mergers, acquisitions and private equity deals. Mr. Villarreal participated as an intern of the International Trade practice group of the law firm of Miller and Chevallier Chartered in their Washington, DC offices. He can be reach at raul.villarrealgarza@procopio.com or 619-525-3874

Eric D. Swenson's practice encompasses both tax controversy and tax planning. Mr. Swenson has represented corporations, partnerships, nonprofits, and individuals in federal, state, and local tax disputes including audits, appeals, and litigation before and against the Internal Revenue Service, CA Franchise Tax Board, CA Employment Development Department, CA Board of Equalization, San Diego County Assessor, and other state taxing authorities. Mr. Swenson has also advised on complex business transactions, including structuring and planning corporate mergers and acquisitions, such as tax-free reorganizations, debt and equity restructuring, litigation settlements, employment and executive compensation related tax issues, and the formation and operation of corporations, limited liability companies, S corporations, and nonprofit organizations. Mr. Swenson is admitted to practice in the United States Tax Court, United States Court of Federal Claims, and the United States District Court, Southern District of California. Mr. Swenson previously worked as an attorney for the IRS Office of Chief Counsel in San Diego and most recently at DLA Piper (formerly Gray Cary Ware & Freidenrich LLP) in San Diego. He can be reach at erik.swenson@procopio.com or 619-515-3235

Laura Benini Candido holds an LL.B. from Universidade Presbiteriana Mackenzie (Mackenzie Presbyterian University)and Graduate student in corporate law by the Law School of São Paulo's Getulio Vargas Foundation (FGV - GVLaw). Ms. Candido's professional experience is focused on Corporate Law and Tax Law. Laura can be reach at laura@ssplaw.com.br or +55 11 99152-3374.