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INTERNATIONAL REPORT

ON PROFESSIONAL SECRECY AND LEGAL PRIVILEGE

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Introduction

Introduction

Virtually every developed legal system in the world shares the belief that communications between lawyers and clients are, and should be, confidential. Various terms “professional secrecy,” “attorney-client confidentiality,” “legal privilege,” and other names, the concept represents one of the most important pillars of a nation’s legal system. While some jurisdictions elevate professional secrecy to a fundamental human right, while others consider it a core legal principle, it is universally recognized as essential to the rule of law.

At its core, professional secrecy guarantees and promotes the essential relationship of trust and confidence between client and attorney by encouraging candid communications between them. As a matter of public policy, it is indispensable to the preservation of the client’s right to counsel, to present a defense, to personal privacy and, ultimately, to due process and freedom. It further protects lawyers in the exercise of their professional obligations by allowing them to offer frank, informed and responsible advice without fear of reprisal.

The roots of professional secrecy trace back to Greek and Roman law, in which it initially arose as an ethical and moral duty of the lawyer. The protections became part of common law norms, first appearing in English law as a constraint on the power of the state in the famous 1576 decision, *Berd v. Lovelace*. Since its origins, many have recognized the inherent tension between the duty of professional secrecy which prevents disclosure of information provided to an attorney and the interest of the State in learning the truth in order to administer justice.

Despite the fact that it is recognized as a basic principle, and reflective of that long-standing tension, professional secrecy is often under attack. In some instances, countervailing public policy concerns regarding for example, human rights or environmental issues, where the plaintiff asserts a “need to know” all the facts, places stresses on the right to professional secrecy. In other instances, pressures result from authoritarian assertions by a particular government seeking to exercise control over its citizens. Between those two poles lie a multitude of competing policies. To be sure, there are exceptions in various jurisdictions that permit certain disclosures of privileged information for the public good, and some jurisdictions recognize instances where professional secrecy may be waived. Nonetheless, the fundamental recognition of the privilege means that the starting point is protection of the privilege and secrecy, subject to disclosure in exceptional circumstances – and not the other way around.

At present, the issues of professional secrecy and privilege are constantly evolving. But they remain critical to legal professionals around the globe in a broad range of contexts. The concept is also far from uniform, varying among jurisdictions. In civil law systems, the right of professional secrecy belongs to lawyers but also forms part of their obligations as members of the Bar. In many jurisdictions, it applies exclusively to lawyers practicing independently, and not to in-house counsel, for

example, who do not have the same rights or obligations as outside counsel. But the opposite is true in many other jurisdictions, where communications with all attorneys, including in-house counsel, are subject to the protection. There are also variations regarding who “owns” the privilege and who has the right to waive it. While the privilege is generally limited to legal advice, that concept is also subject to varying interpretations.

Adding to the complications surround the issue of professional secrecy is the related issue of privacy concerns in an age in which technology and means of communication pose special risks and with them special duties of care. It is also not always clear how to apply privilege in global transactions when communications cross borders, may be subject to competing laws. That question becomes more difficult to tease apart when the communication involve facts, business advice or other information not traditionally classified as legal advice. While the desire for a consistent and common framework is clear, the resolution is not.

At its Annual Conference in Luxembourg in 2019, UIA heard reports from collective members from a number of countries across six continents. The aim of the session was to review examples the current status at a high level of what is variously referred to as professional secrecy or attorney-client confidentiality and privilege. A selection of countries, as well as certain regional organizations in both common law and civil law jurisdictions made presentations. The intent was not to provide a dispositive and detailed exposition of all countries but to provide a representative and comparative overview.

Consistent with that goal, UIA here seeks to offer a report that provides a general basis for comparison of approach and rules at the regional, national and international levels, based on specific applications in cases, statutes, and policies, under both common and civil law. The inquiry involved a variety of particular concerns: (1) the reluctance to take a matter to court for fear of having to disclose confidential information at issue in the dispute; (2) the clash between the right of confidentiality and the right to present a defense; (3) the practice in arbitration of grading different levels of confidentiality to allow lawyers to manage data access; (4) the benefits of harmonizing privilege and secrecy standards for the benefit of both individuals and companies; and (5) the hesitation of companies to disclose their confidentiality and privacy policies. Of course, all of these issues vary over time and among different legal cultures.

This is an ongoing project and will be updated from time to time. The UIA welcomes continued input and provides this report as a starting point for further inquiry. Certain of its members may wish to issue statements of policy as to privilege, and this report is offered to them as an informational resource. Other members may wish to consider reform of their statutes and regulations. Still others may propose regional variations. While the common denominator remains the universal principle of respect for professional secrecy, one thing is clear: variations and nuances among jurisdictions make a “one size fits all” definition impossible.

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Selected Countries and Regions: An Overview

EUROPE

UIA Report on Professional Secrecy and Legal Professional Privilege

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INTRODUCTION

Across Europe, communications between lawyers and their clients are confidential and protected. This is vital to protecting rule of law and access to justice. However, modern societies face a difficult challenge to balance the protection of confidentiality with legal requirements to disclose information to prosecute crimes or to respect freedom of information laws. The way in which this principle is translated into Europe's legal systems varies from country to country with key distinctions between common law and civil jurisdictions.

The two sections that follow will briefly outline how such a principle manifests itself in Common Law and in Civil Law jurisdictions, and will provide some examples for each system. This will be followed by a brief overview of the debate that has taken place at European level on issues of confidentiality and professional privilege. The Chapter will conclude with some recommendations and ideas for further analysis.

COMMON LAW: LAWYER-CLIENT CONFIDENTIALITY

In common law jurisdictions, 'legal professional privilege', protects communications between a professional legal adviser (a solicitor, barrister or attorney) and his or her clients from being disclosed without the permission of the client. The privilege is the right of the client and the duty of the lawyer and it can only be waived by the client. 'Confidentiality' as a rule of professional conduct, is often mistranslated into English as privilege. Confidentiality and privilege involve different rights and obligations.

* England and Wales

Legal professional privilege is a fundamental right recognised by the English and Welsh courts (Articles 6 and 8 European Convention on Human Rights/Human Rights Act 1998 and *Campbell v United Kingdom* (1992) 15 EHRR 637, *Foxley v United Kingdom* (2000) 31 EHRR 637). It has existed for over 400 years and is a necessary corollary of the right of every person to seek legal advice, ensuring the proper administration of justice.

In recent times, legal Professional Privilege in England and Wales has come under pressure, for example, from the Investigatory Powers Act 2016. Following lobbying by the Bar Council and the Law Society of England and Wales, protections for legal professional privilege were increased in the Act. The investigating authorities must now satisfy the Secretary of State that (1) there are exceptional and compelling circumstances (2) the public interest outweighs confidentiality (3) there are no other means by which the information could be obtained.

Legal Professional Privilege

Common law justification for legal professional privilege in English law goes back to *Pearse v Pearse* (1846) 1 De G & Sm 12. England and Wales distinguishes between two branches of legal professional privilege: legal advice privilege and litigation privilege. Lawyers for this purpose includes barristers, solicitors, and in-house lawyers in England, non-UK lawyers, trainees and paralegals.

Legal advice privilege applies to communications between a lawyer and their client made in connection with the giving or receiving of legal advice. Confidential communications include those relating to public or private rights, liabilities, obligations or remedies or are otherwise made in a 'relevant

legal context’, that form part of a ‘continuum of communication’ aiming to keep client and lawyer informed so that legal advice may be given as required (investigative (Three Rivers District Council v The Bank of England (No 6) [2005] 1 AC 610, as confirmed by The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006, Balabel v Air India [1988] 1 Ch 317).

Litigation privilege applies to communications between lawyers or their clients and any third party for the purpose of obtaining advice or information in connection with existing or reasonably contemplated litigation if they are made for the sole or dominant purpose of conducting that litigation and the litigation is adversarial rather than investigative (Three Rivers District Council v The Bank of England (No 6) [2005] 1 AC 610 at para.102).

A waiver of legal professional privilege may be express or implied and can be made on a limited basis. No adverse inferences should be drawn from a claim to privilege or a refusal to waive privilege (Wentworth v Lloyd [1864] 10 H.L.C. 589) whether under section 34 of the Criminal Justice and Public Order Act 1994 (which permits adverse inferences to be drawn from a defendant’s silence when questioned) or otherwise.

In-House Counsel

Not all employees of a company are considered ‘the client’ for the purpose of legal professional privilege only those employees who are tasked with seeking and receiving such advice on behalf of the corporation. Employees who are merely speaking to the company’s lawyers, e.g. to talk to them about the factual background, for example, will not be. (Three Rivers District Council v The Governor and Company of the Bank of England (No 5) [2003] QB 1556 (“Three Rivers (No.5)”). Privileged information and material may be sensibly and confidentially disseminated within the corporation without legal advice privilege thereby being waived (Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) (The Good Luck) [1992] 2 Lloyd’s Rep 540) although the wider the dissemination the bigger the risk of deemed waiver. Shareholders in litigation between them and the corporation are entitled to see legal advice obtained by the company so long as that advice was not obtained by the company in relation to its dispute with the shareholders (Sharp and others v Blank and others [2015] EWHC 2682).

Communications

Confidential communications between a lawyer and a client, and all material forming part of the continuum of those communications (Balabel v Air India [1988] 1 Ch 317) will attract legal advice privilege if they relate to public or private rights, liabilities, obligations or remedies or are otherwise made in a “relevant legal context” (as described in Three Rivers (No 6) [2005] 1 AC 610). (On the question of whether there is an additional “dominant purpose” test in legal advice privilege, solicitors should refer to the litigation in the case of R (Jet2.com) v CAA [2018] EWHC 3364 (Admin), which is ongoing at the time of writing).

Legal advice privilege will arise not only where the communications directly concern the seeking or giving of legal advice, but may also arise where the communications consist of facts and are part of what the courts have called a ‘continuum of communication’ between client and lawyer ‘aimed at keeping both informed so that advice may be sought and given as required’ (Three Rivers ‘No 6’).

In Property Alliance Group Limited v The Royal Bank of Scotland PLC [2015] EWHC 3187 (Ch) Snowden J noted that lawyers are often tasked with investigating relevant information, and must be able to provide clients with candid factual briefings secure in the knowledge that such communications (and any records thereof or of decisions taken in consequence thereof) can only be disclosed with the client’s consent.

Legal Professional Privilege: Exceptions

There are narrow exceptions that apply to legal professional privilege. The main exception is often referred to as the “iniquity exception”. This means that no privilege arises if a lawyer’s assistance is sought to further a crime or fraud. It is irrelevant whether the lawyer is aware of the client’s iniquitous purpose. Further exceptions to privilege include: the few (if any) statutes in which Parliament has abrogated privilege; some limited situations in which legal regulators can compel production of privileged information from lawyers (although that doesn’t amount to a loss of client’s privilege more widely); and in cases of express or implied waiver of privilege.

Law enforcement agencies and regulators are not entitled to decide themselves whether a claim to LPP is properly made. Where privileged material has been seized by law enforcement agencies pursuant to ‘seize and sift’ powers in criminal investigations (see section 51 of the Criminal Justice and Police Act 2001) any allegations that the iniquity exception applies and that the claim to LPP might not be justified should be assessed by independent counsel. Where the information or material alleged to be disclosable as a result of the iniquity exception remains in the hands of the lawyer or the client, the relevant enforcement agency should apply to the court for an order (production orders pursuant to the court’s discretionary jurisdiction under section 37 of the Senior Courts Act 1981).

Communications between a corporate client and in-house counsel are not privileged for the purpose of certain investigations by EU institutions (*Akzo Nobel Chemicals Ltd v European Commission* [2010] 5 CMLR 19).

Lawyers’ ethical duties to the courts and regulators help guard against abuse.

Confidentiality

Lawyers and law firms in England and Wales (including in-house lawyers and lawyers’ support staff) have a duty of confidentiality to their clients. A lawyer’s duty of confidentiality is wider than privilege and attaches to any information received by a lawyer in the course of their legal practice. It is an obligation both as a matter of case law, statute and codes of conduct. That duty applies to all confidential information about a client’s (or former client’s) affairs, irrespective of the source of the information. It can also apply to other information that a lawyer learns during a retainer with a client, which may be unrelated to the client. The lawyer must not wrongfully disclose or misuse such information. The duty of confidentiality applies to the confidential affairs of prospective clients, continues after the end of the retainer between the lawyer and the client, and remains even after the death of a client. Firms must identify risks to client confidentiality and have in place effective systems and controls to enable them to do so and mitigate any such risks arising from the potential disclosure of information. (Section 1(3)(e) of the Legal Services Act 2007, SRA Principles 3, 4 and 6, SRA Mandatory Outcomes on confidentiality and disclosure (Chapter 4), SRA Code of Conduct 2011 O4.1 and O4.5).

Confidentiality: Exceptions

A lawyer’s general duty of confidentiality applies except to the extent disclosure is required or permitted by law or the client consents to disclosure. There are areas of law (e.g. data protection law) that would regulate when information can be required of a person and how a lawyer can use information obtained in the course of practice. HM Revenue and Customs has power to require the disclosure of confidential documents and/or information in certain circumstances. Other examples include reporting requirements deriving from anti-money laundering and anti-terrorism legislation. There are also further specific and limited overrides to the duty of confidentiality, including overrides relating to the prevention of harm and in the context of client litigation against lawyers.

Sanctions for Violations

The duty of confidentiality is both a legal and a professional obligation. A lawyer is under a duty to take reasonable care of all documents provided by a client, as well as not to disclose any confidential information which the client has communicated. A negligent failure to take such reasonable care is a breach of the duty of confidentiality. A breach of a lawyer's duty of confidentiality can give rise to civil law claims for financial damages or compensation. Breaches may also give rise to disciplinary proceedings for lawyers under the relevant rules of professional conduct and could even amount to a criminal contempt of court.

*** The Republic of Ireland**

Legal Professional Privilege in Ireland has two categories. Legal advice privilege covers communications between a lawyer and a client in a professional relationship for the purpose of giving or receiving legal advice are privileged. Litigation privilege covers communications if litigation is pending or contemplated and the document was prepared for the dominant purpose of the pending or contemplated litigation.

Legal Professional Privilege is a right of the client based on case law developed over the nineteenth century. It originally applied only to communications made to a barrister or solicitor after the commencement of litigation. This was extended to communications made in contemplation of litigation and then to disputes where litigation was not yet contemplated and finally to legal advice irrespective of whether litigation was contemplated or underway. One party can always challenge privilege claimed in court.

If the client waives expressly or impliedly then privilege ends. Legal professional privilege is not subject to any time limitations and continues even after the death of a client or the termination of the mandate. A lawyer has the obligation to produce a document in Court or to third parties which are subject to privilege, if the client asks. Consequences of non-compliance are professional misconduct, breach of contract or civil claims for negligence. Professional disciplinary sanctions can be applied by the lawyer's professional body.

There are exceptions where the courts have rejected a claim of legal professional privilege. The lawyer can be released from their duty by the client and by the courts in exceptional circumstances described in case-law. These include communications furthering a crime, testamentary dispositions, proceedings concerning the welfare of children, exculpatory evidence. Money laundering reporting obligations are the most important exceptions in practice.

A lawyer is not allowed to give the name of a client in a brochure and cannot inform in public about matters pending in Court in which he has been instructed and about the decision. The employees and external service providers of a solicitors (not barristers) are subject also to privilege by the case law. The consequences of breach by such an employee is vicarious liability on the part of the principals of the legal practice. Lawyers in the firm are treated as one lawyer, with the exception of the use of Chinese walls. There is also a possibility of the involvement of the Data Protection Commissioner. Lawyers acting as arbitrators and mediators are subject to legal professional privilege.

*** Cyprus**

In Cyprus, information covered by lawyer-client confidentiality cannot be divulged without the client's consent. It is the right of the client and the duty of the lawyer. This right exists in common law, professional rules and as an implied contractual term. It applies to employees of a lawyer (who are not members of the Bar) and to their lawyer's external service providers and other lawyers with whom the lawyer shares an office.

Confidential information includes information which the lawyer receives about their client as well as communication between the client or the lawyer with a third party if made for a pending or anticipated litigation. This includes letters between lawyers if they are made Without Prejudice. A lawyer cannot give the name of his client in a brochure. A lawyer can inform in public about matters pending in Court in which he or she has been instructed and about the decision, if the Court proceedings are open to the public.

Clients can waive their privilege. A lawyer has the obligation to produce a document in Court or to third parties which are subject to confidentiality, if the client asks. A lawyer has the right to produce a document in Court or to third parties which are subject to confidentiality, if the client asks. The consequences of non-compliance can include professional sanctions; for breach of professional ethics, civil damages or breach of an implied contractual term. There are exceptions for example in cases where there is danger to human life or if the information exchanged is targeted to lead to criminal act.

CIVIL LAW: PROFESSIONAL SECRECY

The concept of professional secrecy found in civil law countries, has important differences compared to the principle of legal privilege in common law countries. In civil law countries, the protection of communications between lawyers and their clients stems from the lawyer's duty of professional secrecy. In common law countries, legal professional privilege refers to the client's right to receive confidential legal advice. Unlike legal privilege, professional secrecy, in certain countries does not cover the advice given by in-house lawyers in the same way as advice given by external lawyers practising in a firm.

* France

Professional Secrecy

In French law, professional secrecy is a principle protected by the Criminal Code. This principle provides an absolute unqualified obligation for certain professionals including, lawyers, not to disclose confidential information given to them by their clients that is not limited in time. In France there are no exceptions to this principle. The client cannot release their lawyer from this duty because it is a duty of the lawyer and not a right of the client. There are criminal and disciplinary sanctions for violations of professional secrecy. No distinction is made between professional secrecy that is legal advice or relates to litigation.

Confidentiality

Confidentiality differs from professional secrecy. Confidentiality protects communications between lawyers under the professional rules of French law societies and bar associations. It prohibits a lawyer from using correspondence from another lawyer as evidence in court and from giving their clients copies of letters received from the other side's lawyer.

Sanctions

There are criminal penalties for violations of professional secrecy in the majority of EU Member States including France, Belgium, Luxembourg, Italy, Netherlands, Germany, Spain, Greece, Sweden and Finland.

In House Lawyers

In France, the status in-house legal counsel is not the same as a lawyer so that their advice is not protected by professional secrecy.

*** Germany**

German lawyers have the right and the duty to observe confidentiality or ‘professional secrecy’ for information the lawyer has acquired in the course of professional practice. Privilege continues after the lawyer has ceased to act for a client and even after the death of the client. In the case of insolvency, privilege will pass to the liquidator.

Lawyers are not permitted to produce a document as evidence in civil and criminal cases without the clear consent of the client. The client can waive on condition that they have the necessary ability to judge his action and then their lawyer has the obligation to produce such a document. Privileged documents cannot be made subject to document discovery, and neither the lawyer nor the client can be compelled to testify regarding privileged information.

Sanctions

Potential consequences of a breach include criminal liability, civil damages and professional disciplinary sanctions.

Exceptions

Professional Secrecy is limited by some legislation in the public interest. In money laundering cases there is an obligation to report cases to the Bar. Lawyers cannot withhold information on the grounds of Professional Secrecy when dealing with the tax authorities about their own tax declaration. Lawyers may also need to disclose privileged information in defence of their own rights, for example, regarding lawyers’ fees.

Professional practice rules and legislation provide some exceptions, including if the defence of the lawyer’s interests require the disclosure of information. However, according to the principle of proportionality, the lawyer will only be able to disclose what is necessary to claim for example, in order to claim his own fees.

Professional secrecy does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance. When privileged information is disseminated by the press or in a court case that does not receive much media coverage, the lawyer may remain bound by Professional Secrecy.

A lawyer can inform in public about matters pending in Court in which he or she has been instructed and about the decision. The lawyer can advertise names of clients in brochures only to the extent where this is not against clients’ interests and where the client has given his express consent.

Who is Covered?

Professional Secrecy extends to all partners within a law firm. Lawyers’ staff also have the duty to protect confidentiality. For a firm that is a limited liability company (GmbH) Professional Secrecy extends automatically to all directors. In lawyers stock companies (AG), Professional Secrecy covers directors, non-executive directors and lawyers who are shareholders. In the case of lawyers who collaborate through a shared office (so called *Bürogemeinschaft*), each lawyer must keep the Professional Secrecy towards all his/her colleagues. Professional Secrecy also applies to all partners who are members of professions allowed to form a multi-disciplinary partnership. Lawyers acting

as arbitrators and mediators are not covered by professional secrecy. The question of whether professional secrecy applies in some situations will depend on the amount of legal advice involved compared to other tasks. Law firms with non-executive directors in a stock company and board members, even those who are not lawyers, will have to keep Professional Secrecy.

In principle, the search of law offices and homes of lawyers is allowed in Germany, if the lawyer him/herself is the accused in preliminary proceedings. However, there are strict conditions. The investigating authorities are to carefully observe the requirements of the search and its strict proportionality.

Interception of Communications

Communications between lawyers and their clients can only be intercepted under very strict conditions. This includes for example suspects of explicitly listed serious crimes. Interception may be permitted if it is probable lawyers will act as intermediaries for the passing on of information between the suspect and a third person. The interception of criminal lawyers is forbidden (except in cases where there is evidence for the criminal lawyer to be involved in the crime) and collected data cannot be used. Other lawyers can be subject to observation when the interest in criminal persecution prevails over the professional secrecy of the lawyer.

DEBATE AT EUROPEAN LEVEL

Confidentiality is a core value of the legal profession but faces a variety of pressures and challenges. Governments are attempting to limit confidentiality in order to prosecute crimes. Communication via new media also tests confidentiality. Confidentiality supports rule of law by ensuring access to justice.

In national laws across Europe, confidentiality is protected through different mechanisms with different scope and effects. The European Court of Justice has both recognised the differences between national laws and pointed to its desire to take these into account the law of member states concerning lawyer-client confidentiality¹.

*** European Court of Justice**

Other key cases on legal professional privilege include the judgment of the ECJ, 18 May 1982 in *AM & S Europe Limited v Commission of the European Communities Case 155/79*. This case concerned the European Commission's powers to require production of documents concerning the market activities including written communications between a lawyer and client considered necessary to investigate an infringement of the treaty rules on competition. The court found that the national laws of the member states protected the confidentiality of written communications between lawyer and client provided that these communications were made for the purposes the client's defence and or were made between a client and an independent lawyer who was not the client's employee².

Finland, Italy, Sweden, Austria and Slovenia. Only France, Italy and Sweden categorically refuse to protect the confidentiality of advice provided by in-house legal counsel. In the United Kingdom, Denmark, Spain, Portugal, Ireland, Greece and Scotland in-house counsel has the same status and regulation as a lawyer employed by a law firm or sole practitioner. This differs with regards to competition law matters. This remains an area of active debate at European level.

1. *Case 155/79, AM & S Europe Ltd. v. Commission of the European Communities, 198*

2. E.C.R. 1575, 2 C.M.L.R. 264 <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=155/79&td=ALL>

* European Court of Human Rights

Confidential communications between lawyers and their clients are protected by Articles 6 the Right to a fair trial, and 8 the Right to respect for private and family life, of the European Convention of Human Rights (ECtHR). Privilege is not regarded as an absolute right and may be justifiably limited in certain circumstances.

In *Michaud v. France*, 6 December 2012, the European Court of Human Rights (ECtHR) held that the obligation to report money laundering suspicions in France did not interfere disproportionately with legal professional privilege, because it didn't apply to lawyers when defending litigants and the legislation provided a filter allowing lawyers to submit their reports to the president of their Bar association rather than directly to the authorities.

Pending applications to the ECtHR are testing the extent to which freedom of expression prevails over professional secrecy. This includes applications brought by lawyers and journalists in relation to the French Intelligence Act of 24 July 2015. These are pending applications by the Association Confraternelle de la Presse Judiciaire v. France and 11 other applications were communicated to the French Government on 26 April 2017³.

A Fact Sheet on confidentiality released by the European Court of Human Rights in January 2019 highlights the reasoning in the judgement of (*Michaud v. France*, judgment of 6 December 2012, 118-119)⁴. This states that Article 8 ECHR on the Right to respect for private and family life protects communications between lawyers and their clients because defending litigants is a 'fundamental role in a democratic society' and 'lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential'. This was recognised as underpinning the right to a fair trial under Article 6.

Article 8 (2) sets out the scope of qualifications:

"There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The ECtHRs case law confirms that that any limitation of rights under article 8 ECHR must be proportionate to a legitimate aim. Key cases have dealt with topics including the disclosure of bank statements in criminal proceedings (*Brito Ferrinho Bexiga Villa-Nova v. Portugal* 1 December 2015) interception of communications between lawyers and their clients by phone tapping and secret surveillance (*Laurent v. France* 24 May 2018), (*Kopp v. Switzerland*, 25 March 1998), (*Pruteanu v. Romania* 3 February 2015), (*Versini-Campinchi and Crasnianski v. France*, 16 June 2016), other secret surveillance (*Klass and Others v. Germany*, 6 September 1978), obligations to report suspicions of money laundering (*Michaud v. France*, 6 December 2012), searches and seizures carried out at a lawyer's offices or home (*Niemietz v. Germany*, 16 December 1992), (*Tamosius v. the United Kingdom*, 19 September 2002) (*Petri Sallinen and Others v. Finland*, 27 September 2005) (*Smirnov v. Russia*, 7 June 2007) (*Wieser and Bicos Beteiligungen GmbH v. Austria*, 16 October 2007), (*Iliya Stefanov v. Bulgaria*, 2 May 2008) (*Golovan v. Ukraine*, judgment of 5 July 2012) (*André and Another v. France*, 24 July 2008), (*Robathin v. Austria*, 3 July 2012), (*Vinci Construction and GMT Génie Civil and Services v. France*, 2 April 2015), (*Sérvulo & Associados - Sociedade de Advogados, RL v. Portugal*, 3 September 2015) (*Lindstrand Partners Advokatbyrå AB v. Sweden*, 20 December 2016), (*Leotsakos v. Greece*, 4 October 2018), (*Wolland v. Norway*, 17 May 2018). These cases are a clear indication of the extent to which privilege and confidentiality have been challenged across Europe.

3. *Association Confraternelle de la Presse Judiciaire v. France and 11 other applications*. European Court of Human Rights. 26 April 2017. Request no. 49526/15. <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173634%22%7D>

4. 'Factsheet – Legal professional privilege'. European Court of Human Rights. January 2019. https://www.echr.coe.int/Documents/FS_Legal_professional_privilege_ENG.pdf

Some commentators suggest that at the national and European regional level, the fight against terrorism, cross-border organised crime and money laundering has tended to take priority over the protection of confidentiality in the case law of ECtHR. This is particularly the case where national laws permitting bulk surveillance of communications technologies have been enacted⁵.

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, 105 amending Council Directive 91/308/EEC of 10 June 1991 on prevention of money laundering obliges lawyers to inform the competent authorities of any suspicion of money laundering as well as financial institutions. Although there are some protections built into the directive, the ECJ has limited this to litigation privilege⁶.

* Regional Projects on Confidentiality

Over the past fifty years, there have been a number of collaborative regional projects on this topic. Some notable examples include the Edwards report 1976⁷ as updated by the CCBE in 2003 looks at Professional Secrecy, Confidentiality and Legal Professional Privilege In Europe⁸.

The Fish Report of February 2004 Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions. A report by John Fish, Former President of the CCBE and Solicitor, Dublin. This report examines the rights of lawyers to assert privilege on behalf on their clients to resist the production and seizure of documents and other written communications in civil and criminal proceedings across the EU 27 jurisdictions⁹.

In February 2004 CCBE also outlined its response to the second consultation from the UK Solicitors Regulation Authority (SRA) On Amendments to Rule 3 (Conflict Of Interest) And Rule 4 (Duties Of Confidentiality And Disclosure) Of The Solicitors' Code Of Conduct 2007. The CCBE concluded that it was not supportive of relaxing the UK conflict of interest rule for reasons including an increased likelihood of leaking confidential information and difficulty of obtaining meaningful informed consent from clients¹⁰.

The CCBE carried out a survey of national laws and regulation on confidentiality in 2009. The report provides neat, systematic summaries on each country that responded to the survey. The CCBE also published 'Recommendations on the protection of client confidentiality within the context of surveillance activities' in 2016¹¹.

5. Protection of Attorney-Client Privilege in Europe' Penn State International Law Review. Volume 27 Number 2. Article 9. 9-1-2008. By Prof. Taru Spronken and Jan Fermon. Pages 457-458.

6. Ibid.

7. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) 'The Professional Secret, Confidentiality And Legal Professional Privilege In The Nine Member States Of The European Community. By D.A.O. Edward, Q.C. 29 October 1976.

8. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) 'The Professional Secret, Confidentiality And Legal Professional Privilege In Europe (An update on the Report by D.A.O. Edward, QC)'. 30 September 2003. https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Reports/EN_DEON_20030930_Update_of_th_Edwards_report.pdf

9. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) 'Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions'. John Fish. 27 February 2004 https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Reports/EN_DEON_20040227_Fish_report.pdf

10. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) 'Response To The Second Consultation From The Solicitors Regulation Authority (SRA) On Amendments To Rule 3 (Conflict Of Interest) And Rule 4 (Duties Of Confidentiality And Disclosure) Of The Solicitors' Code Of Conduct 2007. 23 January 2010;

11. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) 'Recommendations: On the protection of client confidentiality within the context of surveillance activities'. 28 April 2016 https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20160428_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf

On 15 September 2017 the CCBE issued a statement on behalf of its members reaffirming its commitment to legal professional privilege and highlighting infringements of this right in member countries including where lawyers are treated as “accomplices” of their clients and associated with their cause, particularly in the case of charges relating to terrorism or organised crime and where lawyers were asked by administrative or financial authorities to report on their clients in matters such as suspicious funding sources or “aggressive” tax planning.

The 2019 edition of the Charter of core principles of the European legal profession & Code of conduct for European lawyers addresses confidentiality at 2.3¹². In April 2019, the 4th International Lawyers Forum in Berlin met to discuss the issue. The UIA will examine the issue at its annual conference in November 2019.

CONCLUSIONS AND RECOMMENDATIONS FOR FURTHER ANALYSIS

As it is evident by the number of publications quoted in this report, the topic of confidentiality and professional privilege has been debated in many fora over a number of years, including recently at high profile events such as the 4th International Lawyers Forum in Berlin (April 2019) and at the 63rd UIA congress in Luxemburg. Perhaps the time has come for the CCBE to work with its members and produce an updated version of its regional survey on the topic, which is now 10 years old.

It is also important to recognise that the proliferation of new communication technologies is likely to keep the topic of lawyer-client confidentiality in the spotlight. International lawyers’ associations should be ready to engage in the debate and defend this key pillar of rule of law and access to justice, as well as ensure its interpretation and implementation remain fit for purpose.

BIBLIOGRAPHY

- CCBE questionnaire on professional secrecy/legal professional privilege/confidentiality 10 March 2009.
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘Recommendations: On the protection of client confidentiality within the context of surveillance activities’. 28 April 2016.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20160428_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf
- Case 155/79, AM & S Europe Ltd. v. Commission of the European Communities, 1982 E.C.R. 1575, 2 C.M.L.R. 264 <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=155/79&td=ALL>
- Association Confraternelle de la Presse Judiciaire v. France and 11 other applications. European Court of Human Rights. 26 April 2017. Request no. 49526/15.
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173634%22%5D%7D>
- Taru Spronken and Jan Fermon. ‘Protection of Attorney-Client Privilege in Europe’ Penn State International Law Review. Volume 27 Number 2. Article 9. 9-1-2008. Pages 457-458.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1440205

12. Commission Consultative Des Barreaux De La Communauté Européenne (CCBE) ‘Charter of core principles of the European legal profession & Code of conduct for European lawyers’. 17 May 2019
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

- The Council of the Bars and Law Societies of the European Union (CCBE) ‘Position of the CCBE on the Requirements on a Lawyer to Report Suspicions of Money Laundering and on the European Commission Proposal for a Third Eu Directive on Money Laundering Regulations (2004)’, 4 November 2004.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ANTI_MONEY_LAUNDERING/AML_Position_papers/EN_AML_20041104_CCBE_position_on_the_requirements_on_a_lawyer_to_report_suspicions_of_money_laundering_and_on_the_European_Commission_Proposal_for_a_Third_EU_Directive_on.pdf
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community. By D.A.O. Edward, Q.C. 29 October 1976.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Reports/EN_DEON_19761029_Edwards_report.pdf
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘The Professional Secret, Confidentiality and Legal Professional Privilege In Europe (An update on the Report by D.A.O. Edward, QC)’. 30 September 2003.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Reports/EN_DEON_20030930_Update_of_th_Edwards_report.pdf
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions’. John Fish. 27 February 2004.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_Reports/EN_DEON_20040227_Fish_report.pdf
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘Response to the Second Consultation from the Solicitors Regulation Authority (SRA) on Amendments to Rule 3 (Conflict of Interest) and Rule 4 (Duties Of Confidentiality And Disclosure) of the Solicitors’ Code of Conduct 2007. 23 January 2010.
- Commission Consultative des Barreaux de la Communauté Européenne (CCBE) ‘Charter of Core Principles of the European Legal Profession & Code of Conduct for European Lawyers’. 17 May 2019.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf
- “Confidentiality of Advice Given by In-House Legal Counsel Practicing in the European Union” Jacques Buhart, avocat à la Cour d’appel de Paris, Avocat au Barreau de Bruxelles.
- European Court of Human Rights ‘Factsheet – Legal Professional Privilege’, January 2019.
https://www.echr.coe.int/Documents/FS_Legal_professional_privilege_ENG.pdf
- Solicitors Regulation Authority ‘Protecting and Maintaining Client Confidentiality, 9 January 2015.
<https://www.sra.org.uk/confidentiality/>
- Law Society of England and Wales ‘Legal Professional Privilege’, 9 September 2019
<https://www.lawsociety.org.uk/support-services/advice/articles/legal-professional-privilege/>
- Law Society of England and Wales ‘Legal Professional Privilege Practice Note’, 6 September 2018.
<https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-professional-privilege/>
- Law Society of England and Wales ‘GDPR in Practice: Legal Professional Privilege and Client Confidentiality’, 6 December 2018.
<https://www.lawsociety.org.uk/support-services/practice-management/gdpr/gdpr-in-practice-lpp-and-client-confidentiality/>

EUROPE: SPAIN

Professional Secrecy in Spain

CONTRIBUTOR:

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PRELIMINARY NOTE

In Spain, lawyers who are admitted to the bar are subject to a duty of professional secrecy (which is not only attorney-client privilege). Only lawyers who are admitted to the bar are entitled to appear in court defending their client (even though private individuals can also defend themselves and public institutions have their own legal representation that might not be incorporated in the bar). Such lawyers are self-employed, although they can be partners or associates in a law firm. They must comply with the bar's code of ethics. In Spain, there are 83 bar associations, one in each province, 50 of them, and 33 with a smaller jurisdiction. The size and number of affiliates of each bar varies very much. Madrid has more than thirty thousand members whilst there are some bars with less than one hundred. The structure is however the same, one President (*Decano*) and one Board (*Junta de Gobierno*).

There is legally no distinction between lawyers who are employed by a company (in-house counsel) and those lawyers who are not. Every individual lawyer has to be incorporated to the bar and can use the title of *Abogado*. However, the legal representatives of the state or a public organisations (*Abogados del Estado*) do not need to be members of the bar and they are usually not. In the last years, in house lawyers are beginning to organise themselves in private consortiums.

This report focuses on the duty of professional secrecy of lawyers who belong to the bar. Unless indicated otherwise, for the purposes of this report, the term «lawyer» refers to a member of the bar (*Abogado*).

SCOPE OF AND LIMITATIONS ON THE DUTY OF PROFESSIONAL SECRECY

* Statutory Basis and Implications

The professional secrecy is recognised in the Spanish Constitution (*Constitución Española de 1978*). The Spanish Constitution promulgates the right of professional secrecy – section 18 – and determines that it shall be regulated by law.

The last sub-section of section 24 implicitly acknowledges the professional secrecy to which the lawyer is bound, but fundamentally in his facet of defender when the law is entrusted with its regulation: “The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.”

The judgement of the Supreme Court of Justice (*Tribunal Supremo*) delivered on 17th February 1998¹ ruled that professional secrecy was the basis of the right to be defended.

Section 542.3 of the Organic Law governing the Judiciary (*Ley Orgánica del Poder Judicial*) – hithe – to section 437.2 – provides that: “Lawyers shall keep secret all facts or information that have been confided to them through any of the facets of their professional activity and may not be obliged to give evidence thereon.”

The same law specifies what these functions are. The lawyer is not only a legal advocate but is also a consultant and an adviser. Section 542.1 of the Organic Law governing the Judiciary provides that “The title and function of lawyer exclusively pertains to a graduate by law who professionally

1. Judgement of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 17th February 1998, Reporting Judge, Mr Xiol Ríos, Aranzadi 1998/1633.

practices the defence of parties in all kinds of proceedings or provides professional guidance and legal advice.”

The ultimate basis of the lawyer’s professional secrecy is therefore two-pronged. On one hand, it is based on the right of the client to privacy (section 18.1 of the Spanish Constitution) in the facet of guidance and advice, and on the other, not to give evidence against his client which is guaranteed by section 24 of the Magna Carta with respect to the right to be defended.

In addition to the provisions of the Organic Law governing the Judiciary, rule 416 of the Spanish Rules of Criminal Law Procedure (*Ley de Enjuiciamiento Criminal*) exempts the defendant’s lawyer from giving evidence on the facts that the defendant confides in him in his capacity as defender.

Section 135 of Organic Law 2/1989 governing Military Procedure (*Ley Orgánica de Justicia Militar*), passed in Spain on 13th April 1989, provides that lawyers are included among those who are exempt from informing the authority of criminal offences that have been confided to them by their clients.

Professional secrecy is addressed in numerous provisions of the Spanish Lawyers General Statute (*Estatuto General de la Abogacía Española*) hereinafter the Statute: section 21, prohibition from sharing premises with incompatible professionals if this might adversely affect the obligation to abide by professional secrecy; section 25.2 on anti-ethical advertising activities comprising “The direct or indirect disclosure of facts, data or situations protected by professional secrecy.” Protection is also provided by virtue of section 28 relating to the collective practice of the profession and section 32.1, which reproduces section 542.3 of the Organic Law governing the Judiciary – hitherto 437.2 – referred to above.

Section 42.1 of the Statute, which sets forth the obligation to employ the maximum conscientiousness and diligence in the defence of a client, requires that in doing so, professional secrecy must be observed.

Lastly, the Statute refers to secrecy – though not professional in these cases – in sections 49.6 and 50.1.

In its preamble, the Code of Conduct (*Código Deontológico de la Abogacía Española*), “the Code”, lists professional secrecy as one of the fundamental principles of the legal profession and as a reason for setting out certain limitations in the rules governing incompatibility and advertising, the nonlimitation of free competition and the social function of the legal profession.

In accordance with the Code, professional secrecy includes communication with clients, with colleagues, with the “adversary”, confidential information and proposals and in general “*all of the facts and documents that the lawyer is informed of or has been given due to any of the facets of his professional activity.*”

The Code also makes reference to face-to-face and remote conversations with clients and with the opposing party – supposedly in the presence of the client and his lawyer, if the client is represented – and with the counsel of the adversary party, but also protected by the professional secrecy rule are conversations that might be held with persons who, though not clients, opponents or lawyers, come into contact with the lawyer, such as a relative of the client, an expert or a witness.

Also subject to the professional secrecy rule are talks with other lawyers, a fellow-helper, or the lawyer he might be succeeding in the defence of the same client. For further information see a judgement delivered by the Supreme Court which defines the scope of secrecy and confidentiality including the draft copies and the purely oral conversations, without signature being required on the documents.² Another judgement delivered by the Supreme Court on recordings that were not admitted may also be consulted.³

2. Judgement of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 22nd April 1997, Reporting Judge, Mr Mateos García, Aranzadi 1997/3094.

3. Judgement of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 11th May 1999, Reporting Judge, Mr Lecumberri Marti, Aranzadi, 1999/4779.

The duty of professional secrecy even though normally protects the client is not conceived only for that and its basis are therefore not contractual but legal and the authorization from the client to disclose information does not allow the lawyer to breach his duty of confidentiality.

A lawyer thus cannot use in a new case information that he has received or being aware of in another case nor can testify in respect of facts that he has learned in his professional activity as defender or advisor.

In civil cases, the court should not accept privileged information into evidence. Any such information must be discarded with application of the theory of *the fruit of the poisoned tree*.

* Scope of the Duty

The duty to abide by professional secrecy is objectively absolute, that is, it embraces all facts or information, but it is not universal, in other words, not all lawyers, whatever function they are performing, are subject to such an obligation.

It is absolute as it covers all information, whether written or oral, obtained by the lawyer (not only the one provided by the client) in any of his functions of defending in Court or giving legal advice either in litigation relating to the client's rights and obligations or in the course of soliciting advice regarding the client's legal rights and obligations. This includes information provided by the opposing party or a third party.

Therefore, any information the lawyer receives (i) in the course of defending or representing a client before a court, including an administrative court or committee entitled to determine the rights and obligations of individuals, and (ii) in the context of ascertaining the client's legal position, including when advising the client on the preparation or performance of a transaction, is covered by the duty of keeping professional secrecy.

The duty, however, is not universal in the sense that not all activities which a lawyer might be performing are covered by the duty of confidentiality. Some activities outside of the strict legal profession (e.g. when the lawyer acts as a company director, a trustee in bankruptcy or a lobbyist) are thus not protected. In this regard, it may be clearer to distinguish between assistance provided by a lawyer in order to help the client determine legal rights or obligations and other activities carried out by a lawyer. For instance, when a lawyer serves as a director, liquidator or court-appointed trustee, the lawyer is not acting on behalf of or providing assistance to a client. Information obtained from lobbying activities is, of course, only privileged to the extent such activities are intended to define or enhance the legal position of a client. Indeed, lobbying on behalf of a client could also constitute the provision of assistance to the client in defining a legal position or avoiding litigation.

In short, correspondence or other information which the lawyer sends or receives when serving as a liquidator, director, trustee in bankruptcy or when fulfilling a court appointment is not protected by the duty of professional secrecy. Furthermore, any funds a lawyer receives outside the exercise of the legal professional (even if received from a client) are not protected, meaning the lawyer may be asked to account for the use or origin of these funds.

In general, any correspondence between lawyers is covered by the duty of professional secrecy and thus privileged. Furthermore, any enclosures in such correspondence, advice the lawyer prepares on the client's rights and obligations, personal notes made by the lawyer are also covered by the obligation to keep confidentiality. It should be noted that whilst the Code only refers to correspondence received by the lawyer, the Statute covers any correspondence between lawyers, thus remitted or received.

The phrase "abide by secrecy" when it refers to professional life goes beyond ensuring that matters that are confidential remain so. The obligation to uphold professional secrecy is not to reveal, that is, not to state, declare, inform or communicate any matter that the lawyer has come to know in the course of his professional practice. The matter may be secret or not secret. In other words, it may

be unknown to all or known to all. This does not matter: the lawyer may only consider that a matter of any nature which has been confided to him in the course of any of his professional activities is protected by professional secrecy.

In its judgement delivered on 16th December 2003⁴, the Supreme Court reasserted the interpretation of the scope and content of secrecy in respect of the obligation to abide thereby even regarding matters that are of public domain and well-known. It concerned the disclosure of certain statements and confidential matters that had already been made public through the very extensive coverage given to them by the media. The Supreme Court stated in its decision that just because the content of said statements and confidential matters and their existence were no longer secret was no reason for relieving lawyers from their duty to keep professional secrecy. This position was based on the fact that when the lawyer made his statement public and reaffirmed the content of the statements and confidential matters, he was adding weight to the possible gravity and certainty to the content of said disclosures.

The same does not happen with official secrets that are no longer secret when they have been discovered, and when this happens, even though the discovery is unlawful, they are governed by the freedom of expression⁵.

In its judgment delivered on 12th February 1998⁶, the Supreme Court had the opportunity to specify the scope of the professional secrecy binding a lawyer who as witness had given evidence to facts that he had come to know while rendering his services.

In his defence the lawyer said that he had not acted in the proceeding and that he had gained “... knowledge of the facts from the negotiations conducted but not so much in his capacity as a lawyer”, which the client himself admitted. The Court stated: “*This argument cannot be accepted. The evidence examined, as detailed in the judgement of the proceeding, shows that the denounced party acted in his capacity as a lawyer on the questions relating to the matter, which subsequently became the subject matter of litigation to which court he was summoned as a witness. The fact that the particular service rendered on which he gave evidence might have consisted of confidential business to endeavour to come to a compromise or agreement does not mean that professional secrecy cannot also be extended to said business...*”

On another occasion, the Supreme Court⁷ also pointed out that, in spite of the generality of the obligation to abide by professional secrecy, lawyers are only required to do so in their professional capacities, but not as individuals. This is a reaffirmation of the principle that the lawyer is bound by the rules of conduct when he acts in his capacity as such and not merely because he is professionally qualified to do so.

* Persons Subject to the Duty of Professional Secrecy

The professional secrecy rule by which subjects are bound extends to cover the lawyer’s employees, subordinates and collaborators, which was ratified by sections 9 and 14.1 of Act 2/2007 governing professional companies (*Ley de sociedades profesionales*) relating to compliance with rules of conduct.

Royal Decree 1331/2006, passed in Spain on 17th November 2006, by virtue of which the special labour relations of lawyers who render services in collective or individual law firms (*Real Decreto*

4. Sentence of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 16th December 2005, Reporting Judge, Mr Puente Prieto, Aranzadi 2005/3604.

5. This was stated by the European Court of Human Rights in its judgement delivered on the case *Vereniging Weekblad Bluf versus Austria* on 9th February 1995.

6. Judgement of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 12th February 1998, Reporting Judge, Mr Xiol Ríos, Aranzadi 1998/1633.

7. Judgement of the Spanish Supreme Court, Chamber Two, delivered on 16th march 2006, Reporting Judge, Mr Martín Pallín, Aranzadi 2006/4778.

1331/2006, de 17 de noviembre, por el que se regula la relación laboral de carácter especial de los abogados que prestan servicios en despachos de abogados, individuales o colectivos) applies this obligation to those who work for the owner of the firm by setting forth in the last sub-section of section 6 and in section 24.2 provisions on disciplinary liability.

The general consensus is that professional secrecy is not only in the interest of the client but also of society as a whole and a matter of public policy.

Professional secrecy is the “cornerstone of the practice of law”.⁸

* Exceptions to and Optional Derogations from the Duty of Professional Secrecy

The duty of keeping confidentiality might be subject to some limitations.

Professional secrecy has traditionally been conceived as a duty and a right. With respect to the profession of law, secrecy is a negative right, not to give evidence, and is only exercised when the lawyer is requested to give evidence even when his role involves communication between the defendant and the counsel.⁹

Already in 1984, the Constitutional Court (*Tribunal Constitucional*)¹⁰ authorized the possibility of requiring certificates of current account movements while stating that such a requirement did not in itself violate the professional rule nor did the simple disclosure of the client’s name and the amounts paid by him on fees. The judgement, however, stated conclusively that although the Spanish Constitution does not explicitly reinforce the banking secrecy rule, it does so with the professional secrecy rule.

In its judgment 6/1988 delivered on 21st January 1988, the Constitutional Court¹¹ stated that the violation of the professional secrecy rule – incidentally, on the part of an employee – was a contravention that, “on no account could (n) be legitimated with the argument of freedom of information...”

Exceptions

Despite how categorically impossible it is to reveal the professional secret, there are situations in which it is inevitable that certain circumstances have to be reported even though they might be considered to be protected by this obligation of confidentiality.

On the obligation to collaborate with and inform the State Agency for Tax Administration (*Agencia Estatal de Administración Tributaria*), account has to be taken of section 93 of the General Tax Law, Act 58/2003, passed in Spain on 17th December 2003 (*Ley General Tributaria*), which requires the disclosure to said State Agency of all kinds of data, reports, records and receipts of tax relevance of which professionals become aware in the practice of their professional activity, provided the disclosure of which might not jeopardise personal and family honour or privacy.

8. According to a statement contained in the judgement of the Spanish Supreme Court, Chamber Three, Division Six, delivered on 3rd March 2003, Reporting Judge, Mr Trillo Torres, Aranzadi 2003/2643.

9. See OTERO GONZALEZ, María del Pilar “*El secreto profesional desde la óptica del deber de declarar en el proceso penal*” (The professional secret from the viewpoint of the obligation to give evidence in a criminal prosecution) Legal Journal La Ley (The Law) 5135, 20000 and “*Justicia y secreto profesional*” (The law and professional secrecy) Madrid, Centro de Estudios Ramón Areces, Madrid, 2001.

10. Judgement of the Spanish Constitutional Court 110/1984 delivered on 26th November 1984, Reporting Judge, Mr Latorre Segura.

11. Judgement of the Spanish Constitutional Court 6/1988 delivered on 21st January 1988, Reporting Judge, Mr Díez-Picazo y Ponce de León.

Neither can the obligation affect confidential data of their clients which have come to their knowledge as a consequence of providing professional advice or defence services. It is to be emphasized that professionals may not invoke the professional secrecy rule to prevent the verification of their own tax position.”¹²

The Supreme Court has a body of case law relating to the professional secrecy rule in respect of collaboration with the State Agency for Tax Administration albeit in relation to real estate agents, other professionals and private banking.¹³

The position of lawyers to whom their clients confide their intention of committing a crime is commonplace with the accompanying dilemma of whether to keep this information secret or not. The dilemma can be solved¹⁴ by considering “that the secrecy rule does not apply because: a) the right of defence has not materialised (since it is a future event), only leaving then the right to privacy (for this purpose of less significance); b) it does not fall within the right of the confidant to privacy (since it is a criminal plan) and c) the lawyer’s social function (the third element of the structure) compels him not to conceal such a secret because in accordance with the Spanish Lawyers General Statute, said function is aimed at justice, advice, harmony and the defence of private and public legitimate interests by virtue of applying legal science and technique. The assistance to be provided by the lawyer must always seek the best execution of the legitimate rights and interests of his clients.”

Also¹⁵, the exemptions from the secrecy rule arising from the circumstance of necessity, supporting his argument on section 20 of the Spanish Criminal Code (*Código penal*) currently in force.

On defending themselves in disciplinary proceedings lawyers could verge on breaking the professional secrecy rule, the reason for which they must tread with the utmost caution, but neither would a refusal en masse to reveal anything because of being bound by the secrecy rule be acceptable. Should the opposite criterion be applied, lawyers would be exposed to the most unfounded denunciations of all kinds, civil, criminal and ethical, without any possibility of defence.

It is generally accepted therefore that, in certain exceptional cases of need, a lawyer must disclose information otherwise covered by professional secrecy. This is typically the case when the life or health of a person is in jeopardy. In doubt, the lawyer will refer the matter to the President of the bar association, who cannot authorize him to disclose the information but is able to advise the lawyer to adopt a remedial action¹⁶.

Lawyers may not hide behind professional secrecy to protect the acts of their own doing nor to cover up a crime they have committed. Any information however referred to an admission of a crime or a reference to a tool used to commit a crime by a client or a third party is subject to confidentiality.

Derogations

It is important to establish the nature of the secrecy rule where duty – or obligation – coexists with a right in order to determine to whom it belongs and, therefore, who can exempt it, if such exemption

12. For further information you may consult the judgement of the Spanish Constitutional Court 76/1990 delivered on 26th April 1990, Reporting Judge, Mr Leguina Villa.

13. Judgements of the Spanish Supreme Court, Chamber Three, Division Two, delivered on 3rd February 2001, Reporting Judge, Mr Mateo Díaz, Aranzadi 2001/250; on 7th June 2003, Reporting Judge, Mr Mateo Díaz, Aranzadi 2003/4014, Chamber Three, Division 6; on 6th March 1989, Reporting Judge, Mr Martínez Sanjuán, Aranzadi 1989/2177, Chamber Three, Division Two; on 2nd July 1991, Reporting Judge, Mr Llorente Calama, Aranzadi 1991/6219, and Chamber Three, Division Two, delivered on 30th October 1996, Reporting Judge, Mr Gota Losada, Aranzadi 1996/8608.

14. SOLDADO GUTIERREZ, José “*El secreto profesional del Abogado*” (The Lawyer’s Professional Secret), article awarded with the first prize of the Revista Jurídica de Andalucía (The Legal Journal of Andalusia), 1995 in Revista Jurídica de Andalucía, number 17, page 1183 and thereafter.

15. CORDOBA RODA, Juan, Abogacía, “*Secreto profesional y blanqueo de capitales*” (The legal profession, professional secrecy and money laundering, Publishing house: Marcial Pons, Madrid, Barcelona, 2006.

16. Paragraph 5 of the Code.

is possible, that is, if as a right it may be waived and if as an obligation, it may be condoned, or if the lawyer can be relieved from safeguarding the rule.

If the secret must only be kept because of the relationship of trust that has to exist between client and lawyer, it could be understood that the right belongs to the client and, as such, the client may use it as it pleases. However, for some time, this idea has not necessarily been accepted.

For some time now, this idea has been surmounted.

For example, the Constitutional Court has dismissed an appeal for legal protection while stating that the professional secret does not belong to the client¹⁷.

The professional secret has always been prone to come into conflict with other values and principles of the legal profession. If a lawyer becomes aware of the commission of an offence, the lawyer's obligation is to denounce it to the authorities so that it may be investigated and those responsible may be punished. If, however, this information has become known to the lawyer through the lawyer's professional practice then that lawyer is bound to forsake the obligation to cooperate with the law in the light of the obligation to keep the information confidential.

The impossibility of denouncing the offence exists even when the client expressly authorizes the lawyer to do so. The secret does not belong to the former and although this situation might seem absurd, the disclosure by the lawyer could lead to undesirable consequences for third parties.

The preservation of secrecy, however, at all costs could also give rise to serious damage or irreparable injustice. Think of the lawyer who knows that his client is the perpetrator of a crime for which a third party is serving sentence. Once again this conflict of obligations favours the preservation of the secret when such information comes to the lawyer in the practice of his profession.

To conclude, it can be affirmed that nobody in Spain, not even a judge nor the president of the Bar Association, no authority, no matter how high-ranking and important it might be, can intervene and relieve the lawyer from his obligation to keep secret the information that have come to him as a consequence of his professional practice. Neither can the client¹⁸.

* Law Firms

Lawyers who work in a law firm tend to share confidential information. It is generally accepted that no restrictions apply to this type of sharing of information. When a client engages the services of a law firm, all the lawyers of the firm are deemed engaged whether a member is handling the case or not are subject to the duty of confidentiality.

The duty applies to all information provided by the client to the lawyers of the firm, regardless of whether they are partners or associates. In all cases, they work on behalf of the firm.

The situation is different when lawyers work in a cost-sharing structure. In this case, the lawyers do not practice jointly, they only share costs and office space. In this case, they need to keep separate files. A client of one lawyer is not a client of the others. The obligation is therefore limited to information shared with the lawyer who represents the client and does not extend to the other lawyers who belong to the costsharing structure.

Sections 9 and 14.1 of Act 2/2007 governing professional companies have ratified such obligations but may cause certain problems in respect of professional secrecy since it permits the co-existence of professional partners and capitalist partners in the ownership of law firms. This is not an entirely new problem since there are already multi-professional companies in which lawyers work together

17. Judgement of the Spanish Constitutional Court 183/1994 delivered on 20th June 1994, Reporting Judge, Mr Díaz Eimil.

18. The situation is different in The United Kingdom since in cases like this, the client may authorise the lawyer to reveal the secret.

with those who are not and therefore according to their own Code of Conduct, they either have or have not, and to different extents, the obligation to keep the facts or information that come to their knowledge secret.

Ethics, in respect of the Act governing professional companies, is a constant theme to be respected so that the rules “do not become distorted when they are implemented through a corporate figure.”

But the difficulty is not envisaged in the text of said Act that foresaw¹⁹ over ten years ago in respect of the unexceptionable nature of the obligation to keep the professional secret from the non-professional partners who, by contrast and in the exercise of the rights conferred on them by commercial law, are entitled to exercise the rights to be informed and learn of the confidential matters that might have been confided to the professional on the assurance that they were protected by the secrecy rule.

Take for example, the invoicing by a firm incorporated as a company and the legitimate interest on the part of the non-professional partners to be informed of the reasons why a certain fee yields one amount and not another²⁰.

* Legal Assistants and Staff

Law firms employ secretaries, support staff and collaborators of any kind, who are also subject to the obligation of keeping confidentiality and their principal (s) is committed to take all measures in order to preserve it and is personally responsible for any violation that could take place.

* External Service Providers

The matter of the extension of professional secrecy to external service providers is not specifically addressed but the rule that the lawyer is responsible for the acts of their collaborators apply as there is no distinction between services provided outside or inside.

In addition, when confidential documents are sent outside the firm to non-lawyers, the duty of professional secrecy continues to apply. These persons work on behalf of the firm, within the limits of their particular assignment. If the confidential information inadvertently comes into the hands of a third party, the court may not allow this information to be presented into evidence.

* Multidisciplinary Associations

Lawyers are entitled to cooperate on a permanent basis with other professionals provided that is no incompatibility between the professions. In these cases, the lawyer should ensure that all his associates respect the professional secrecy. This does not mean the lawyer cannot share information with the nonlawyer; information can be shared but only provided that the non-lawyer keeps the obligation of keeping confidentiality.

In any event, privileged information shared by lawyers with non-lawyers in order to prepare the client’s case should remain protected by the duty of professional secrecy. Paragraph 24 of the Statute specifically provides this obligation.

19. ANGULO RODRIGUEZ, Luis de, “Los despachos colectivos de Abogados y las normas colegiales” en “El ejercicio en grupo de profesionales liberales” (“Collective law firms and collegial rules” in “Group practice of liberal professionals” Universidad de Granada, 1993, Page 313 and thereafter.

20. For further information, you may consult ORTEGA REINOSO, Gloria “Sociedad profesional. Composición de los despachos de Abogados” (Professional Companies. Composition of law firms) in the Law Journal Derecho Privado (Private Law), November, December 2006, page 75 and thereafter.

HISTORY OF THE DUTY OF PROFESSIONAL SECRECY IN SPAIN

The duty of professional secrecy for lawyers is not a new concept. Its background reaches back to law adopted during the Middle Age.

Already in the 1822 Criminal Code disclosure of the professional secret was punished and there was a similar provision in the 1848 Criminal Code, and in the 1850 Criminal Code there was reference to the lawyer and the solicitor, and in the code promulgated in 1870 (section 371), with a slight amendment, it became section 439 of the 1928 Criminal Code.

This was retained in section 365 of the 1932 Criminal Code – that of the Republic – and it was transferred without amendment to the Criminal Code introduced after the civil war, the 1944 Criminal Code. It was not amended in the 1973 Code, but was in the 1995 Code.

Section 199 of the present-day Criminal Code punishes the person “... *who reveals third-party secrets which become known to him due to his work or labour relations, ...*” and the “...*professional who, in breach of his obligation to keep the professional secret, reveals those of another person,...*”.

In the field of Spanish criminal law the new code has maintained the secret nature of the facts revealed to become liable for a criminal offence. This is not so from an ethical point of view, a field in which information does not have to be secret for the obligation to arise not to reveal such information.

SUPERVISION

* The Bar Associations

A lawyer who belongs to the bar is an independent legal professional who is free to determine how best to defend his or her clients and protect their rights and interests.

Lawyers are subject to the authority of the bar association, which, through the President, oversees compliance with the code of ethics of the legal profession. The bar authorities cannot direct or instruct lawyers in the handling of their cases. Their authority is limited to the imposition of disciplinary sanctions if a lawyer breaches his or her ethical duties. If the bar finds that a lawyer has violated the code of ethics, disciplinary proceedings will be initiated before a disciplinary body.

The obligation of preserving confidentiality is also an ethical duty, the violation of which will result in the imposition of disciplinary sanctions.

* The Courts

Lawyers must of course abide by the law. The civil courts have jurisdiction to hear any claim for professional liability brought against a lawyer by a client. The criminal courts have jurisdiction over crimes committed by lawyers in the exercise of their profession. No special rules apply in this respect to lawyers.

SANCTIONS

* Proceedings and Sanctions

Disciplinary Proceedings and Sanctions

The bar association receives and examines complaints against the association's members. The complaint should be in writing and can be filed by anyone. The bar can also start proceedings at its own initiative or further to a complaint by the courts. The bar association has normally a permanent Commission or disciplinary tribunal who deals with this matter. If the Commission finds that the complaint is inadmissible or unfounded, the plaintiff and the lawyer will be informed accordingly. In this case, the person who has filed the complaint can ask the National or the local Counsel of Bars to review the decision. If the complaint has any substance, one of the members of the Commission, a member of the Board or an independent lawyer – the system varies in the different bars – is appointed as an investigator.

The lawyer under investigation must be given an opportunity to be heard, is entitled to produce information and evidence in support of his or her defence, and can be assisted by a lawyer of his or her choosing.

If, after investigation, the appointed lawyer is of the opinion that there are sufficient grounds for disciplinary sanctions, the case will be opened as a file which is dealt by the disciplinary tribunal and the lawyer will be informed of this decision. If a decision is not taken within six months after this decision is made, the lawyer and the bar association can apply for or decide that the file should be reopened again provided that the offence is not under the statute of limitations. Most serious offences should be seen within three years since they were committed, serious offences, within two and misdemeanours, not after six months.

Upon termination of the filing of the case where both the plaintiff and the lawyer have full right of audience, the matter is referred to the Board of the bar association with a proposal. The Board can decide either to apply a penalty to the lawyer or dismiss the complaint for lack of evidence. All parties are informed of this decision, which can be appealed in a month's time to the National or local Counsel of Bars.

The following disciplinary sanctions can be imposed by the disciplinary body: (i) a reprimand, (ii) a suspension from the practice of law for a period of up to three years, or (iii) expulsion from the bar. The expulsion from the bar has effects in the whole of Spain, namely, the lawyer cannot practice in any other jurisdiction in spite of the fact that he may be incorporated in another bar. Besides he cannot apply to be incorporated during that period.

The board must justify its decision and both the lawyer – in case of a sanction being imposed – and the plaintiff, in case of the dismissal of the complaints can be appealed to the National or local Counsel which has its own disciplinary board.

Both parties may appeal and could be heard before the Counsel and make allegations. The roll of the plaintiff and whether he has an interest on the disciplinary matters – not counting the civil or criminal implications – is still a matter under dispute.

The sanctions are communicated to the Courts and recorded in a special registry.

After the decision of the Counsel, both parties appeal before the ordinary Court and the decision of the Court may be appealed before the High Court.

Criminal Proceedings and Sanctions

Violation of the obligation of keeping confidentiality is punishable by criminal sanctions according to paragraph 199 of the Criminal Code.

The criminal court (*Juzgado de lo Penal*) has jurisdiction. The court's decision can be appealed to the competent High Court, whose decision can in turn be challenged, although only on legal grounds, to the Supreme Court.

It is to be pointed out that in order that the criminal offence can be punished it is necessary that the information revealed is in fact secret and not of public knowledge. On the contrary, disciplinary measures can be taken against a lawyer who violates his duty of keeping confidential all the information that he has obtained in the exercise of the profession.

There is no difference if this violation takes place by testifying in court (including before an investigating magistrate) or before a parliamentary inquiry committee.

Civil Proceedings and Damages

Violation of the obligation of keeping facts confidential and disclosing professional secrets may cause damages to the client and in certain cases to a third party. That party bears the burden of proof of damages and the fact that they have been produced as a consequence of the violation.

The courts of first instance have jurisdiction over such proceedings, and appeal is possible to the courts of appeal and, finally, to the Supreme Court (on legal grounds only) provided that the damages are of consideration.

*** Relationship between Criminal Sanctions and Disciplinary Sanctions**

Disciplinary and criminal sanctions are imposed independently but there are relations between them. When a disciplinary case has been filed and the disciplinary tribunal is made aware that there are also criminal procedures on their way, the disciplinary case should be suspended until a final decision is adopted in the criminal courts. Once a criminal sanction is imposed on a lawyer, the disciplinary tribunal should continue the proceedings and another sanction could be imposed to the lawyer on the basis of the same facts which have been established in the Court and should not be changed.

The imposition of both criminal and disciplinary sanctions on the basis of the same facts does not violate the general principle²¹ of *non bis in idem as the sanctions are imposed for the violation of different rules*.

DUTY TO PROVIDE INFORMATION TO THE AUTHORITIES

*** Money Laundering and Terrorism**

Credit institutions, financial institutions and financial intermediaries, real estate brokers, diamond traders, surveillance companies, notaries, bailiffs, auditors and accountants are obliged to inform

21. This is considered a general (unwritten) rule of law which does not need to be enshrined in legislation in order to be applicable.

the Financial Information Processing Unit (*Servicio Ejecutivo de Prevención de Blanqueo de Capitales, anagram SEPBLAC*) of any transaction they know or presume that is related to money laundering or the financing of terrorism – Act 10/2010 of 28th April 2010 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing –.

This Act continues to include lawyers among those who are obliged to collaborate with the financial unit in the prevention of money-laundering.

This legislation only applies to lawyers when participating with their clients either taking part in the conception, guidance advice or execution of transactions relating to the acquisition or sale of real estate or companies, the management of funds, securities or other assets, the opening or management of bank accounts or securities accounts, the contribution to companies, the incorporation or management of companies, trusts, fiduciary or similar legal constructions, or when acting on behalf of clients in financial transactions or transactions relating to real estate (Art. 2^o of the Act of 28th April 2010).

In this case, the lawyer must identify the client seeking advice on any of the above matters before providing assistance. However, if the client is seeking assistance in ascertaining its legal position or with respect to litigation, the lawyer can accept the case before fulfilling the identification requirement.

However, the Belgian Constitutional Court held that requiring lawyers to communicate information received from clients in relation to litigation, or in order to prevent litigation, to the Financial Information Processing Unit violates the duty of professional secrecy and is thus unconstitutional.

A lawyer who is informed of facts which he knows or presumes are related to money laundering or the financing of terrorism must immediately inform the financial unit and cannot inform the client of this fact or that an investigation is under way. There is no “tipping off”. The law establishes this obligation to collaborate with The Executive Service of The Commission for the Prevention of Money Laundering and Monetary Infractions (SEPBLAC) and notify said Service, on one’s own initiative, of any fact or transaction regarding which there is a suspicion or certainty that it is related to money laundering without disclosing said notification to the client.

Lawyers must not inform the financial unit when they receive or obtain information from a client in the course of ascertaining the client’s legal position or providing assistance with respect to litigation, including when rendering advice on the initiation or avoidance of litigation, regardless of whether they receive such information before, during or after litigation. This exception does not apply when the lawyer takes part in the money laundering activity or the financing of terrorism, or provides advice on money laundering activity or the financing of terrorism or knows that the client is seeking advice for the purposes of money laundering or the financing of terrorism according to the terms of the third European Directive.

The phrase included in the Act, without prejudice to its provisions, “*Lawyers shall keep the professional secret pursuant to the law*” leaves few doubts that – regarding “*participative guidance*” – this is a dilution of the obligation to keep the professional secret.

* Collective Settlement of Debts

There are no special provisions in Spain in this context. In principle, lawyers may not use the information obtained or revealed to them in a case in favour of a different client in another case.

TREATMENT OF LAWYER'S DOCUMENTS AND CORRESPONDENCE IN THE CONTEXT OF JUDICIAL INVESTIGATIONS

The judgement of the European Court of Justice (Grand Chamber), delivered on 14th September 2010 in case C-550/07²², stated that the professional secret is inseparable from the lawyer's independence and for this reason, the communication between the in-house lawyer and the company for which he works are not subject to confidentiality. The professional secret therefore does not cover the correspondence between clients and their in-house lawyers.

During 2005 a lawyer was charged in Spain for an alleged offence of disobedience when he refused to deliver voluntarily to the police officers who were handling a rogatory commission from a court of another country of the European Union "all such documentation as is relevant" for an investigation concerning two foreign citizens and a company domiciled abroad "and that is in his possession," as had been ordered by the judge who was processing the rogatory commission. The court dismissed the charge though not without first stating that "Although it is obvious that the professional secret cannot be absolute or unlimited in nature and protect all degree graduates who are members of a Bar Association just like that regardless of the activities they conduct..." therefore the lawyer should have handed over all documents and the court order to do so was fully legitimate and appropriate as was the subsequent inspection.

The solution would have been the same in the United Kingdom, the home-country of the client, since the lawyer was obliged to deliver the records that were required of him by virtue of a "production order", but was not required to give evidence to the police, though he was required to do so before the court²³.

The professional secrecy rule protects any communication between the lawyer and his client if it takes place by telephone. Not long ago, however, the telephone lines of certain defendants were tapped during a major financial scandal; the police presented the tapes to the judge on which conversations and advice given by the lawyers to their client on the defence tactics were recorded. Regrettably, rather than directly rejecting this evidence, the judge's first reaction was to request from the prosecutor a report on which of the elements could be admitted and which could not. Fortunately, the judge subsequently rectified the situation and these evidential elements were not included in the court record.

Very recently, a judge was charged with ordering the tapping of conversations between clients and lawyers. The Court case still has not been heard.

SEARCH OF A LAWYER'S OFFICE

The search of the office or home of a lawyer is not governed by law. According to the Statute, if the investigating magistrate decides to notify the President of the bar to be present during the search, he or a representative duly appointed should attend. This takes place often as it is a guarantee for all parties concerned. The search should be limited to files relating to clients that are under investigation. No other files should be opened or looked at. However, the normal practice is to request the software and copy the pertinent files.

When questioned by the investigating magistrate, the lawyer should not disclose information protected by the obligation of confidentiality.

22. Subject matter: Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd

23. Guide to the Professional Conduct of Solicitors, 1999, eighth edition, appendix 16A, page 335.

A decision of the Supreme Court has ruled that it is not contrary to the law the obtaining of other pieces of conviction during the search at a lawyers office and it should be the magistrate to decide at a later stage what is pertinent and what is not²⁴.

TAPPING OF TELEPHONE CONVERSATIONS WITH A LAWYER

In certain cases defined in the Code of Criminal Procedure the investigating magistrate may authorize the tapping of telecommunications where there are serious indications that the person in question has committed a specific crime or if this person is suspected, on the basis of precise facts, of maintaining regular contacts with a suspected criminal. Any relevant information is set down in an official transcript for further investigation. There is no provision for lawyers even though any conversation with the client as his defence cannot be transcribed.

THE LAWYER AS WITNESS

Another inroad into the professional secrecy rule is that relating to the lawyer giving evidence as a witness.

An Abrogative Provision of Act 1/2000 governing Civil Procedure (*Ley de Enjuiciamiento Civil*), passed in Spain on 7th January 2000, has derogated, inter alia, section 1247 of the Spanish Civil Code, which considered to be incapacitated to give evidence as witnesses, among others, “those who are bound to keep a secret due to their position or profession in matters relating to their position or profession.”

This provision, which clearly included lawyers, has been substituted with section 371 of the Rules of Civil Procedure, the title of which is “*Witness under the obligation to abide by the secrecy rule*”. The abrogated provision referred to the incapacity of lawyers to give evidence as lawyers. It was not a privilege; it was not motivated by any desire to give lawyers special consideration. It was a form of avoiding unpleasant and futile situations.

The lawyer is obliged to appear before the court as, just like any other person, he is bound to attend to the summonses and notices of the Judiciary while incurring, should he fail to do so, the pertinent liability.

Before giving evidence, however, he should respectfully remind the judge that the facts about which he is going to be asked, should he know of them, are protected by the obligation to keep the professional secret since he learned of them in his capacity as lawyer of one of the parties. It should be remembered that the professional secret is established not only by internal, customary and traditional rules but also by an Organic Law and therefore section 371 of the Rules of Civil Procedure are not applicable to a lawyer.

In the situation that a judge should oblige the lawyer to give evidence, the latter must refuse to do so and request protection from the Board of his bar association by virtue of section 41 of the Spanish Lawyers General Statute. This opinion is not unanimous. There are those who think otherwise and consider that the obligation to keep the secret is only “professional”²⁵.

24. Judgements of the Spanish Supreme Court, Chamber Two, delivered on 25th February 2004, Reporting Judge, Mr Martin Pallin, Aranzadi 2004/1843.

25. ALONSO OLARRA, Guillermo, Comentarios a la nueva Ley de Enjuiciamiento Civil (Commentary on the new Rules of Civil Procedure), Dykinson, 2000, page 372. RIFA SOLER, José María, Comentarios a la nueva Ley de Enjuiciamiento Civil, Iurgium Editores, Barcelona, 2001, pages 371 and 372. MARCHENA GOMEZ, Manuel, Enjuiciamiento Criminal, Ley y legislación complementaria. Doctrina y Jurisprudencia, (Criminal Prosecution, Law and complementary legislation. Doctrine and Case Law. Publishing House, TRIVIUM SA, Madrid, 1998.

It is impractical to summon a professional colleague to give evidence on facts that are protected by the obligation of professional secrecy since the lawyer summoned as witness will not give evidence if he or she is well informed. Should the lawyer do so inadvertently or be unaware of the rule, the lawyer's statement must not be taken into account insofar as it might damage or benefit either of the parties. When this circumstance has been pleaded, the judge should apply the fruit of the poisonous tree doctrine, which inspired section 11 of the Organic Law of the Spanish Judiciary^{26 27} and was implemented by the judgements delivered by the Supreme Court on 2nd July 1998 and the Constitutional Court on 22nd March 1993 and 1st October 1990. Evidence given by the lawyer who is bound to keep the professional secret is unlawful.

The Supreme Court²⁸ qualified the situation in the light of the questions asked to the lawyer-witness, and considered the evidence of a duty solicitor to be inadmissible²⁹.

THE LAWYER AND THE PRESS

It is generally accepted that a lawyer can, with the client's consent, speak to the press in order to defend the client against allegations made in the press. However, the lawyer should refrain from conducting the case in the press rather than in the courtroom. In any case, the lawyer cannot disclose privileged information to the press.

POWERS OF THE TAX ADMINISTRATION AND OTHER AUTHORITIES

This matter has been dealt with above.

CONCLUDING COMMENTS

■ To conclude, we should recall the speech made by the President of the Madrid Bar Association on the occasion of the awarding of the Gold Medal of the Bar Association of Madrid to HM, the King³⁰: "And, over time, when the legal professional secrecy rule was conceived, it was not done to cover our conduct, but to guarantee that the truth can only be obtained by following the straight path while respecting the presumption of innocence."

26. Judgement of The Provincial High Court of Las Palmas, Division One, delivered on 12th November 2001, Act 202555/2001.

27. "*The fruit of the poisonous tree doctrine*" according to the legal terminology of The United States of America, which is used to describe evidence based on information obtained unlawfully. The logic of the expression is that if the origin of the evidence (the tree) is corrupt, whatever derives from such evidence (the fruit) will also be corrupt.

28. Judgement of the Spanish Supreme Court, Chamber Two, delivered on 27th September 2002, Reporting Judge, Mr Martín Pallín, Aranzadi 2002/9240.

29. Judgement of the Spanish Supreme Court, Chamber Two, delivered on 4th December 2006, Reporting Judge, Mr Montarde Ferrer, Aranzadi 2007/779, and the individual vote of Mr Martínez Arrieta described therein is very important.

30. MARTI MINGARRO, Luis, Discurso con ocasion de la concesión al Rey Medalla de Oror del Ilustre Colegio de Abogados de Madrid, Published in OTROSI, Law Journal of The Bar Association of Madrid, July-August 1996.

Report on Attorney-Client Privilege

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INTRODUCTION

The Japan Federation of Bar Associations (“JFBA”) has strongly been promoting reinforcement and more clear promulgation of statutory provisions on attorney-client privilege under Japanese law. In this context, in February 2016, the Working Group on Attorney-Client Privilege published an official report describing the current status of Japanese law and enforcement practices, the practical problems as well as JFBA’s proposals with respect to the aforesaid issue.

Traditionally, Japanese law has several provisions granting the attorney and/or the client the right to refuse production of certain attorney-client communication in civil and criminal proceedings; however, they have generally been understood as the revelation of the attorney’s professional confidentiality obligations rather than the client’s entitlements to access to legal professionals on a confidential basis.

Contrary to common law jurisdictions where the production of documents in judicial proceedings tends to be more stringent and comprehensive, typically shown by the procedures of “discovery” in the United States, under Japanese law, parties in civil proceedings are, in principle, free to select evidence for production before courts. To put it another way, if a party does not want to produce a document containing attorney-client communication, the party may simply opt not to do so; the counterparty may request the court to compel another party’s document production under limited circumstances.

Due to the aforementioned document production rules, the Japanese legislators were not, until recently, brought home to the need for more organized attorney-client privilege rules commonly applicable to any form of legal consultation with attorneys.

Nevertheless, facing the harmonization of attorney-client privilege rules in major jurisdictions worldwide and the cross-border administrative and judicial procedures, typically in anti-monopoly investigations, there has been a keener sense of urgent need for attorney-client privilege rules to be clearly promulgated in Japanese law in line with global standards. The procedures under Japanese peculiar rules could adversely affect those in other jurisdictions, which must be resolved very quickly for Japan to maintain its competitiveness and continue to be recognized as a fascinating investment destination even if foreign investors face legal problems.

In particular, as more fully stated below, the ambit of targeted persons (especially the client), the category of procedures where attorney-client privilege is guaranteed is considerably limited or otherwise ambiguous. The JFBA has been tackling this issue for years and making proposals to the legislative authorities.

In this chapter, we will explain the current status of legislation and enforcement practices and practical problems occurring in Japan as well as JFBA’s policy towards effective solutions for the future.

CURRENT STATUS IN JAPAN AND JFBA'S POSITION – GENERAL

*** Right to Refuse Disclosure of Attorney-Client Privilege under Current Law**

Civil Procedure Code

Civil Procedure Code (Article 197, Paragraph 1, Item 2)

When “a person who is or was ..., attorney-at-law (this includes registered foreign lawyers), patent attorney, defense counsel, notary, or ... is examined with regard to any fact learned in the course of duty that shall remain confidential”, such person may refuse testimony.

The aforementioned provisions aim to ensure reliability and *raison d'être* of these professionals. Here, the client is interpreted as the beneficiary of protected secrecy;

And the entitlement lies on the attorney-at-law, etc.

Right to refuse production of documents (Article 220, Item 4(c) of Civil Procedure Code)

The person holding “documents detailing a fact prescribed in Article 197, Paragraph 1, Item 2 or a particular prescribed in Article 197, Paragraph 1, Item 3, neither or which are exempt from the duty of silence” is exempted from obligations to produce documents.

Prevailing theories hold that anyone in possession of these documents, including the client, is entitled to refuse production of such documents under the aforementioned provision because it does not stipulate any limitation on the scope of targeted possessor of documents.

Right to refuse response to “inquiries by a party” (Article 163, Item 6 of Civil Procedure Code)

The inquired party need not respond to “an inquiry about the same kind of particulars as those regarding which a person may refuse to testify pursuant to the provisions of Article 196 or Article 197”.

The issue referred to in 2.1.1.2. above also applies because this provision does not stipulate any limitation on the scope of targeted persons.

Arguable interpretation under current law

As regards the refusal of testimony, it remains arguable whether the client is entitled to refuse testimony of the contents of advice given by his/her attorney (prevailing theories interpret it in the negative). This may appear (and is criticized as being) inconsistent with the prevailing interpretation to the effect that anyone (including the client) is exempted from production of documents before the court (the exact scope of such exemption in itself is not literally defined precisely).

Arbitration and other ADRs

In arbitration, it depends largely on the rules of each arbitration organization as well as the arbitrator's interpretation thereof. Nevertheless, it is commonly held that, in the international commercial arbitration, any matters subject to attorney-client privilege are excluded from disclosure obligations, whether they are documents or verbal statements. The IBA Rules on the Taking of Evidence in International Arbitration in 2010 also materialize this principle.

Criminal Procedure Code (Law No. 131 of 1948, as amended)

Right to refuse testimony (Article 149 of Criminal Procedure Code)

An “... attorney-at-law (including a foreign lawyer registered in Japan), patent attorney, patent attorney, notary public... or any other person who was formerly engaged in any of these professions may refuse testimony on matters pertaining to the confidential information of others which he/she came to know through entrusted professional conduct”.

- A. The right to refuse seizure derives from the same objective; and
- B. The entitlement lies on the attorney-at-law, etc.

Right to refuse seizure (Article 105 of Criminal Procedure Code)

An “... attorney-at-law (including a foreign lawyer registered in Japan), patent attorney, patent attorney, notary public... or any other person who was formerly engaged in any of these professions may refuse the seizure of articles containing the confidential information of others which he/she has been entrusted with and retains or possesses in the course of his/her duties”.

Prevailing theories hold that anyone in possession of these documents, including the client, is entitled to refuse production of such documents under the aforementioned provision because it does not stipulate any limitation on the scope of targeted possessor of documents;

This provision aims to protect such certain professional activities as attorneys-at-law frequently handling another person’s secrecy, thereby ensuring the reliability of persons entrusting secrecy to these professionals;

This rule also applies to the seizure under the National Tax Rules Violation Control Act (Law No. 67 of 1900, as amended); and

The entitlement lies on the attorney-at-law, etc.

Guarantee of secrecy of interview and correspondence (Article 39, Paragraph 1 of Criminal Procedure Code)

“The accused or the suspect in custody may, without any official being present, have an interview with, or send to or receive documents or articles from counsel or prospective counsel upon the request of a person entitled to appoint counsel...”

The prevailing theories and jurisprudences hold that criminal investigating authorities are also prohibited from enquiring to the person in custody about the contents of communication exchanged between such person and his/her attorney in the course of their interview.

Right of the person seeking retrial to appoint an attorney (Article 440, Paragraph 1 of Criminal Procedure Code)

It is held by the jurisprudence that a person seeking retrial (especially a condemned criminal) is also entitled to an interview with his/her attorney without an official being present because his/her opportunity to receive assistance from such attorney should be substantially guaranteed.

Administrative Procedures

No provision sets forth attorney-client privilege under the rules of administrative procedures; however, Article 23 of Attorney Act (Law No. 53 of 1933, as amended) may serve as the basis for alleging such privilege.

Attorney Act

Article 23 of Attorney Act states as follows: *“Unless otherwise provided by law, an attorney or a former attorney shall have the right and bear the duty to maintain the confidentiality of any facts*

which he/she may have learned in the course of performing his/her duties.” It therefore ensures the attorney’s entitlement to secrecy in the areas other than civil and criminal proceedings as well.

Summary

As so far discussed, under the current laws of Japan, the attorney-client privilege is widely protected in civil and criminal proceedings by the above-cited provisions of law; however, the following two issues still remain to be resolved.

First, it remains unclear whether and to what extent the client is also entitled to refuse testimony and production of documents, which would be covered by the attorney’s rights and obligations to secrecy. In JFBA’s view, it should be interpreted in the affirmative because such attorney-client communication is by nature interactive and accordingly the intention of current laws is to exclude such communication from production as evidence in any civil and criminal proceedings.

Second, the scope of attorney’s entitlement to refuse disclosure is, at least literally, limited to civil and criminal proceedings (not beyond these areas). Although some theories argue that Article 23 of Attorney Act justifies refusal of disclosure in administrative procedures, this view has not officially been held at present. In JFBA’s view, this is unbalanced and the attorney’s such entitlement to secrecy should therefore equally apply regardless of the nature of proceedings.

*** Jurisprudence on the Protection of Attorney-Client Privilege**

No jurisprudence in Japan has squarely stated the ambit of protection of attorney-client privilege.

To note, however, there is a famous JASRAC case precedent involving the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Law No. 54 of 1947, as amended; hereinafter abbreviated as the “Anti-Monopoly Act”) and the conducts of Fair Trade Commission (Japanese competition authority). A public entity engaging in the management of copyrighted music products (Plaintiff) receiving an elimination order from the Fair Trade Commission sought revocation of such order before the Commission, in the administrative proceedings.

A competitor company filed, in the course of these proceedings, an application with the Commission for disclosure of evidence collected from the Plaintiff, in response to which the Commission disclosed copies of certain documents containing the Plaintiff’s attorney’s advice. The Plaintiff objected to the Commission’s such disclosure of documents allegedly covered by attorney-client privilege.

The court unfortunately rejected, in both first and second instances, the Plaintiff’s claim on the grounds that (i) such competitor company’s application for the Plaintiff’s evidence facilitates its preparation of civil claims against the Plaintiff; and (ii) the attorney-client privilege alleged by the Plaintiff cannot be recognized as legal rights unless it is squarely stipulated as statutory provisions of law; and (iii) neither Article 23 of Attorney Act nor the exemption from obligations to produce documents under Article 220 of the Civil Procedure Code (Law No. 109 of 1996, as amended) serves as the basis for attorney-client privilege in these administrative procedures.

*** JFBA’s Position**

JFBA has endeavored to establish a system enabling clients to consult with attorneys on strictly-confidential basis, not only in the areas of civil and criminal proceedings but also in anti-monopoly, finance and securities.

Accordingly, JFBA’s basic policy clearly states that *“the entitlement to be exempted from seizure of correspondences and to consult with attorneys without anyone’s intervention must be put in place*

urgently in criminal proceedings as well as such administrative proceedings as the Anti-Monopoly Act, with a view to enabling people's access to lawyers without any concerns".

CURRENT STATUS IN JAPAN - SPECIFIC QUESTIONS

* Civil Procedures

Current Status

Under Japanese Civil Procedure Code, there is no such system as "discovery" or "disclosure" prevalent in many other jurisdictions. This may be one of the underlying causes of ambiguity in this area.

In cross-border legal proceedings (such as cartel investigation), some documents which would be under attorney-client privilege in foreign jurisdictions may not be the case in Japan (or else the party may hesitate to insist on such privilege despite his/her possible entitlement before Japanese legal proceedings).

Consequently, producing such documents in Japan, even if required (or at least induced) by the Japanese authorities, substantially risk being construed by non-Japanese authorities as the producing party's waiver of attorney-client privilege. If so, that party may suffer seriously adverse position in legal proceedings outside Japan because certain documents, which would otherwise be covered by attorney-client privilege under the non-Japanese jurisdiction, could be accessed and seized by such non-Japanese authorities.

For that reason, in particular, to prevent the incompleteness of Japanese attorney-client privilege rules from becoming the bottleneck in cross-border proceedings, JFBA recognizes an urgent need for clarification and reinforcement of attorney-client privilege in the statutory provisions of law.

JFBA's Proposal in 2012

In the document titled "*Tentative Proposal of Amendment to Civil Procedure Code Regarding Orders to Produce Documents and Inquiries by a Party*" dated February 16, 2012, JFBA made the following proposals:

- A. The witness should also be entitled to refuse testimony "*when questioned about the issues involving consultation or exchange with his/her attorney, etc. with a view to obtaining the attorney's legal advice and thus retained as confidential*";
- B. Article 220 of Civil Procedure Code (setting forth conditions for entitlement to refuse production of documents) refers to (a) above and clarifies that anyone may refuse to produce the target of documents, irrespective of the status of the possessor thereof; and
- C. Also, (a) above should also be referred to in the rules of "inquiry by a party", where the responding party is entitled to refuse response to such inquiry.

Problems

The clarification and reinforcement of attorney-client privilege are discussed in the context of and together with more powerful evidence collection methods under the civil procedures in Japan. These apparently contradictory two issues are two-sided coins because the more extensive the

latter becomes, the greater need for protection of secrecy against disclosure would be recognized (which would have gone to the extreme in the U.S. in the form of “discovery” rules).

The precise scope of professionals subject to attorney-client privilege (Article 197, Paragraph 1, Item 2 of Civil Procedure Code) must be identified (i.e. foreign attorneys, neighboring professions such as judicial scrivener and tax attorney, arbitrators and other ADR providers);

The target of attorney-client privilege should also be clarified, including the promulgation of so-called work product rules as well as the handling of inter-company communication involving in-house legal counsels; and

To ensure consistency between the new attorney-client privilege rules and the existing rules on inquiries under the commissioning of examination or delivery of documents (Articles 186 and 226 of Civil Procedure Code) and/or Article 23-2 of Attorney Act.

* Criminal Procedures and Detention Facilities

Current Status

The detained suspect and defendant are entitled to see and consult with his/her attorney without an official being present (Article 39, Paragraph 1 of Criminal Procedure Code); however, this privilege applies only to physical interviews (verbal communication) with an attorney, not necessarily to written correspondences exchanged with the attorney.

After court conviction, the inmate may only be allowed to see his/her attorney with an official being present; and his/her written correspondences from or to his/her attorney may be censored. This also applies to minors detained in Juvenile Classification Home.

Right to interviews, etc. with an attorney

Despite the ambiguity of statutory rules, there have been several court precedents in favor of attorney-client privilege, with respect to the censorship of interviews and/or written correspondences between an attorney and a criminal defendant (before court conviction).

More specifically, the following behaviors of the authorities have been held illegal by the court:

- A. The police officer enquires the suspect about the contents of his/her interview with an attorney, including the advice given by that attorney;
- B. The prosecutor seizes the written correspondences with an attorney left in the room of a defendant under detention; and
- C. The prosecutor seizes and refers to as evidence an attorney’s emails addressed to the defendant’s family.

Inmates and retrials for condemned criminals

While the person soliciting retrial is entitled to appoint an attorney (Article 440 of Criminal Procedure Code), the interview of condemned criminals is in principle accompanied by an official (Article 121 of the Act on Penal Detention Facilities (Law No. 69 of 2014, as amended)).

There is a court precedent where a condemned criminal interviewing with an attorney to prepare for a retrial filed a judicial complaint on the grounds that the presence of an official during the interview infringes upon his right to defense. The court partially admitted the condemned criminal’s complaint.

Problems

The right to interview with a criminal defendant without an official being present, which is indisputably codified, has traditionally been construed as the attorney’s entitlement rather

than the defendant's privilege. This is the fundamental reason the protection of such privilege is prone to be narrowly interpreted.

From the standpoint of the defendant's entitlement to defense, even non-detained suspects and defendants should be entitled to access and exchange with their attorneys without any censorship from authorities.

Further, following the court precedent referred to in 3.2.1.2. above, when it comes to the persons seeking retrial, the enforcement practices have been changing in favor of such persons and accordingly often do without an official being present, but with more or less inconsistency of criteria in enforcement.

* Anti-Monopoly Act

Current Status

In the course of on-site inspections initiated by the Fair Trade Commission under the Anti-Monopoly Act, the records of consultation with an attorney, including those prepared irrelevantly to the suspected case, may be unilaterally seized by the Commission. As stated in 2.2. and 2.3. above, the court has unfortunately not granted any attorney-client privilege for anti-monopoly inspections, under the pretext of the absence, unlike civil and criminal procedures, of any statutory rules on such privilege.

The anti-monopoly investigation tends to generate all the more serious consequences because similar investigations often take place simultaneously in the U.S. and EU. As stated earlier, the seizure of attorney-client communication due to the lack of privilege under Japanese law risks being deemed as a waiver of privilege by non-Japanese competition authorities. As a result, the investigated party may unreasonably be disqualified from privilege which would otherwise be available under applicable laws.

For countermeasures against this pitfall, which could have materially adverse effect on cross-border trading and investment, the law experts and authorities are gradually moving forward in favor of attorney-client privilege, but with limited success.

In 2009, the Competition Law Forum, comprised of attorneys specialized in competition law, published an opinion on the due process of administrative trials. In the course of amendment to the Anti-Monopoly Act in 2013, the power of administrative review was transferred from the Fair Trade Commission to the court; however, the issue attorney-client privilege still remained open to further review. Onwards, the Japanese government and law experts have been attempting to elaborate specific statutory rules on this issue; however, the current conclusion remains unchanged and thus stays with the mention, bureaucratically, that "it deserves further review". As of December 2014, the Cabinet decided not to introduce the attorney-client privilege in the context of anti-monopoly investigation.

In March 2019, following a cabinet decision, the Fair Trade Commission of Japan announced "*Handling of Communication Exchanged Secretly Between Traders and Their Attorneys*", materializing the bill towards promulgation of the amended Anti-Monopoly Act whereby the attorney-client communication is to be barred from disclosure to the authorities, under certain conditions, with respect to the investigation of unfair restraint of trade, which is one of the typical forms of prohibited anti-competitive practices. In this regard, the specific formalities and the precise ambit of protection still remain open and are accordingly supposed to be defined in ancillary ordinances and guidelines under the Act in the future.

In JFBA's view, although this amendment in favor of the investigated party is a remarkable step forward towards better protection, at least partially, of attorney-client privilege; however, the scope of such protection remains exceedingly narrow compared to the counterpart in foreign jurisdictions in that it is limited to the investigations of unfair restraint of trade. For the improved rules

not to end up in a dead letter, the method of judging whether certain documents fall under the privilege, the clarification to the effect that the e-mail correspondences are also encompassed in the target of protection.

JFBA's Actions

Since the Anti-Monopoly Act was amended in 2005, JFBA has been seriously stating opinions on the due process of administrative trials. In August 2007, JFBA recommended the introduction of attorney-client privilege in its *"Opinion on Discussion Report Regarding Basic Issues of Anti-Monopoly Act"*. Further, in May 2008, JFBA requested, in the *"Opinion on Partial Amendment to Anti-Monopoly Act, etc."* for disclosure of the recorded statements of the parties concerned which are prepared by the authorities in the course of anti-monopoly investigations as well as the attorney's physical presence during interviews from authorities.

In July 2014, JFBA also submitted an opinion to the Cabinet Social Gathering: *"Under the current practice of administrative trial, the questionnaires and response (both paper documents and emails) exchanged between the client (targeted trader) and the attorney are actually seized in the course of on-site inspections and order for production of documents."* In this regard, however, is required a mechanism to ensure protection of secrecy, say, the exemption of attorney-client communication from seizure by the Fair Trade Commission, following further clarification of the ambit of secrecy protection and of more organized procedures for judgment of such ambit.

Despite all this, as of December 2014, the Cabinet unfortunately concluded this issue in the negative.

Problems

Above all, in the context of reinforced international cooperation in anti-monopoly investigations, as shown in OECD's Recommendation of the Council in 2014, such loss of attorney-client privilege in non-Japanese judicial procedures (including civil class actions) after the forced disclosure of attorney-client communication in Japan could potentially trigger fatal damages.

These damages could further expand to the status of global economy, in particular, the investor's choice of markets for fear of procedural deficiencies. For that reason, business experts are also fully aware of the need for and strongly soliciting early promulgation, in line with global standards, of attorney-client privilege in the anti-monopoly investigations.

In anti-monopoly investigations, the leniency system was introduced in 2006 in Japan, encouraging traders to voluntarily identify and rectify any behaviors violating the Anti-Monopoly Act, which are necessarily be assisted by attorneys, thereby facilitating and ensuring compliance with these laws and fostering sound and competitive market economy. However, due to the lack of attorney-client privilege in anti-monopoly investigations, the trader may hesitate to consult and exchange correspondences with attorneys in Japan.

*** Finance and Securities**

Current Status

Since 2009, a prior approval of the authorities is required before consulting with attorneys in the course of finance and securities inspection. This has heavily been criticized as undue restriction against the people's right to access attorneys for consultation.

JFBA's Actions

As of December 2009, JFBA published the “*Opinion Soliciting Abolition of Inspection Policy of Financial Services Agency and Securities and Exchange Surveillance Commission Requiring Pre-Approval for the Inspected Trader’s Consultation With Attorneys*”, stating that this could jeopardize people’s fundamental right to defense by accessing attorneys and, more broadly and ultimately, the rule of law.

Problems

In response to JFBA’s aforementioned opinion, the authorities mentioned that such approval would in principle be given and that there would be no practical hindrances. Nevertheless, JFBA is somewhat skeptical about this.

*** Tax**

In response to the question of whether an audited person is entitled to refuse disclosure to the tax authorities of the legal (or tax) advice given by an attorney or a tax lawyer, neither statutory provisions of law nor jurisprudence have so far established specific rules or criteria.

Often confused with this issue is the right of an attorney being audited by tax authorities to refuse disclosure of his/her client information on the grounds of the attorney’s professional secrecy obligations. To the best of JFBA’s knowledge, there have been no precedents where Japanese tax authorities required the attorney to disclose the contents of advice given by the attorney to his/her respective clients. When it comes to tax audit targeting an attorney, the tax authorities have interests in identifying the flow of financial resources (i.e. legal fees, disbursements) from his/her accounting books. Within this context, the attorney is practically obligated to cooperate with the tax audit.

In any case, facing the ambiguity of statutory rules, in JFBA’s view, it should be clearly defined in written law under what conditions and to what extent the attorney-client communication is exempted from disclosure to the tax authorities.

*** Intellectual Property**

In Japan, the patent attorney (“*benri-shi*”) is a profession distinct from an attorney-at-law (“*bengo-shi*”). Accordingly, the patent attorney is subject to their distinct rules and under the supervision of the Patent Attorneys Association.

In the area of intellectual property law, the penal sanctions and its enforcement against infringement or unfair competition have gradually been reinforced in Japan. Also, in the civil proceedings involving intellectual property, special rules on request for production of documents to another party facilitate, compared to other civil proceedings, collection of evidence for the parties (Article 105 of Patent Act (Law No. 121 of 1959, as amended)).

Facing these trends, there has been a greater need for reinforcing attorney-client privilege with a view to defending the client’s rights to defense against undue disclosure.

At present, there is no specific statutory provision referring to the protection of communication between the patent attorney and the client; however, the Patent Attorneys Association is, similarly to JFBA, strongly soliciting the introduction and application of attorney-client privilege for patent attorneys in the form of express statutory rules.

To note, disputes related to intellectual property often involve, by nature, cross-border jurisdictions and thus coordination with rules in other jurisdictions would be of particular significance.

PROPOSED AMENDMENT TO RULES ON ATTORNEY-CLIENT PRIVILEGE

*** Reasons for the Need to Introduce Attorney-Client Privilege**

The justification for JFBA's demand for incorporation of attorney-client privilege into the laws of Japan is summarized in the following two points:

First, the client's right to legal defense is significantly impaired due to the lack and ambiguity of rules on attorney-client privilege. As stated earlier, this is particularly true in the area of criminal procedures and anti-monopoly investigations: Criminal investigation authorities may practically intervene, despite some court precedents in favor of the defendant, the defendant's communication with his/her attorney. As precautionary measures against anti-monopoly investigations, the client sometimes hesitates to consult with or receive advice from an attorney in case of any doubt about their compliance with laws. It is obvious, in these circumstances, that the client is hindered from effective legal advice from the attorney, thereby failing to defend his/her own legal position properly.

Second, people's entitlement to access attorneys for legal consultation without hesitation constitutes the starting point for thoroughly penetrating and accordingly ensuring full compliance with laws. This is a matter of public interest, going beyond the rights of particular individuals such as the client and the attorney. More specifically, as is typically the case with leniency procedures, the attorney plays an indispensable role in the client's early identification and voluntary rectification of suspected violation of laws. If the mere fact of past consultation with an attorney were to generate such negative inference in the eyes of authorities that the client was aware of the possible illegality of his/her conducts (which, regrettably, occurred in anti-monopoly investigations), it would, on the contrary, frustrate people's self-awareness towards full compliance with laws.

*** Basic Orientation towards Amendment to Attorney-Client Privilege Rules**

Outline of Amendments

In JFBA's view, the outline of amendments consists in the following two main arrows:

First, the right to refuse disclosure of attorney-client communication should be equally and consistently guaranteed, irrespective of the nature of procedures (so that any administrative procedures are encompassed in the scope) whenever the party is legally or practically required to produce relevant documents.

Second, any detailed persons with restricted access to other persons or exchange of written communication should be guaranteed the right to see an attorney without an officer being present and to exchange correspondences with an attorney without any censorship or other modes of intervention from officials.

Substantive Object of Attorney-Client Privilege

In JFBA's view, the object of attorney-client privilege is as follows: *"when questioned about the issues involving consultation or exchange with his/her attorney, etc. with a view to obtaining the attorney's legal advice and thus retained as confidential"*.

Definition of "attorney, etc." (scope of targeted professionals)

It should broadly encompass non-Japanese attorneys (irrespective of whether they are registered at Japanese bars) and in-house corporate counsels as well as such neighboring professions as patent attorneys, tax lawyers, judicial scriveners, administrative scriveners, certified social insurance labor consultants, real-estate surveyors. In Japan, these are distinct professionals whose practice areas partially overlap those of attorneys-at-law.

Scope of "consultation or exchange"

It should encompass, whether verbal or written, any and all communication between client and attorney, so long as such communication aims for the client to obtain legal advice, regardless of whether the client was, at the time of such communication, expecting future disputes or judicial proceedings.

Note that the target of protection is "communication", meaning that no document existing before the consultation with an attorney falls under the attorney-client privilege, even if such document has been provided to the attorney at later stages.

Definition of "retained as confidential"

Under the current law, the target of privilege exempted from testifying obligations is *"any fact learned in the course of duty that shall remain confidential"* (Article 197, Paragraph 1, Item 2 of Criminal Procedure Code), which is further narrowly limited, under supreme court jurisprudence, to the facts "which would objectively deserve protection".

In this regard, the aforementioned criteria are vague and subject to discretionary judgment, which would pose practical difficulties on the spot of enforcement, because the officer intending to seize certain documents allegedly containing communication covered by attorney-client privilege has no way to objectively identify whether they should fall under that privilege.

For the future, there should be no such vague conditions; rather, all attorney-client communication with a view to obtaining legal consultation should be deemed to be retained as confidential and thus remain under the umbrella of privilege.

Here, the remaining questions to be resolved include (i) in the event of waiver by the client of privilege, how to ensure voluntary nature of such waiver (when pressured by the authorities under threatened sanctions, the client practically tends to be forced to waive such privilege despite his/her entitlement to it); (ii) whether selective waiver of privilege is allowed (i.e. the client wishes to disclose certain documents only to prosecutors in criminal proceedings, but not in civil proceedings); (iii) how about the differences between the scope of the attorney's professional confidential obligations and that of attorney-client privilege; and (iv) whether and to what extent the privilege should be levied in the event of investigations targeting the attorney's own misconducts.

Scope of "client"

The scope of "client" is argued, in particular, when the client is a corporate entity consulting with an attorney for the purpose of internal audit (in some cases, investigation of the employee's misconducts).

In this case, JFBA's interpretation is that the communication between the attorney and such employee (investigated person) does not generally fall under the privilege because the "client" here is the corporate entity, not the employee.

Nevertheless, from the standpoint of protection of such employee's privilege, the employee should also be informed of the opportunity to and encouraged to engage his/her own attorney for defense.

Consequences of Violation of Privilege

The client whose documents have been seized by officials against the attorney-client privilege rules shall be entitled to request for return of such documents and, in some cases, compensation of damages under the Act Concerning State Liability for Compensation (Law No. 125 of 1947, as amended)

Further, any document procured in violation of the attorney-client privilege should be ruled inadmissible in the relevant administrative or judicial proceedings of whatever nature.

Procedures

As stated above, practical problems are prone to arise on the spot of seizure by the authorities of certain documents if it is arguable whether they fall under the privilege. Once the authorities seize and access these documents, which would actually be perceived by the authorities, the value of such privilege would be diminished even if such seizure is subsequently held illegitimate.

For this reason, in-camera procedures or any other process with similar effects would be required. The possible practice would be that the client (investigated party) is entitled to mask or seal off certain documents considered to be under privilege; if the authorities disagree, the judgment will be made by an independent person belonging to another department of the relevant administrative organ conducting the investigation or else by a judge in court proceedings.

In any event, such judgment must be made by an independent person who is not involved in the investigation and has no decision-making power against the investigated client.

*** Tackling Public Misunderstandings Involving the Attorney-Client Privilege**

In Japan, the concept of attorney-client privilege, which originates in common-law jurisdictions, is somewhat brand-new. In the circumstances, it may sometimes be adversely interpreted as the attorney's right to conceal unfavorable evidence. This would unfortunately stem from fundamental misunderstanding of the nature of this privilege or the role of attorneys played in the forum of compliance.

First, some people unreasonably argue that any documents undesirable for the client and provided to an attorney would automatically come under the umbrella of privilege and that the truth would accordingly be hindered from revelation in administrative or judicial proceedings; however, the target of privilege is "communication" with the attorney, not the documents existing before consultation with an attorney. Therefore, the existence of such privilege would not unreasonably hinder the revelation of truth at all.

Second, some people who generally distrust the attorney as a defender of evils, argue that attorneys may abuse the privilege by, say, alleging or advising the client that certain documents outside the scope of privilege are to be protected against disclosure. However, such risk should be hedged by reinforcing disciplinary sanctions against violation of professional ethics or by establishing tough and effective in-camera procedures in the event of differences as to the scope of coverage under privilege.

In order for the attorney-privilege to be promulgated and enforced in good faith for the future, it would perhaps be necessary to cultivate and illumine the public in the first place.

NORTH AFRICA

Some Comments Regarding Legal Privilege in North Africa

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COUNTRIES TAKEN INTO CONSIDERATION

So as to proceed with the above-mentioned study, but focused in Africa, we have obtained information regarding Africa, and specifically the situation in the Republic of Congo and Morocco.

It seems that in several countries, the French Criminal Code is directly applicable¹, but in other countries they have got their own legislation regarding legal privilege². We have to indicate that the papers that have been sent for our attention could not reflect the whole reality of legal privilege client-attorney, considering the huge differences across Africa.

However, we could indicate that the regulation of the legal privilege client-attorney, its object, the exceptions to said duty as well as the legal consequences in the event that said privilege is breached could be considered similar as the ones that are in force in most countries in Europe, whether it goes by the name of professional secrecy or legal privilege.

REASON BEHIND LEGAL PRIVILEGE

We have to highlight that scholars unanimously understand that the legal reason behind the existence of legal privilege would be the public interest itself considered and, therefore, it is a general regulation compulsory in their legal system, with no limit in the time³.

The client has to be free to disclosure any information in front of his/her lawyer, because the client trusts the lawyer, who later will use the information to proceed with the defense of the client⁴, and means that legal privilege is a fundamental key issue of the profession of lawyer itself⁵.

OBJECT OF THE LEGAL PRIVILEGE

In these countries, legal privilege covers the conversations and meetings held between the lawyer and his/her client, the information that comes from third people regarding the issues under defense on behalf of the client, the correspondence held between the lawyer and the client, but also between lawyers themselves (but in these last communications the word “official” or “confidential” must be placed to protect them)⁶.

1. Aziber Seid Algadi, “Fondements du secret professionnel de l’avocat”, Lexbase Hebdo édition professions n. 191 du 2 avril 2015, at 1; vid. also Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, rapport au Congrès UIA de Dresde (novembre 1012 (sic)), at 3; vid. also Kayudi Misamu Coco, “Le secret professionnel: constances et evolution”, Conakry/Guinee, April 2017, at 4-5.

2. Kayudi Misamu Coco, “Le secret professionnel: constances et evolution”, op.cit., regarding the Republic of Congo. And Abdelmajid Tijani, “Le secret professionnel en droit marocain et en droit compare”, L’Opinion, April 30, 2015 regarding Morocco.

3. Art. 2.1 RIN. Also vid. Aziber Seid Algadi, “Fondements du secret professionnel de l’avocat”, op.cit., at 2; also vid. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 1-2.

4. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 3.

5. Art. 74 of the Organic Law of the profession of lawyer at the Republic of Congo. Vid. also Kayudi Misamu Coco, “Le secret professionnel: constances et evolution”, op.cit., at 4-7.

6. Art. 65-6 Law number 71-1130, of December 31, 1971. Also vid. Aziber Seid Algadi, “Fondements du secret professionnel de l’avocat”, at 2; also vid. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 2-3.

Moreover, in Congo, it is also covered by legal privilege the name of the clients and the agenda of the lawyer⁷.

On the other side, the information disclosed by a person to a lawyer, who is not acting as a lawyer, but as a friend in said conversation, will not have the consideration nor the coverage of legal privilege, but could be considered as “necessary secret”⁸.

PEOPLE OBLIGED BY THE LEGAL PRIVILEGE

It is understood that legal privilege obliges the lawyer regarding the information provided by the client. However, no information has been obtained regarding the possibility that the duty of legal privilege also has to be considered extended to other people of the Law Firm, such as secretaries, IT personnel, etc.

Of course, legal privilege is a duty for the lawyer, but also considered a right: the lawyer has got the right to keep the legal privilege in the event that the client releases the lawyer from said duty⁹.

EXCEPTIONS TO THE LEGAL PRIVILEGE

Legal privilege client-attorney could not be considered as an absolute right or duty. It has important exceptions in these countries that could be considered similar as the ones stated in Europe. We can cavass them as follows¹⁰:

- Legal privilege could be legally breached by the lawyer when he/she has to defend himself/herself from their own client¹¹.
- Moreover, legal privilege could also be breached by the lawyer in the event that the client states that he/she is going to commit a criminal offence¹².
- The conflicts that may arise in the event that keeping a legal privilege could affect to the security of the country itself¹³.
- Finally, legal privilege could also be breached or revealed in certain events regarding money laundry regulation¹⁴.

7. Kayudi Misamu Coco, “Le secret professionnel: constances et evolution”, op.cit., at 7-8.

8. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 4. Said concept is also mentioned by Kayudi Misamu Coco, “Le secret professionnel: constances et evolution”, op.cit., at 9-10.

9. Morgane Woloch, “Le secret professionnelle de l’avocat”, work of Master of Criminal Law, published by the University of Panthéon-Assas, 2010, at 42.

10. Aziber Seid Algadi, “Fondements du secret professionnel de l’avocat”, op.cit., at 2.

11. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 3.

12. Art. 226-14 of the Criminal Code.

13. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 5-6.

14. Jean-Marie Burguburu, “Contenu et limites du secret professionnel”, op.cit., at 6-7; also vid. Christian Charrière-Bournazel, “L’avocat peut-il ‘partager’ le secret?”, Discours, October 28, 2013, at 3-4.

LEGAL CONSEQUENCES OF THE BREACH OF THE LEGAL PRIVILEGE

As it happens in other countries, the breach of the legal privilege client-attorney by the lawyer could imply deontological and criminal consequences¹⁵.

Regarding the criminal consequences, the disclaim of any information claimed to be reserved by the person who is in charge of keeping it as confidential will mean an imprisonment and a fine of Euros 15,000¹⁶.

However, criminal consequences could not be applied in the event that the law authorizes to disclose the information protected with legal privilege¹⁷.

15. Jean-Marie Burguburu, "Contenu et limites du secret professionnel", *op.cit.*, at 3.

16. Art. 226-13 of the Criminal Code. Also *vid.* Aziber Seid Algadi, "Fondements du secret professionnel de l'avocat", *op.cit.*, at 1; also *vid.* Kayudi Misamu Coco, "Le secret professionnel: constances et evolution", *op.cit.*, at 3-4; and *vid.* Morgane Woloch, "Le secret professionnelle de l'avocat", *op.cit.*, at 17, worked focused on the criminal consequences of the breach of the legal privilege by the lawyer.

17. Art. 226-14 of the Criminal Code. Also *vid.* Kayudi Misamu Coco, "Le secret professionnel: constances et evolution", *op.cit.*, at 2-3.

CENTRAL AFRICA

Secret professionnel et confidentialité des correspondances : état de la question en République démocratique du Congo

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INTRODUCTION

« *Les choses que, dans l'exercice ou même hors de l'exercice de mon art, je pourrais voir ou entendre sur l'existence des hommes et qui ne doivent pas être divulguées au dehors, je les taisais* » disait Hippocrate (de 460 à 356 avant J.C.), Père du serment que professent les médecins.

Dans ses antimémoires, André Malraux rappelle la phrase de l'un de ses personnages : « *Qu'est-ce qu'un homme ? Un misérable petit tas de secrets...* ».

Son propos visait principalement à faire la différence entre ce que l'on cache et ce que l'on ignore de soi. Au rebours de la psychanalyse, le secret envisagé ici correspond à ce que l'on cache. On peut cacher un secret en le taisant ou en l'habillant par un mensonge ou autrement (c'est le cas des personnes qui cherchent à préserver un secret de famille).

C'est le cas également des organisations qui peuvent avoir intérêt à ce que certaines informations n'accèdent pas à l'espace public (secret d'État et sa variante secret Défense).

Une sagesse affirme que tout ce qui est secret suscite la curiosité, mieux l'interdit attire. Le secret devient de polichinelle lorsqu'il est connu de beaucoup. Il peut ne l'être que de ceux à qui on le révèle ou qui en ont la révélation.

Dès lors qu'on l'apprend dans l'exercice de sa profession, ou tout au moins de certaines, il devient professionnel et obéit alors à un régime strict caractérisé spécialement par la sanction pénale de sa violation organisée par le Code pénal.

Il semble que le secret professionnel est même médical, à l'origine. La première formulation de l'obligation de secret concernait les médecins : « *Ce que tu as appris de ton malade, tu le tairas dans toute circonstance* ». (Hippocrate)

Le secret des prêtres s'instaura plus tard, notamment pour ce qu'ils auraient appris en confession. Un troisième secret apparaîtra, celui de l'avocat, héritier du secret professionnel du prêtre, puisque l'avocat est issu du monde cléricale dont il emprunte la robe.

Le présent rapport indiquera le cadre normatif de ces principes essentiels (I) avant d'en analyser la pratique au sein des juridictions ordinaires en République démocratique du Congo (II).

L'on a souvent cherché à savoir ce qu'est le secret professionnel, certains textes comme le règlement intérieur cadre des barreaux de la RDC, se contentent de dire en son article 63 : « (...) *l'avocat est rigoureusement tenu au secret professionnel* » ou « *le secret de l'instruction s'impose à l'Avocat (...)* ».

Cette définition appréhende le secret professionnel sous son unique aspect déontologique comme étant une obligation, c'est-à-dire un des devoirs imposés à l'avocat. Lors même qu'il peut se concevoir aussi comme un privilège, un droit reconnu à l'avocat, en l'occurrence de se taire.

Les auteurs du répertoire pratique du droit Belge considèrent que « *les faits couverts par le secret professionnel sont ceux, en général, que l'avocat apprend dans l'exercice de la profession, soit de son client, soit de la partie adverse ou de son conseil, soit de tiers* ».

Sont ainsi considérés comme secret professionnel les confidences du cabinet, les écrits du client à son conseil, les faits appris au cours d'une instruction pénale et jusqu'aux faits surpris par l'avocat à l'occasion de sa profession (Nyssens, introduction à la vie du Barreau, 2^e édition Bruxelles 1974, n°17).

AU PLAN NORMATIF

« Il est interdit aux avocats (...) de révéler les secrets qui leur sont confiés en raison de leur profession ou d'en tirer eux-mêmes un parti quelconque » prescrivait l'ordonnance-loi n°68-247 du 10 juillet 1968 portant organisation du Barreau, abrogée par l'ordonnance-loi n°79-028 du 28 septembre 1979, spécialement à son article 74, 10^e tiret.

Ces deux textes organiques sont restés muets quant à la consécration expressis verbis des échanges entre avocats de sorte que l'on en déduit la confidentialité garantie dans le cadre du devoir plus général du secret.

Une décision de principe du Barreau de Kinshasa du 22 janvier 1970 et la décision du Conseil National de l'ordre n° CNO/8/87 du 19 août 1987 portant règlement intérieur cadre des Barreaux de la République démocratique du Congo viennent combler cette lacune.

En effet, il ressort de la décision de principe que :

- des correspondances entre avocats sont strictement confidentielles ;
- leur production en justice n'est admise qu'exceptionnellement et avec l'autorisation préalable du Bâtonnier ;
- les mentions « non confidentielles » sont inopérantes ;
- seuls échappent à la confiance les engagements, les accords ou les acquiescements constatés dans les correspondances entre avocats si ceux-ci ont agi en mandataires des clients.

Au titre VI portant sur « des devoirs de l'avocat », au chapitre I sur « de quelques devoirs généraux », l'article 63, dans sa rubrique « du secret professionnel, du secret de l'instruction, du secret de la correspondance et des pourparlers », dispose au point 3 :

« La correspondance professionnelle entre avocats est confidentielle et ne peut être produite en justice ».

Toutefois, lorsque cette correspondance concrétise un accord définitif entre parties, elle peut, avec l'autorisation préalable du Bâtonnier National ou du Bâtonnier, être versée aux débats.

La confidentialité est donc le principe, la production, assortie par ailleurs de conditions, l'exception.

Il y a lieu de signaler que diverses autres mesures ont été prises par les barreaux en vue d'encadrer au mieux la production des échanges intervenus entre avocats tant les demandes en ce sens foisonnent.

Par ailleurs et c'est l'occasion de le rappeler, la protection pénale à l'obligation générale au secret dont jouissent des personnes dépositaires par état ou par profession des secrets qu'on leur confie sauf les cas où elles sont appelées à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets.

À la même disposition d'ordre général prescrivant l'interdiction aux avocats de révéler les secrets professionnels, il sera ajoutée une autre interdiction portant sur des renseignements et/ou des documents.

En effet, la nouvelle loi organique sur le Barreau, adoptée par le parlement et actuellement en instance de promulgation renforce la garantie de confidentialité en interdisant à l'avocat de communiquer à des tiers tous renseignements ou documents relatifs à une affaire dont il a la charge et de se livrer à tout commentaire concernant ladite affaire, sauf s'il est requis par la loi (article 66, 11^e tiret).

Du point de vue du droit comparé, le régime qui s'applique au secret professionnel et à la confidentialité des correspondances échangées entre avocats est plus proche des systèmes Belge et Français dont il est inspiré quoique ces deux derniers systèmes aient déjà connu des évolutions notables susceptibles, encore une fois d'inspirer les modifications en droit Congolais de la déontologie.

Il demeure que dans la mise en œuvre de ces règles professionnelles et déontologiques, les juridictions ordinales recourent parfois en cas de silence ou de lacunes aux règles du droit Français ou Belge à titre de principes généraux notamment quant au champ d'application de la confidentialité, à l'énumération des documents non couverts par la confidentialité, le règlement de compétence en cas de conflits opposant des avocats appartenant à des Barreaux différents, enfin, l'étendue du secret professionnel.

AU PLAN JURISPRUDENTIEL ET DE LA PRATIQUE PROFESSIONNELLE

* Exposé de l'affaire

Le 30 mars 1993, l'avocat NK écrit au Bâtonnier une lettre portant comme objet : « demande d'autorisation » tout en précisant dans le corps de la lettre que la lettre de son confrère annexée à sa lettre au Bâtonnier n'était pas confidentielle au regard de sa teneur et de sa forme et qu'il comptait la produire à l'audience du 6 avril 1993 comme preuve établissant que c'est à la demande de telle partie que sa cliente CMZ avait été mise en index par la Banque centrale.

Cette lettre bien que réceptionnée le 1^{er} avril, le Bâtonnier de l'ordre n'y réservera une réponse que le 9 avril soit après l'audience en signifiant à Maître NK qu'il n'est pas permis à un avocat de produire en audience publique une lettre adressée par un confrère autant qu'il n'est pas permis à un avocat de réserver à son client copie de la lettre qu'il écrit à son confrère.

Le Bâtonnier lui précisa que s'il avait produit une telle lettre, il serait obligé de l'entendre.

Le 27 avril 1993 accusant réception de cette lettre, l'avocat précité a réitéré avec références doctrinales à l'appui les raisons qui le fondaient à croire que la correspondance litigieuse n'avait pas un caractère confidentiel en raison du fait que le confrère de la partie adverse s'était limité à lui transmettre le point de vue de sa cliente.

Le Bâtonnier au vu de cette lettre cita l'avocat devant le Conseil de l'ordre pour avoir notamment violé par sa lettre du 5 avril le devoir de confidentialité dû aux correspondances entre avocats en produisant à la cour d'appel, la lettre du 24 février lui adressée par Maître NK dans le cadre de l'affaire qui opposait leurs clientes.

Le Conseil de l'ordre déclara le manquement non établi, suivant en cela la défense de l'avocat déféré qui arguait qu'il n'a ni agi que comme mandataire de son client en communiquant à Maître NK la position de sa cliente, c'est-à-dire l'acquiescement à l'idée que c'est elle qui était à la base de la mise en index de la CMZ auprès de la Banque centrale.

Dans une autre espèce, l'avocat fut poursuivi pour avoir réservé copie de sa correspondance adressée à un confrère, aux autorités de l'État sans une autorisation préalable de Monsieur le Bâtonnier.

Dans sa défense, l'avocat reconnut les faits mis à sa charge mais nia les avoir commis avec intention de nuire, ajoutant qu'il n'avait fait que répondre aux vœux de sa cliente, personne morale travaillant avec le gouvernement Congolais et réagit en la même forme que le plaignant :

Le Conseil dit établi le manquement au devoir de délicatesse dès lors que ce qui est interdit c'est la réservation de copie de lettres entre avocats au tiers, ce qui est un acte positif et matériel.

Qu'il est difficile, poursuit le conseil, en se trouvant en face d'un écrit dont l'ampliation viole les règles d'apprécier l'intention avec laquelle elle a été faite.

Il bénéficiera de larges circonstances atténuantes en raison de sa délinquance primaire car il écopa d'une peine de suspension de 3 mois avec une peine accessoire d'inéligibilité aux charges ordinaires pour une période d'un an.

Bien des cas s'observent dans la pratique et rendent si souvent mal aisée la solution à apporter tant ils relèvent des activités différentes de l'avocat notamment, le conseil, la défense, la gestion du cabinet.

C'est la situation d'un avocat qui succédant à un autre, demande de pouvoir produire une lettre que son prédécesseur lui a adressée et qui décrit le déroulement d'une réunion d'expertise ; ou de l'avocat qui écrit directement à un adversaire en personne, pourtant assisté d'un conseil ; ou de l'avocat qui s'interroge sur la possibilité pour lui de signer, par procuration une lettre adressée par son client à l'adversaire en personne ; ou encore la lettre qu'un avocat a envoyée à son confrère et contenant un décompte des sommes dues à la suite d'une décision de justice.

La jurisprudence française et belge est abondante à cet égard et intéressante en ce qu'elle attache au secret professionnel et à la confidentialité de la correspondance de l'avocat les caractères général et absolu.

CONCLUSION

Le secret professionnel et son corollaire la confidentialité des correspondances entre avocats sont encore le socle de la profession d'avocat.

Cette obligation au secret est générale et absolue de sorte que l'avocat ne peut en être délié par son client.

Le secret couvre non seulement les renseignements reçus du client par son avocat, mais également ceux reçus à son propos ou à propos de tiers dans le cadre des affaires dont il a eu la charge de conduire et cela pendant un certain temps. À ce sujet, le Conseil National de l'Ordre des Avocats de la République démocratique du Congo a dû introduire par voie de règlement un délai de viduité d'une année, lequel paraît court.

La confidentialité couvre l'ensemble des échanges en ce compris les documents faisant l'objet d'échanges entre avocats.

Elle couvre également les conversations téléphoniques entre avocats comme l'ont bien reconnu la Cour de Justice de l'Union européenne et la Commission européenne des Droits de l'Homme (CEDH).

Il appartient à la profession de préserver ce droit au secret et à la confidentialité, fruit d'une longue, lointaine et pénible conquête, face à des États de plus en plus policiers et séurocrates.

Fait à Luxembourg, le 7 novembre 2019

Secreto profesional de la abogacía en Latinoamérica Argentina - Colombia - Perú

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“La necesidad de reivindicar el Secreto Profesional del Abogado”

Por Sebastián E. Bouvet ¹

INTRODUCCIÓN

El secreto profesional es uno de los deberes fundamentales a la hora de ejercer cualquier profesión, arte u oficio, y es necesario imponerlo ante cualquier requerimiento estatal. En el caso de los abogados el deber se fundamenta en Derechos Humanos elementales, por lo que se requiere una mayor protección del mismo.

En el presente trabajo comenzaré por brindar un concepto del secreto profesional, y seguidamente veremos las justificaciones, la recepción normativa, y el carácter de Derecho Humano. Asimismo trataré un caso particular que está ocurriendo en nuestro país, mediante el cual la Unidad de Información Financiera ha realizado diversos ataques a la profesión, intentando vulnerar el secreto profesional de los abogados y otras garantías constitucionales básicas de todo Estado de derecho.

De todo lo cual se podrá concluir en la importancia de defender este derecho/deber para proteger el ejercicio libre de la profesión de abogado, y velar por el respeto de principios constitucionales básicos.

CONCEPTO

Se trata de un deber profesional que no solo es contemplado en las normas de ética, sino también es receptado en las leyes penales, por lo que sus enunciados no solo son considerados un deber moral, sino también una obligación legal.

Según el diccionario de la Real Academia Española, secreto (del latín *secretum*) es lo que cuidadosamente se tiene reservado y oculto, y en cuanto a la acepción secreto profesional dice que es el deber que tienen los miembros de ciertas profesiones (médicos, abogados, notarios, etc.) de no descubrir a terceros los hechos que han conocido en el ejercicio de su profesión.

JUSTIFICACIÓN DEL SECRETO PROFESIONAL

En primer lugar podemos decir que la tutela del secreto profesional se encuentra justificada en la necesidad de proteger a las personas del perjuicio que les podría ocasionar la revelación de información privada, sobre todo cuando se trata en razón de una profesión, como los abogados, médicos, psicólogos, etc., en cuyo silencio confían. El perjuicio puede causarse a la persona misma que confía la información, como a su familia o entorno social, y puede ser económico o moral.

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Otro justificante es la confianza. El cliente o el paciente necesitan estar seguros de que pueden confiarle sus intimidades al profesional, y que éste no va a revelar nada.

Y como tercer justificante encontramos el Derecho Humano a la intimidad que tiene toda persona, sobre el cual abundaré posteriormente.

Estas tres justificaciones son comunes a toda profesión, como la medicina psicología, etc., o cualquier arte u oficio, pero en el ejercicio de la abogacía hay otro justificante también elevado a la categoría de Derecho Humano fundamental, que es la defensa en juicio de las personas.

NATURALEZA JURÍDICA DEL SECRETO PROFESIONAL

Se han esbozado diversas teorías, a saber:

- Teoría contractualista: considera que entre el profesional y el cliente se celebra un contrato tácito en virtud del cual este último le confía toda la información que necesite conocer y aquél acepta guardar secreto. Incluso se ha hablado de contrato de depósito, o de arrendamiento.
- Teoría del orden público: se basa en que la información confiada al profesional se efectúa como forma de lograr protección de bienes de interés común en las sociedades, como la vida, la libertad, el honor y el patrimonio de las personas.
- Teoría mixta o moral: considera que el secreto profesional se ubica en la encrucijada de los dominios de lo penal, civil, y moral, y ante un determinado conflicto de valores el abogado debe analizar los intereses en juego, teniendo en cuenta que el secreto profesional tiene basamento moral, pero no es un valor en sí mismo.
- El derecho natural como fundamento: Se afirma que el secreto profesional es el fundamento principal de toda relación de confianza entre el cliente y el abogado. Se funda en el principio de la inviolabilidad de la persona humana, de su dignidad y de la intimidad de la vida privada, en sus diversas manifestaciones: privadas, morales, artísticas, técnicas, sentimentales, intelectuales, físicas, etc.

EL SECRETO PROFESIONAL DE ABOGADO

Tal como sostiene el Dr. Manuel Espinoza Melet, *“en la profesión de abogado, el secreto consiste en la absoluta confidencialidad de lo revelado por el cliente, lo cual representa, una extraordinaria fidelidad y lealtad a las informaciones suministradas, así como las actuaciones profesionales, absorbiendo también en ello el material que le sea confiado al abogado para la mejor defensa de los derechos e intereses del patrocinado”*².

La protección del secreto profesional puede provenir de un texto legal, de una norma ética, o no existir. Al respecto suelen distinguirse al menos tres sistemas:

2. Manuel Espinoza Melet, “El secreto profesional”, Anuario de la Universidad Central de Venezuela, Volumen 36, Año 2013. ISSN 1316-5852.

- El que no establece protección legal del secreto profesional, o establece una sanción muy laxa.
- El que otorga una protección relativa o limitada al secreto profesional, ya que la subordina al accionar de la víctima y se admite la posibilidad de justificar la revelación (es el caso de Argentina).
- Aquellos que establecen una protección absoluta del secreto profesional, y se impide la revelación con la excepciones específicamente establecidas (ha sido el caso de Francia y Austria).

Sin perjuicio del sistema que se adopte, es menester poner de resalto que en la profesión de abogado el secreto profesional es de su esencia. El cliente deposita en su letrado de confianza los destinos de su vida, libertad, honor, bienes, el futuro de su familia. Cuando una persona recurre a un abogado, lo hace porque lo necesita, y sea cual sea la actividad que deba desplegar, va a cambiar la vida del cliente. Es que es inherente a la profesión de abogado producir cambios en el mundo, sea ganando un pleito en el que se reconoce un derecho al cliente, obteniendo una libertad, adquiriendo un beneficio de litigar sin gastos, o con la simple consulta evacuada al cliente, ya que éste se retira del despacho de su letrado sabiendo qué es lo que le corresponde por derecho y qué no. Cual sea la laboral encomendada al letrado, va a producir un cambio en la vida de una persona. Y es allí donde radica la esencia de las revelaciones confiadas al abogado.

*“Si la profesión de abogado es, como se ha dicho, una función pública indispensable para el eficaz y buen funcionamiento de la administración de justicia, su ejercicio sería imposible sin la discreción del profesional por cuanto es la esencia misma de su ministerio”.*³

UN DEBER Y UN DERECHO

Al abogado le son confiados documentos, papeles privados, e información de la más diversa índole, y es su deber no divulgarlo. *“El abogado es realmente un gran receptor de informaciones, de toda índole, su cliente le revelará por todos los medios y vías posibles, lo relacionado al caso encomendado, por lo tanto estará en conocimiento de un gran caudal de información relacionada a eventos y acontecimientos que juzgue necesarios para su defensa y está en el absoluto deber de no revelarlos, de aquí nace precisamente, un derecho y un deber de no revelar el secreto profesional... Cabe destacar, que en materia de familia, niños y adolescentes, es muy común que al abogado le sea transmitida más información de lo necesario, quizás esto se deba a lo delicado de la materia, aspectos muy íntimos son analizados a profundidad, y por lo general, el profesional obtiene un caudal enorme de informaciones, precisamente porque en estas materias se invade una esfera muy particular, los aspectos propios de la personalidad y del entorno familiar, es por ello, que el abogado debe abordar todas estas informaciones con gran diligencia y ética profesional, guardando el más estricto y riguroso secreto de lo que le transmite su cliente”.*⁴

Y por otro lado, el cliente tiene el derecho de que las confidencias realizadas no trasciendan a terceros, lo que le podría traer aparejado diversos perjuicios, por ejemplo si la información llega a manos de la contraparte en un litigio. O podría afectar su intimidad, o la seguridad suya y de su familia, máxime cuando se trata de derechos de niñas, niños y adolescentes.

Es responsabilidad profesional y ética manejar adecuadamente lo revelado por un cliente, corresponde mantener las confidencias en todo ámbito, en el despacho, entre colegas, en los estrados judiciales, y en la vida social misma. El secreto profesional no distingue ámbitos. En este punto, es interesante traer a colación un Proyecto de Código de Ética bonaerense que en lo pertinente establecía: *“la obligación de reserva comprende las confidencias recibidas del cliente, las del*

3. Mancuso Francisco, *Ética de la Abogacía y Potestad Disciplinaria*, 1995, Editorial Universitaria de La Plata, pág. 93.

4. Op. Cit. 2.

adversario, las de los colegas, las que resulten de entrevistas para conciliar o realizar una transacción y las hechas por terceras personas al abogado, en razón de su ministerio. En la misma situación se encuentran los documentos confidenciales o íntimos entregados al abogado”, y en otro pasaje disponía que “el abogado debe prevenir a sus empleados de la obligación de no revelar o usar las confidencias o secretos de sus clientes o de los documentos confiados”.⁵

RESEÑA NORMATIVA

Escapa a la presente empresa realizar un exhaustivo análisis de la normativa vigente en la materia, solo haré una breve reseña.

La ley 23.187, que rige el ejercicio de la abogacía en la Capital Federal, impone a los abogados el deber de “*observar con fidelidad el secreto profesional, salvo autorización fehaciente del interesado*” (art. 6, inc. f). A su vez, el Código de Ética del Colegio Público (art. 10, inc. h), permite al abogado revelar el secreto profesional cuando así lo autoriza su cliente, o si se tratara de su propia defensa.

La ley 5177 que regula la Colegiación en la Provincia de Buenos Aires, establece entre las obligaciones del abogado la de “*guardar secreto profesional respecto de los hechos que ha conocido con motivo del asunto que se le hubiere encomendado o consultado, con las salvedades establecidas por la Ley*” (art. 58 inc. 6).

Y las normas de ética bonaerenses rezan lo siguiente:

“El abogado debe guardar rigurosamente el secreto profesional.

I) La obligación de la reserva comprende las confidencias recibidas del cliente, las recibidas del adversario, las de los colegas, las que resulten de entrevistas para conciliar o realizar una transacción, y las hechas por terceros al abogado en razón de su ministerio. En la misma situación se encuentran los documentos confidenciales o íntimos entregados al abogado.

II) La obligación de guardar secreto es absoluta. El abogado no debe admitir que se le exima de ella por ninguna autoridad o persona, ni por los mismos confidentes. Ella da al abogado el derecho ante los jueces, de oponer el secreto profesional y de negarse a contestar las preguntas que lo expongan a violarlo.

III) Ningún asunto relativo a un secreto que se le confie con motivo de su profesión, puede ser aceptado por el abogado sin consentimiento previo del confidente.

En las Normas de Ética Profesional del Abogado de la Federación Argentina de Colegios de Abogados se prevé: “*el secreto profesional constituye a la vez un deber y un derecho del abogado. Es hacia los clientes un deber de cuyo cumplimiento ni ellos mismos pueden eximirlo; es un derecho del abogado hacia los jueces, pues no podría escuchar expresiones confidenciales si supiese que podía ser obligado a revelarlas...*”

Asimismo resulta interesante por su valor interpretativo y por su claridad, reproducir el art. 38 de la “*Declaración de Mar del Plata*”:

38. De guardar el secreto profesional. Extensión:

1) El abogado debe guardar celosamente el secreto profesional que constituye un derecho y un deber inherente a la profesión y al derecho de defensa por ser depositario del secreto o confidencias

5. ‘Art. 30 inc. d y e del Proyecto de Código de Ética de la Abogacía y de la Procuración para la Provincia de Buenos Aires, presentado en las Segundas Jornadas Bonaerenses de Ética de la Abogacía, realizadas los días 1 y 3 de Noviembre de 1973 en la ciudad de Mar del Plata.

del cliente. Si en el secreto de la comunicación reservada no puede existir una debida relación de confianza. Tal derecho y deber perdurar incluso después de cesada la prestación de sus servicios.

2) La obligación de secreto se extiende a las confidencias del cliente, a las del adversario, a las de los colegas, a las que resulten de entrevistas para conciliar o transar y a las de terceras personas, hechas al abogado en razón de su ministerio. Asimismo a los documentos confidenciales o íntimos llegados al letrado.

3) El abogado no debe admitir que se le exima del deber de guardar secreto por parte de ninguna autoridad o persona. Citado a declarar, el abogado tiene derecho de oponerle a los jueces u otra autoridad y a negarse a contestar las preguntas que lo expongan a violarlo, aunque debe concurrir a la citación.

4) El abogado no debe citar al colega adversario a declarar como testigo. Igualmente evitará presentarse espontáneamente como testigo en las causas en que intervenga; pero si esto resultara excepcionalmente ineludible, previamente deberá renunciar a su gestión profesional, en garantía de imparcialidad, y no podrá reasumirla.

5) El abogado no debe intervenir en asuntos que puedan conducirlo a revelar un secreto ni utilizará en provecho propio o de su cliente las confidencias recibidas en el ejercicio profesional, salvo que obtenga el consentimiento de su confidante.

6) La obligación del secreto profesional se extiende a los asuntos que el abogado conozca por trabajar en común o en forma asociada con otros abogados o por intermedio de empleados de éstos. Asimismo, el abogado debe prevenir a los colaboradores, empleados y pasantes del estudio, de la obligación de no revelar confidencias o secretos de los clientes y de los documentos confiados.

7) En la atención de casos internacionales el abogado procurará observar las normas más rígidas que aseguren la protección del secreto.

RECEPCIÓN EN EL CÓDIGO PENAL ARGENTINO

El art. 156 de nuestro Código Penal establece lo siguiente: “Será reprimido con multa de mil quinientos pesos a noventa mil pesos e inhabilitación especial, en su caso, por seis meses a tres años, el que teniendo noticia, por razón de su estado, oficio, empleo, profesión o arte, de un secreto cuya divulgación pueda causar daño, lo revelare sin justa causa.”

Esta tipificación alcanza a cualquier profesión, incluyendo al abogado. Y es coincidente la doctrina en que el bien jurídico protegido es la intimidad, sobre lo que abundaré luego.

En cuanto al verbo típico – revelar –, implica poner en conocimiento de una o más personas a quien no se le había confiado información, es decir “*implica descubrirlo o ponerlo de manifiesto, es decir, darlo a conocer a otro u otros, que no debían conocerlo en la voluntad del dador del secreto*”⁶.

Basta con que solo una persona tome conocimiento del secreto para tener por consumado el delito, y carece de relevancia el medio por el cual accedió.

En cuanto al daño que requiere el tipo penal no se exige su producción efectiva sino que basta la mera posibilidad. “*En la determinación del daño potencial, juegan tanto afectaciones de orden físico como moral, lesiones al honor, a la fama, al patrimonio o a los afectos. En tal sentido, este daño temido puede ser de cualquier índole – físico, patrimonial o moral – y causado por la misma*

6. Parma Carlos, “Violación del Secreto Profesional”, tesis doctoral publicada en <http://www.pensamientopenal.com.ar/system/files/cpccomentado/cpc37763.pdf#viewer.action=download>

*naturaleza del hecho o circunstancia, o por la particular situación en que se encuentra el sujeto pasivo (por ej., poder ser sometido a proceso)”.*⁷

No pocas dificultades traen dilucidar qué se entiende por justa causa para justificar la revelación de un secreto profesional.

Para Sebastián Soler la justa causa consiste en un verdadero estado de necesidad, en el cual se legitima la revelación para evitar un mal mayor, por ejemplo en el ámbito médico sería para evitar que se propague una enfermedad. Para otros existe justa causa si el interesado ha prestado su consentimiento, o cuando sea necesario para la defensa del propio interés y el ejercicio del propio derecho, o en el caso de que exista deber legal de comunicar o denunciar el hecho a la autoridad.

En el caso del abogado entiendo que la única excepción que justificarían violentar el secreto profesional es para defenderse a sí mismo. Si el motivo es otro, entiendo que daría lugar a una afectación a derechos elementales sin justificación suficiente, máxime cuando se trata de la defensa en juicio de los derechos de las personas.

EL SECRETO PROFESIONAL COMO DERECHO HUMANO

*“El secreto profesional del abogado pertenece a la categoría de los derechos humanos fundamentales, por ser esencial para el derecho de defensa y formar parte de la protección de la intimidad personal.”*⁸

Este pasaje es una de las conclusiones a las que se arribó en el VII Congreso e UIBA, y constituye el eje de los temas que se abordarán en este tópico.

* Derecho a intimidad

Una de las justificaciones del secreto profesional es la intimidad de las personas.

A grandes rasgos, podemos decir que la intimidad *“es el derecho de los individuos a disponer de un ámbito privado para sí y para su familia, que no puede ser invadido por terceros, mediante cualquier tipo de intromisiones físicas o por publicaciones o informaciones, ya sea por el Estado o por otro individuo”*⁹.

Es un Derecho Humano fundamental reconocido en diversos tratados internacionales. Por ejemplo, el artículo 12 de la Declaración Universal de los Derechos del Hombre de 1948, dice que:

“Nadie será objeto de injerencias arbitrarias en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques a su honra o a su reputación. Toda persona tiene derecho a la protección de la ley contra tales injerencias o ataques”.

Por otra parte, el Pacto Internacional de Derechos Civiles y Políticos, que entró en vigor en 1976, dice en su artículo 17:

“Nadie será objeto de injerencias arbitrarias o ilegales en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques ilegales a su honra y reputación. Toda persona tiene derecho a la protección de la ley contra esas injerencias o esos ataques”.

7. Alberto Sandhagen, El concepto de ‘Justa causa’ del artículo 156 del Código Penal bajo el prisma del Principio de Legalidad.

8. El VII Congreso de UIBA se celebró en Río de Janeiro en Septiembre de 1986, y la frase citada pertenece a la Quinta Conclusión de la Comisión II que trató el tema “Abogacía y Estado de Derecho”.

9. Ernesto Halabi, “El derecho a la intimidad y su protección internacional”, http://server1.utsupra.com/doctrina1?ID=articulos_utsupra_02A00275178149.

La Convención Americana sobre Derechos Humanos, más conocida como Pacto de San José de Costa Rica, de 1969, dice en su artículo 11 que:

“ Toda persona tiene derecho al respeto de su honra y al reconocimiento de su dignidad. Nadie puede ser objeto de injerencias arbitrarias o abusivas en su vida privada, en la de su familia, en su domicilio o en su correspondencia, ni de ataques ilegales a su honra o reputación. Toda persona tiene derecho a la protección de la ley contra esas injerencias o esos ataques ”.

Con respecto a la privacidad en niños menores de 18 años, la Convención Internacional sobre los Derechos del Niño de 1989, en su artículo 16, establece que:

“ Nadie tiene derecho a invadir, sin una razón legal, tu privacidad, es decir, tu vida privada o tu vida familiar. Tu casa, tu correo, así como tu honor y tu reputación, constituyen tu privacidad y están igualmente protegidos. El estado debe crear leyes que protejan todos los aspectos de tu privacidad ”.

Cualquier excepción que permita la intromisión en la intimidad de las personas, debe encontrarse justificada en un objetivo que guarde el mismo nivel de protección que tiene este derecho, es decir, debe justificarse en el ejercicio de un Derecho Humano fundamental. Y por supuesto, debe haber control judicial suficiente.

Es por ello que excepcionalísimos motivos permiten a los profesionales quebrantar el secreto profesional. Y cualquier profesional puede ampararse en el soporte supraconstitucional del derecho a la intimidad para negarse a otorgar información confiada por un cliente.

La Corte Suprema de Justicia de la Nación sostuvo que *“ sólo la ley puede justificar la intromisión a la vida privada de una persona, siempre que medie un interés superior en resguardo de la libertad de los otros, la defensa de la sociedad, las buenas costumbres o la persecución de un crimen ”.*¹⁰

* La garantía de la defensa en juicio

Uno de los pilares sobre los que asienta todo Estado de Derecho moderno es la genérica garantía de la defensa en juicio, que a grandes rasgos consiste en la posibilidad amplia con que cuenta una persona para acceder a los tribunales de justicia para reclamar el reconocimiento de un derecho y demostrar el fundamento del reclamo, así como el de argumentar y demostrar la falta total o parcial de fundamento de lo reclamado en su contra. Esta máxima se encuentra expresamente establecida en el artículo 18 de nuestra Constitución por cuanto reza que *“ es inviolable la defensa en juicio de la persona y de los derechos ”.*

Es una garantía genérica¹¹ de cual la doctrina y la jurisprudencia han derivado diversos postulados en las diferentes ramas del ordenamiento jurídico, y se encuentran receptadas en los tratados internacionales suscriptos por la Argentina.

La tarea del abogado no es una tarea más en la sociedad, el abogado trabaja con derechos de las personas. De su tarea depende el adecuado ejercicio de los derechos. En efecto, no está de más recordar las funciones que comprende el ejercicio de la profesión:

- *“ Defender, patrocinar o representar causas propias o ajenas, en juicio o proceso o fuera de ellos, en el ámbito judicial o administrativo y en cualquier otro donde se controviertan **derechos o intereses legítimos**.*
- *Evacuar consultas y prestar todo tipo de asesoramiento en cuestiones en que se encuentren involucrados **problemas jurídicos**. Dichas funciones le son propias y exclusivas...”*

Como se advierte, de nuestra función depende que las personas puedan defender cualquier interés con relevancia jurídica. Si realizamos un manejo inadecuado de las confidencias que nos hacen nuestros clientes, ponemos en riesgo la defensa de sus derechos. Y este es otro de los pilares

10. Fallos 306: 1892; 316: 703.

11. Carrió Alejandro D., *“Garantías constitucionales en el proceso penal”*, 6° edición, 1° reimpresión, Buenos Aires, Hammurabi, 2015, pág. 121.

argumentales que debemos defender para proteger la información que llega a nuestro conocimiento en virtud de nuestra profesión.

Por lo tanto, a la hora de ejercer la defensa de un cliente ninguna autoridad puede exigir al abogado información confiada por él, so pena de vulnerar máximas elementales de jerarquía constitucional. Y esto lo traigo a colación por los particulares casos que se han dado en algunos países de América, que se desarrollará a continuación.

EMBATES CONTRA EL SECRETO PROFESIONAL Y LAS GARANTÍAS CONSTITUCIONALES

* Requerimientos de la Unidad de Información Financiera

Desde comienzos del corriente año, la Unidad de Información Financiera (UIF)¹² comenzó a intimar a diferentes abogados que defienden imputados en causas en las que se investigan delitos de corrupción, narcotráfico, y lavado de activos, entre otras, para que estos informen en un plazo de 10 días sobre los honorarios percibidos y a percibir de sus clientes. En efecto, les solicita que informen el importe de los honorarios percibidos, los que hayan pactado o estén pendientes de cobro, como así también la fecha, forma de pago y nombre de la persona que les pagó. El organismo, tiene la clara finalidad de determinar el origen de los fondos.

No solo ello, sino que ante la lógica negativa de algunos abogados a brindar información de sus clientes, la UIF les realizó una denuncia.

Ante esta situación alguno Colegios de Abogados salieron a rechazar enfáticamente el accionar de la institución, y ésta respondió con un comunicado sumamente agravante, que entre sus pasajes expresa lo siguiente: *“El abogado tiene como deber básico cooperar con la administración de justicia defendiendo en derecho los intereses que se le confíen. Por lo tanto, corresponde al abogado la defensa del derecho, y no del delito.*

*Los abogados, como cualquier otro profesional, deberían aspirar a que los fondos con los que su cliente remunera su tarea, sean legítimos y no ampararse en una garantía legal para obtener de su cliente parte del producido del ilícito. De no ser así, incluso los abogados defensores en causas penales, tendrían y usufructuarían dicha garantía para obtener un rédito no solo antiético sino también ilícito.”*¹³

En primer lugar debemos defender los ataques realizados al secreto profesional. En este sentido el comunicado expresaba que aquel *“no se dirige a proteger la modalidad de contratación, ni al pago de honorarios profesionales”*, a lo cual cabe responder que la obligación del abogado de guardar secreto profesional es absoluta, y comprende todo tipo de confidencia, por lo que la excepción planteada por la UIF no tiene recepción normativa alguna. Tal como expresan las normas de ética bonaerense, *“el abogado no debe admitir que se le exima de ella por ninguna autoridad”*, lo que incluye a la entidad referida.

Así también dijo que *“el secreto profesional no puede amparar el pacto entre cliente y abogado para usar fondos ilícitos o sospechados de tales”*, y que *“la tarea de reunir información en el marco de posibles sospechas de Lavado de Activos, sus delitos precedentes, o la Financiación del Terrorismo,*

12. Es un organismo autónomo y autárquico creado por la ley 25.246, y que se encarga del análisis, tratamiento y transmisión de información a los efectos de prevenir e impedir la comisión de delitos como lavado de activos, tráfico de estupefacientes, contrabando de armas, entre otros.

13. <https://www.argentina.gob.ar/noticias/el-compromiso-de-los-abogados-en-la-lucha-contra-la-corrupcion-el-narcotrafico-y-el-lavado>

no se dirige contra el abogado sino que se refiere al análisis de flujos de dinero posiblemente ilícitos. Dicha tarea no vulnera en modo alguno el referido secreto...". En primer lugar, es necesario remarcar que el abogado no tiene porqué indagar sobre el origen de sus honorarios, en segundo lugar hay que aclarar – por más que parezca una obviedad- que corresponde a los órganos judiciales determinar cuándo un dinero es de origen ilícito.

Estos hechos deben situarse en su contexto. Desde hace algunos años el Estado argentino viene poniendo énfasis en la persecución de la criminalidad económica, especialmente en los delitos vinculados a la administración pública, lavado de activos, y tráfico de estupefacientes, es lo mediáticamente se dio a conocer como “*guerra contra la corrupción*” y “*guerra contra el narcotráfico*”.

Y para lograr la persecución efectiva y descubrir los hechos delictivos pareciera ser que se *vale todo*, y que necesariamente se requiere violentar las garantías constitucionales, por ejemplo, la ley del arrepentido, que en nuestro país se utiliza como un mecanismo extorsivo para lograr información en delitos complejos, para los cuales el Estado es impotente para obtenerla mediante las herramientas procesales normales¹⁴. Y así se inserta esta actitud de la UIF, bajo la premisa de que la guerra contra la corrupción justifica todo, incluyendo el quebrantamiento garantías constitucionales.¹⁵

Si un abogado le brinda información de sus clientes al organismo del Estado que colabora en la persecución penal, está afectando la vulneración de su defensa en juicio y de sus consagraciones. Veamos.

Inexistencia de previsión legal de las exigencias de la UIF

Como sabemos, la UIF se encarga de manejar cierta información a los efectos de evitar y prevenir determinados delitos, como el lavado de activo, tráfico de armas y estupefacientes, entre otros¹⁶. Y para el ejercicio de su función tiene la facultad de requerirle a determinados sujetos – considerados obligados – que reporten las operaciones sospechosas¹⁷ (R.O.S) que detecten en el marco de su profesión. Y entre esos sujetos obligados a realizar los reportes de operaciones sospechosas se encuentran las entidades financieras, los casinos, las aseguradoras, los escribanos, entre otros¹⁸, pero no se encuentran los abogados. Lo cual tiene un fundamento lógico en un Estado de Derecho, que es la defensa en juicio de los derechos de sus clientes. Si el abogado tiene que brindarles a los organismos del Estado la información de sus clientes, ¿cómo es posible que logren una efectiva defensa de sus intereses jurídicos?

Pero sin perjuicio de ellos, la UIF expresó en su comunicado que “*se encuentra facultada, de conformidad con el art. 14 inc. 1 de la Ley 25.246 a Solicitar informes, documentos, antecedentes y todo otro elemento que estime útil para el cumplimiento de sus funciones, a cualquier organismo público, nacional, provincial o municipal, y a personas humanas o jurídicas, públicas o privadas, todos los cuales estarán obligados a proporcionarlos dentro del término que se les fije, bajo apercibimiento de ley...*”

Sin embargo, creo que hubiese sido interesante que la UIF transcriba la totalidad del inciso, el cual continúa diciendo que “*En el marco del análisis de un reporte de operación sospechosa los sujetos contemplados en el artículo 20 no podrán oponer a la Unidad de Información Financiera (UIF) el secreto bancario, fiscal, bursátil o profesional, ni los compromisos legales o contractuales de confidencialidad*”. Por lo cual, quienes no pueden oponer el secreto profesional son los sujetos obligados a informar, y tal como he dicho, los abogados no integramos ese catálogo de sujetos.

14. Quiero aclarar que no rechazo la figura del Arrepentido o Delación Premiada, sino el modo de uso.

15. En la Cámara de Diputados de la Nación se presentó un proyecto de ley que incluye a los abogados en la nómina de sujeto obligados a informar a la UIF, que tramita bajo el Expediente 1405-D-2018.

16. Art. 6 de la ley 25.246.

17. Arts. 14 y 21 de la ley 25.246.

18. Art. 20 de la ley 25.246.

Derecho a guardar silencio y a no declarar contra sí mismo

En el proceso penal todo ciudadano tiene derecho a guardar silencio, y a no declarar contra sí mismo. Si el abogado informa a las agencias del estado que su cliente tiene fondos de origen ilícito, está brindando información que su cliente tenía derecho a callar, e implica una imputación directa contra aquél.

La libertad del acusado a no declarar contra sí mismo cuenta con raigambre constitucional, puesto que el artículo 18 de nuestra Carta Fundamental expresamente refiere: Artículo 18. - “(...) *Nadie puede ser obligado a declarar contra sí mismo*”; mientras que como consecuencia de la incorporación de Tratados Internacionales de Derechos Humanos al ordenamiento positivo nacional mediante el artículo 75 inc. 22, este derecho se ve reflejado también en los siguientes instrumentos: Convención Americana de Derechos Humanos, artículo 8.2.G. “*derecho a no ser obligado a declarar contra sí mismo ni a declararse culpable*”; artículo 8.3: “*La confesión del inculpado solamente es válida si es hecha sin coacción de ninguna naturaleza*”. Pacto Internacional de Derechos Civiles y Políticos, Artículo 14.3.G: “*Durante el proceso, toda persona acusada de un delito tendrá derecho, en plena igualdad (...) a no ser obligada a declarar contra sí misma ni a confesarse culpable*”.

Presunción de inocencia

La garantía anterior es complementada por la presunción de inocencia, que consiste en considerar a toda persona inocente hasta tanto no se declare judicialmente su culpabilidad. Por lo cual, cualquier ciudadano puede guardar silencio, y esto no cambia su estatus de inocente. Esta máxima no sólo se vería vulnerada respecto al cliente, sino sobre el abogado mismo, que por el hecho de intervenir en determinadas causas es colocado bajo un manto de sospecha.

Esta garantía se encuentra consagrada en la Declaración Universal de Derechos del Hombre: artículo 11: “*toda persona acusada de delito tiene derecho a que se presuma su inocencia mientras no se pruebe su culpabilidad, conforme a la ley en juicio público en el que se le hayan asegurado las garantías necesarias para su defensa*”. Y la Convención Americana sobre Derechos Humanos, en su art. 8. Inc. 2 establece que “*toda persona inculpada de delito tiene derecho a que se presuma inocente mientras no se establezca legalmente su culpabilidad*”.

Igualdad procesal y sistema acusatorio

Según Calamandrei “*las partes en cuanto piden justicia deben ser puestas en el proceso en absoluta paridad de condiciones*”.¹⁹

El principio de igualdad se halla expresamente contenido en la Convención Americana sobre Derechos Humanos, que en su artículo 24 establece: “*Todas las personas son iguales ante la ley. En consecuencia, tienen derecho sin discriminación, a igual protección de la ley*”. El artículo 8 de dicha Convención dispone: “*Toda persona tiene derecho a ser oída, con las debidas garantías, y dentro de un plazo razonable por un juez o tribunal competente, independiente e imparcial, establecido con anterioridad por la ley...*”. En el mismo sentido, el artículo 14 inc. 1) del Pacto Internacional de Derechos Civiles y Políticos consigna: “*Todas las personas son iguales ante los tribunales y cortes de justicia...*”. La Declaración Universal de Derechos Humanos -con la misma relevancia en nuestro diseño constitucional- dispone en su artículo 7º que: “*Todos son iguales ante la ley y tienen, sin distinción, derecho a igual protección de la ley...*” y en su artículo 10 que “*Toda persona tiene derecho, en condiciones de plena igualdad, a ser oída públicamente y con justicia por un tribunal independiente o imparcial para la determinación de sus derechos y obligaciones, o para el examen de cualquier acusación contra ella en materia penal*”.

19. CALAMANDREI, Piero, “Instituciones de derecho procesal civil”, traducción de Santiago Santis Melendo, EJEA, Buenos Aires 1973, volumen I, pág. 418.

En un proceso penal, de corte acusatorio como el nuestro, las partes deben ser ubicadas en paridad de condiciones, deben tener igualdad de armas. El sujeto imputado cuenta con diversas herramientas para su defensa y con amplia posibilidad probatoria, como así también puede guardar silencio durante todo el proceso y permanecer en el status de inocente hasta que una sentencia firme no diga lo contrario. Y por el otro lado, el Estado a través del Ministerio Público Fiscal, cuenta con todas las facultades investigativas que establecen los códigos procesales. Si el abogado debería brindarle información de sus clientes al Estado, se rompería la igualdad.

Obligación del Estado de investigar y probar

Si la UIF necesita información sobre hechos ilícitos, o tiene sospechas sobre la comisión de un delito, le corresponde denunciar el hecho. Y es el Ministerio Público Fiscal quien debe hacerse de información, y no los ciudadanos proveerla.

Recordemos que *“deberán iniciarse de oficio todas las acciones penales”* (art. 71 del Código Penal), y que el Ministerio Público Fiscal es el encargado de *“promover y ejercer la acción pública en causas criminales y correccionales”* (Ley 24.946 art 25 inc. c.).

Rigiendo la presunción de inocencia, le corresponde al acusador la tarea de voltear esa presunción con prueba que demuestre la culpabilidad, conforme lo ha sostenido nuestro máximo tribunal en reiterada jurisprudencia²⁰. En consecuencia, serán los órganos del Estado los que deben hacerse de la prueba, y no obligar a los imputados/sospechados a proveerla.

*** Escuchas telefónicas ilegales**

A lo largo del corriente año se han difundido en diversos medios de comunicación conversaciones telefónicas entre abogados y clientes (algunos privados de libertad), investigados en su mayoría en causas por delitos llamados de corrupción. Sin embargo, muchas de estas conversaciones no guardan relación alguna con las causas en la que los imputados son investigación, y mucho menos cuentan con autorización judicial.

Estas escuchas y su indiscriminada difusión, representan graves violaciones a los Derechos Humanos, a la privacidad de las personas privadas de su libertad, causando los mismos agravios que los requerimientos de la UIF, y particularmente al ejercicio de la profesión de abogado, violentando el deber de confidencialidad y el secreto profesional.

Tal como surge del art. 11 de las normas de ética de la Pcia. de Bs. As., el secreto profesional comprende todas las confidencias entre cliente y abogado, y debe preservarse en todo momento, de lo contrario no sólo se transgrede la referida norma, sino que también se ve comprometida la defensa en juicio de las personas.

Nuestra Corte Suprema ha dejado sentado que la protección a la privacidad en el ámbito de las telecomunicaciones no sólo alcanza al individuo en particular, sino también a terceros interlocutores, *“Si bien la ‘privacidad’, desde cierto punto de vista, puede ser concebida como un bien propio de cada individuo en particular, no se trata en el caso de un reclamo de protección limitado a un cierto espacio físico o a algún aparato de comunicación en particular. Por el contrario, lo que entra en juego es el derecho a la privacidad en el ámbito de las telecomunicaciones. Ello, por definición, presupone la interacción con otros interlocutores...”*²¹ Por lo cual, en el caso de las escuchas a los abogados con sus clientes, se vulnera tanto la privacidad del cliente, como la del letrado en carácter de interlocutor.

20. C.S.J.N., Sandoval, David S/Homicidio Agravado.

21. C.S.J.N. “Halabi, Ernesto c/ P.E.N. - ley 25.873 dto. 1563/04 s/ amparo ley 16.986”.

En el plano normativo nacional, el Código Procesal Penal **permite a los jueces ordenar la intervención de comunicaciones telefónicas**, conforme lo establece el artículo 236.²² También pueden **obtener los registros** que existan de sus comunicaciones telefónicas. La Ley de Inteligencia Nacional Nº 25.520 expresa que las comunicaciones son inviolables en todo el país, “*excepto cuando mediara orden o dispensa judicial en sentido contrario*”.²³

Por otra parte, la Ley Nacional de Telecomunicaciones **obliga a las empresas del sector a registrar y sistematizar las comunicaciones** para su consulta por parte del Poder Judicial o el Ministerio Público Fiscal, información que debía conservada **por un plazo de diez años**. Estos plazos y obligaciones se incorporaron en 2003 mediante la Ley 25.873, que fue declarada inconstitucional por la Corte Suprema en 2009 en el precedente “*Halabi*”.

En el fallo mencionado se interpuso acción de amparo por considerar que las disposiciones de la ley 25.873 y de su decreto reglamentario 1563/04 vulneran los derechos establecidos en los artículos 18 y 19 de la Carta Constitucional en la medida en que autorizan la intervención de las comunicaciones telefónicas y por Internet sin determinar “*en qué casos y con qué justificativos*” esa intromisión puede llevarse a cabo.

La pretensión se dedujo por considerar que la intervención implica una violación de los derechos a la privacidad y a la intimidad, y además pone en serio riesgo el “*secreto profesional*” del abogado. El demandante manifestó que su pretensión no se circunscribe a procurar una tutela para sus propios intereses sino que, por la índole de los derechos en juego, es representativa de los intereses de todos los usuarios de los servicios de telecomunicaciones como también de todos los abogados. Y en el caso el Colegio Público de Abogados de la Capital Federal y la Federación Argentina de Colegios de Abogados se presentaron adhiriendo a los planteos del actor por considerar que la norma establece consecuencias negativas para todo el colectivo de abogados que ejercen la profesión.

En el ámbito internacional, la Convención Americana de Derechos Humanos establece en su art. 8.2 d el “*derecho del inculpado de defenderse personalmente o de ser asistido por un defensor de su elección y de comunicarse libre y privadamente con su defensor*”. Por su parte, el Pacto Internacional sobre Derechos Civiles y Políticos establece el derecho “*a disponer del tiempo y de los medios adecuados para la preparación de su defensa y a comunicarse con un defensor de su elección*” (art. 14 3. B).

El Comité de Derechos Humanos encargados de interpretar el Pacto Internacional sobre Derechos Civiles y Políticos, dejó sentado que “*el derecho a comunicarse con el defensor exige que se garantice al acusado el pronto acceso a su abogado. Los abogados deben poder reunirse con sus clientes en privado y comunicarse con los acusados en condiciones que garanticen plenamente el carácter confidencial de sus comunicaciones. Además, los abogados deben poder asesorar y representar a las personas acusadas de un delito de conformidad con la ética profesional establecida, sin ninguna restricción, influencia, presión o injerencia indebida de ninguna parte*”²⁴.

Asimismo, el Octavo Congreso de las Naciones Unidas sobre Prevención del Delito y Tratamiento del Delincuente, La Habana, del 27 de agosto al 7 de septiembre de 1990, ha adoptado ciertos principios, con el expreso fin de “*ayudar a los Estados Miembros en su tarea de promover y garantizar la función adecuada de los abogados*” y que “*deben ser tenidos en cuenta y respetados por los gobiernos en el marco de su legislación y práctica nacionales, y deben señalarse a la atención de los juristas así como de otras personas como los jueces, fiscales, miembros de los poderes ejecutivo y legislativo y el público en general.*”

22. Art. 236. – “El juez podrá ordenar, mediante auto fundado, la intervención de comunicaciones telefónicas o cualquier otro medio de comunicación del imputado, para impedir las o conocerlas”.

23. Art. 5.

24. Observación General 32, “El derecho a un juicio imparcial y a la igualdad ante los tribunales y cortes de justicia” párr. 34).

Especialmente en el numeral 22 se expresa “Los gobiernos reconocerán y respetarán la confidencialidad de todas las comunicaciones y consultas entre los abogados y sus clientes, en el marco de su relación profesional” y en el 8 “A toda persona arrestada, detenida, o presa, se le facilitarán oportunidades, tiempo e instalaciones adecuadas para recibir visitas de un abogado, entrevistarse con él y consultarle, sin demora, interferencia ni censura y en forma plenamente confidencial” y que “no se escuchará la conversación”.

SITUACIÓN EN COLOMBIA

Colombia es uno de los países que desde hace años viene desplegando un rol activo en el combate contra el narcotráfico y el lavado de activos, y desde que se ha incorporado a la Organización para la Cooperación y el Desarrollo Económicos (O.C.D.E.) debió adecuar su legislación a los estándares internacionales vigentes en la materia. En este sentido la Superintendencia de Bancas y Seguros estableció un reglamento para abogados y contadores que estén relacionados a la compra de inmuebles y/o administren finanzas, quienes deberán contar con un sistema para prevenir el **blanqueo de dinero**, y deberán reportar las operaciones sospechosas a la Unidad de Información y Análisis Financiero (UIAF).

La normativa alcanza a aquellos estudios jurídicos cuyos ingresos anuales alcancen el umbral de 30.000 salarios mínimos (Salario mínimo en 2019 equivalente a U\$S 253).

Estas disposiciones son objetos de las mismas críticas que se han esbozado sobre las prácticas de la Unidad de Información Financiera argentina, por cuanto afectan al secreto profesional de los abogados, y las garantías básicas como el derecho a la intimidad y a la defensa en juicio.

Cabe recordar que en Colombia la protección del secreto profesional se encuentra receptado expresamente en su Constitución Política, que en su artículo 74 dispone que el mismo es “*inviolable*”.

SITUACIÓN EN PERÚ

El 3 de marzo de 2018 la Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones publicó una resolución²⁵ que detalla nuevas obligaciones impuestas a los abogados vinculadas con la prevención del **lavado de activos** y financiamiento, que fueran incorporadas en el ordenamiento legal mediante el Decreto Legislativo 1249, publicado el 26 noviembre de 2016.

Ahora, los abogados están obligados a implementar todo un sistema de prevención del lavado de activos y financiamiento del terrorismo, incluyendo por ejemplo, tener un *oficial de cumplimiento* que envíe un informe anual a la Unidad de Inteligencia Financiera (UIF)²⁶.

Para el cumplimiento de estas obligaciones se establece que podría hacerse a través de una gestión centralizada a cargo de un Órgano Centralizado de Prevención de LA/FT (Órgano Centralizado) que dependería del Colegio de Abogados de Lima, aunque manteniendo los abogados la responsabilidad como sujetos obligados a informar a la UIF.

La regulación ha precisado que son obligados sólo los abogados que ofrecen servicios de forma independiente o en sociedad. Y en el supuesto en que constituye una persona jurídica, siempre

25. Resolución SBS 789-2018-JUS.

26. <https://legis.pe/abogados-unidad-inteligencia-financiera-secreto-profesional/>

que su objeto social sea la prestación de servicios jurídicos, legales y/o contables. En el caso de los abogados que trabajan en sociedad se ha excluido a la sociedad misma como sujeto obligado de reportar operaciones sospechosas y se ha señalado que solo serán considerados obligados los abogados que la conforman.

En cuanto a las consecuencias ante un incumplimiento, la norma aclara que será sancionada según el Reglamento de Infracciones y Sanciones, aprobado por la Res. SBS N° 8930-2012. Por ello, todo obligado deberá implementar un registro de las operaciones señaladas en la norma e identificada previamente toda data que se encuentre resguardada por el secreto profesional, a fin de evitar que sea consignada erróneamente en el registro.

Asimismo se impone la obligación a ciertos abogados y contadores públicos colegiados de implementar un sistema de prevención del lavado de activos.

Los obligados a implementar dicho sistema son aquellos profesionales abogados y contadores que, de manera independiente o en sociedad, realicen o se dispongan a realizar – en nombre de un tercero o por cuenta de éste – de manera habitual las siguientes actividades: (I) Compra y venta de bienes inmuebles; (II) Administración de dinero, valores, cuentas del sistema financiero y otros activos; (III) Organización de aportaciones para la creación, operación o administración de personas jurídicas; (IV) Creación, administración y/o reorganización de personas jurídicas u otras estructuras jurídicas; y (V) la compra y venta de acciones o participaciones sociales de personas jurídicas.

Y se establece que deben registrar las operaciones individuales referidas, sin importar el monto de la operación, en el Registro de Operaciones (RO). Y que dicha información “no se encuentra sujeta al secreto profesional”²⁷.

Caben sobre esta regulación las mismas objeciones que a la situación argentina y colombiana. Y al igual que en Colombia, en Perú el secreto profesional tiene protección expresa en su Constitución (art. 2 inc. 18)²⁸.

CONCLUSIONES

Ha quedado claro que el secreto profesional en el caso de los abogados tiene características propias que no se dan en las otras profesiones, artes u oficios. Esta diferencia radica en labor esencial del abogado, que es ejercer la defensa de los derechos de las personas. Sin secreto profesional es imposible pensar en una adecuada defensa en juicio de las personas.

La defensa en juicio al igual que el derecho a la intimidad son garantías básicas elevadas a la categoría de Derecho Humano fundamental, y han recibido recepción normativa en los diversos tratados internacionales que nuestro país ha incorporado a su ordenamiento jurídico.

Por lo cual, entiendo que resulta muy difícil justificar la liberación del abogado de proteger el secreto profesional, pues sólo la vulneración a otro Derecho Humano podría justificarlo y cuándo no quede otra alternativa para su protección. Solo la defensa en causa propia justificaría blanquear las confidencias de los clientes.

Es por ello que los requerimientos de la UIF son abiertamente inconstitucionales, por cuando producen la vulneración del catálogo de derechos y garantías básicas mencionadas. Lo mismo sucede en cuanto a las escuchas telefónicas. Y este fenómeno es común en la mayoría de los países de América latina, que en la necesidad – más que loable – de acentuar la efectividad de los mecanis-

27. <https://elperuano.pe/noticia-precisan-obligaciones-abogados-para-prevenir-lavado-activos-64961.aspx>

28. Art. 2 inc. 18 que dispone que todo ciudadano tiene derecho a “mantener reserva sobre sus convicciones políticas, filosóficas, religiosas o de cualquiera otra índole, así como a guardar el secreto profesional”.

mos de combate de la criminalidad económica y dada la dificultad de su investigación, han creado normas y políticas que comprometen las garantías básicas de un Estado de Derecho, como así también afectan al libre ejercicio de nuestra profesión.

Por todo lo expuesto considero imprescindible que los abogados, a través de sus Colegios, en reuniones institucionales, en congresos, y en todo ámbito propicio, reivindiquen enfáticamente el carácter que tiene el secreto profesional, y sus implicaciones en la protección de los Derechos Humanos. *“El abogado debe mantener el honor y la dignidad profesional. No solamente es un derecho, sino un deber, combatir por todos los medios lícitos, la conducta moralmente censurable de jueces y colegas y denunciarla a las autoridades competentes o a los Colegios de Abogados”*²⁹.

Insisto, debemos velar por la protección del secreto profesional ante cualquier embate y en toda oportunidad, pues a pesar de lo que se diga, la profesión de abogado es la más noble de todas.

29. Art. 2 de las normas de ética de la Provincia de Buenos Aires.

NORTH AMERICA

Attorney-Client Privilege: U.S. Perspective

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“The United States involves different state laws that are not always the same, and federal law that is not always interpreted the same way across jurisdictions, so the comments here are general and not exhaustive, and not meant to provide legal advice. All comments are individual to the author and do not speak for the American Bar Association.”

INTRODUCTORY COMMENTS

The concept of client confidentiality is embodied in the disciplinary rules of professional conduct that govern lawyers, and for which they may be disciplined. While that may be referred to as “privilege,” it is a rule of confidentiality, analogous to the notion of “professional secrecy.” In the context of what is admissible evidence or otherwise required discovery, the “attorney-client privilege” protects disclosure as a general matter of attorney-client communications relating to legal advice. Other related concepts, such as attorney work-product, protect the impressions and comments of an attorney, as well as certain work product prepared in anticipation of litigation.

PRIVILEGE AS ETHICS RULE

- ABA Model Rule 1.6: **Confidentiality of Information.**
- Lawyer not reveal information **relating to the representation of a client** unless the **client gives informed consent, UNLESS** (a) disclosure impliedly authorized to carry out the representation **OR** (b) prevent harm or crime or necessary to establish defense, detect conflict, or per court order.
- Note that the ABA Model Rules are not law by themselves, but if adopted by a state, territory or other jurisdiction within the United States, at that point it becomes part of that jurisdiction’s law.

PROSPECTIVE AND FORMER CLIENTS

- ABA Model Rule 1.18: Prospective Clients.
Even when no client-lawyer relationship ensues, lawyer who learned information from prospective client not use or reveal that information, except per Rule 1.9 as of a former client.
- ABA Model Rule 1.9: Former Clients.
Lawyer who formerly represented client in matter or whose present or former firm formerly represented client in matter **shall not** thereafter:
 - (1) use information relating to representation to disadvantage of former client except as Rules permit or require with respect to client, or when the information has become generally known; or
 - (2) reveal information relating to representation except as these Rules would permit or require with respect to a client.

RATIONALE

- Fundamental principle of client confidentiality and attorney-client privilege: trust encourages full and frank discussion including embarrassing or legally damaging subjects, to enable lawyer to effectively represent client and advise against further wrongful conduct.
- Not generally apply to business advice, only legal advice. However, it is often a fact-intensive matter to determine what is legal advice versus business advice or simple transmission of basic facts. In addition, ABA Model Rule 2.1 requires the lawyer to act as advisor and consider other factors, such as social and economic considerations, in rendering legal advice.

RELATED DOCTRINES

Attorney Work Product: may vary state to state, but generally, *“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”* United States v. Nobles, 422 U.S. 225, 238 (1975).

WAIVER

Work product doctrine waived when the work product is shared with an adversary or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. *BouSamra v. Excela Health*, 210 A.3d 967 (Pa. Supreme Court 2019).

EVIDENTIARY PRIVILEGE

- Federal Rule of Evidence 501: common law as governs privilege, but in civil cases, state law governs where it provides the rule.
- Federal Rule of Evidence 502: rules on waiver and disclosure in various circumstances; notably, no waiver for inadvertent disclosure (where reasonable steps taken and prompt rectification).
- Though “procedural,” Rule 44.1 allows proof of foreign law, including privilege, in federal proceedings.

RESTATEMENT DEFINITION

The Restatement (Third) of the Law Governing Lawyers also distinguishes between the confidentiality responsibilities of lawyers, the attorney-client privilege, and the work-product immunity. The Restatement (Third) of the Law Governing Lawyers is not law in itself, but a series of statements that is meant to summarize basic legal principles in its topic area. As with ABA Model Rules, it does

not become law unless and until a jurisdiction adopts it as the statement of law in that jurisdiction. It offers the following:

§ 59 Definition of “Confidential Client Information” – Confidential client information consists of information relating to representation of a client, other than information that is generally known.

§ 68 Attorney-Client Privilege – Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

§ 87 Lawyer Work-Product Immunity

- (1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.
- (2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.
- (3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.

Note that within each section are commentaries, hypothetical examples, exceptions, and a detailed development of the various factors and components in each. A significant body of jurisprudence has developed, and these comments are meant to provide the briefest overviews.

CORPORATE CONTEXT

- Privilege applies not just to legal advice given by the lawyer, but certain information provided to the lawyer by the client. The distinction is that it extends to communications, not facts; purpose, not black and white “*control group*” test, applies. *Upjohn Co. v. United States*, 449 U.S. 383 (U.S. 1981).
- Factors in determining the coverage of the privilege: (1) communication made for purpose of securing legal advice; (2) employee making the communication should have done so at direction of corporate superior; (3) superior made the request so the corporation could secure legal advice; (4) subject matter of communication within the scope of the employee’s duties; and (5) communication should not have been disseminated beyond those persons who need to know it. *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 203 (E.D.N.Y. 1988) (citing *Weinstein on Evidence*).

IN HOUSE COUNSEL

- Generally, in house counsel in United States have attorney client privilege for legal, not business advice.

- Higher scrutiny may apply to in house than with outside counsel regarding scope.
- The standard may be subjective and look to whether “*primarily*” or “*predominantly*” legal advice is involved.
- Generally applies to parent or affiliated companies.

JOINT DEFENSE PRIVILEGE

- Extends privilege to third parties sharing a common legal interest.
- Exception to general rule of waiver when disclosure to third parties: joint defense strategy, ongoing common enterprise, multiple clients sharing common interest about a legal matter. *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. N.Y. 2015).
- Rationale of protecting communications.

CHOICE OF LAW

- Privilege is treated as a procedural issue, and federal courts will apply the privilege laws of the jurisdiction in which they sit. However, Federal Rule of Evidence 44.1 allows proof of foreign law, including privilege, in federal proceedings.
- A party has the burden of proving the applicability of a foreign privilege if it wants to assert it. In *re Air Crash at Belle Harbor*, 241 F.R.D. 202, 204 (S.D.N.Y. 2007). If a party does assert the viability of a foreign privilege, the court will undergo a traditional conflict of law analysis to determine if the foreign privilege applies. In *re Rivastigmine Patent Litig.* (MDL No. 1661), 237 F.R.D. 69, 74 (S.D.N.Y. 2006).

DOMESTIC CROSS BORDER PRIVILEGE ISSUES

- The issue exists domestically as well. See *Valencia v. Colo. Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 97721 (D.N.M. Dec. 6, 2007) (federal law will govern work product issues, but attorney-client issues are a matter of state law).
- Attorney client privilege is a matter of state procedural law from the federal standpoint, but determining which state’s privilege applies is still the subject of a choice of law analysis; state courts will also undergo that analysis. *Sterling Fin. Mgmt., L.P. v. UBS PaineWebber, Inc.*, 336 Ill. App. 3d 442 (Ill. App. Ct. 1st Dist. 2002).

As noted, though, courts may permit a part to prove the applicable privilege law.

FOREIGN PRIVILEGE ISSUES

- Not extended in European Union to communications between in-house counsel and employees, mainly due to claim of lack of dependence.
- Varies from jurisdiction to jurisdiction; e.g., Germany recognizes a limited in house privilege under certain circumstances.

Foreign Privilege Issues (cont'd)

- Can be criminal if violated in civil law countries.
- Issues in determining who is an “attorney” where different types of legal functionaries.
- May foster inefficient use of outside counsel for simple communications.
- May depend on context—in EU, the Akzo Nobel case was a competition investigation by EU.
- Canada: cases split; may depend on expectation of privilege when foreign lawyer involved.
- Circumstances and substance of advice matter.

PRIVILEGE AND INTERNATIONAL ARBITRATION

- IBA Rules on Taking of Evidence in Arbitration Article 9 provides for exclusion by the tribunal of evidence or discovery due to “*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable...*”
- In so determining, tribunal to consider, inter alia, “*the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen*” and any possible waiver, as well as “*the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.*”
- Privilege involves evidentiary issues and arbitrators are not generally bound by rules of evidence. However, this may be addressed by statute, the rules of the arbitration tribunal, protective orders and agreement of counsel, and the like, so as to protect privileged communications.

ATTORNEY CLIENT PRIVILEGE AND THIRD PARTY FUNDING

- Litigation funder needs not just factual information in order to evaluate a case, but also insight into the attorney’s strategy and assessment.
- Certain information is not confidential, such as publicly filed pleadings or public records. Other information is confidential, and may be covered by attorney-client privilege or attorney work product.
- The attorney-client privilege can be waived if the information, subject to certain exceptions relating essentially to physical or economic harm, is disclosed to third parties.
- Attorney-client privileged information should not be disclosed to the litigation funder. However, with a proper non-disclosure agreement, information considered attorney work product is more easily protected.

COMMON INTEREST EXCEPTION

- A common law doctrine by which Courts uphold attorney-client privilege, in spite of the disclosure of attorney-client communications to a third party, because that third party shares a “*common interest*” with the client.

- Essential element of the exception is that the parties must maintain a reasonable expectation of confidentiality in their communications.
- Under federal law there are two approaches to the “common interest” exception. The first is to require that the client and third party have a legal interest in common, as opposed to a merely commercial interest.
- The second approach to “*common interest*” requires only that the “*third party and the privilege holder are engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise.*”

In re Int’l Oil Trading Co., LLC, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016).

INTERCEPTED CALLS

As a general matter, the attorney-client privilege is not absolute, and wiretap intercepted conversations of lawyers and clients can under certain circumstances, be admitted into evidence. See., e.g., *United States v. Edwards*, 303 F.3d 606, 618 (5th Cir. 2002) (“*despite its venerated position, the privilege is not absolute and is subject to several exceptions. Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity.*” (quotations omitted)). When the warrant for wiretap is sought, the law enforcement agency may indicate what happens when attorney-client privilege may be involved. *United States v. Moran*, 349 F. Supp. 2d 425, 462 (N.D.N.Y. 2005) (“*each of the applications clearly states that none of the conversations to be intercepted were expected to be privileged, and if any privileged conversations were intercepted, such interception would be immediately suspended.*”). In such a case, if the privileged information were to be used, it would need to meet the exception to the privilege and also have been obtained through a proper wiretap.

CONCLUDING COMMENTS

Confidentiality and privilege issues arise in a variety of contexts, and not all have touched on here. For example, privilege issues also arise when a lawyer leaves one firm to join another; certain limited exceptions exist to confidentiality to check for conflicts of interest. The specific law in the applicable jurisdiction must be consulted.

OCEANIA

Professional Secrecy and Privilege Legal professional privilege in Australia – New issues in applying a fundamental principle

Paper prepared for the 63rd UIA Congress 2019 (Luxembourg)

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LEGAL PROFESSIONAL PRIVILEGE

In Australia, professional secrecy and privilege is more frequently called “*legal professional privilege*,” or “*client legal privilege*.” The term “*client legal privilege*” has become more common because the privilege belongs to the client, and not the lawyer. However, both refer to a common law right that protects the confidentiality of communications made between a lawyer and his or her client. This confidentiality enables clients to communicate freely and frankly with their lawyer; thereby supporting the administration of justice and encouraging compliance with the law. In *Daniels v ACCC*, the privilege was described as “*an important common law right, or perhaps, more accurately, an immunity*”¹.

Sir William Deane AC QC, a former justice of the High Court of Australia and Governor-General of Australia has said:

[Legal professional privilege] represents some protection of the citizen – particularly the weak, the unintelligent and the ill-informed citizen – against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice – to cope with the demands and intricacies of modern law – will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.²

In *Esso Australia Resources Limited v The Commissioner of Taxation*, Justice Kirby (quoting Justice Deane in *Attorney General (NT) v Maurice*) described the fundamental purpose of privilege:

It arises out of “a substantive general principle of the common law and not a mere rule of evidence.” Its objective is “*of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law.*” It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as “*a bulwark against tyranny and oppression*” which is “*not to be sacrificed even to promote the search for justice or truth in the individual case.*”³

The benefit of this freedom is considered to outweigh the alternative benefit of having all the information available to the court to assist in decision-making.

Legal professional privilege has also been established in legislation. Section 118 of the *Evidence Act 1995 (Cth)* provides that:

118 Legal Advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person:

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

1. *Daniels v ACCC* [2002] HCA 49.

2. *Baker v Campbell* (1983) 153 CLR 52 at 120 per Deane J.

3. *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67 at [111] per Kirby J, quoting *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J.

Section 119 of the *Evidence Act 1995 (Cth)* provides that:

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

The legislative tests turn on the purpose for which the communication was made. Privilege will attach to documents with multiple purposes, if the privileged purpose was the “dominant purpose”, that is the “ruling, prevailing, or most influential” purpose.⁴

The privilege is a protection established in the common law and in legislation, but it can be lost either by deliberate waiver or by inadvertent oversight. Lawyers have a duty to assert the privilege even though the privilege is a protection afforded to the client. In *Spalding v Radio Canberra Pty Ltd [2009] ACTSC 26*, Justice Refshauge stated:

Express waiver can only be effected by the holder of the privilege, though the holder may not be the only person who can claim the privilege. Thus, with legal professional privilege, the privilege is that of the client, but it is the duty of the client’s lawyer (or lawyers) to claim the privilege if it exists.⁵

Accidental waiver of privilege by a lawyer may expose the lawyer to a professional negligence claim. However, the Courts will generally allow the correction of an accidental disclosure of a privileged document as part of the discovery process.⁶

The *Evidence Act* also contemplates a range of circumstances in which client legal privilege will not prevent evidence being adduced, including where a communication is made “*in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to civil penalty.*”⁷

This paper focuses on the tension between the information gathering powers and interests of regulators and the protection of the individual by professional secrecy and privilege.

CASE STUDY ONE: LAWYER X AND THE MELBOURNE GANGLAND KILLINGS

In the late 1990s, a series of “tit-for-tat” murders within Melbourne’s criminal underworld spiralled out of control. In the eight-year period from 1998 to 2006, 27 people were killed, with much of the violence taking place in public places – outside homes, in carparks and on the street. The killings

4. Federal Commissioner of Taxation v Spotless Services Ltd (1996) 186 CLR 404, 416.

5. Spalding v Radio Canberra Pty Ltd [2009] ACTSC 26 per Refshauge J, at [17].

6. Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303 at 319.

7. Evidence Act 1995 (Cth), section 125.

received nation-wide attention and put enormous pressure on police in the state of Victoria to restore law and order.

To help secure convictions, Victoria Police relied on the testimony of Lawyer X, a registered informant through the 1990s and during the gangland killings. Victoria Police and the lawyer involved sought to suppress her identity to her underworld clients. It was argued that if the identity was revealed “*the risk of death [to the lawyer] would become ‘almost certain’.*”⁸ The Supreme Court of Victoria, the Court of Appeal and the High Court of Australia all ruled against the push to keep the identity of lawyer X a secret, saying that the public interest in maintaining the integrity of the justice system outweighed the concerns for the lawyer’s safety.⁹ Lawyer X was later revealed to be the criminal defence barrister, Nicola Gobbo.

Ms Gobbo’s clients were a “who’s who” of the underbelly world and included key figures in the gangland killings. The resulting scandal brought into doubt multiple gangland convictions and is now the subject of a Royal Commission. The Royal Commission is also looking at Victoria Police’s management of other legal professionals it has used as sources.

In a scathing judgement delivered last year, the High Court of Australia declared Lawyer X’s conduct a “fundamental and appalling” breach of her obligation to her clients and her duty to the court.¹⁰ It also maintained the conduct of police was “reprehensible” and an “atrocious” breach of duty.

The High Court summarises the tension:

It follows, as Ginnane J and the Court of Appeal held, that the public interest favouring disclosure [of Lawyer X’s identity] is compelling: the maintenance of the integrity of the criminal justice system demands that the information be disclosed, and the propriety of each Convicted Person’s conviction be re-examined in light of the information. The public interest in preserving [Lawyer X’s] anonymity must be subordinated to the integrity of the criminal justice system.¹¹

CAST STUDY TWO: GLENCORE AND THE PARADISE PAPERS

Glencore is a Swiss-based commodity trading and mining company - one of the world’s largest diversified natural resource companies and Australia’s biggest coal producer.¹² In late 2014, four companies in the global Glencore group engaged a law practice in Bermuda to provide legal advice on a restructure of their Australian entities.

The resulting legally privileged documents were then stolen from the electronic file management system of the law firm, Appleby. These documents became part of the so-called “Paradise Papers,” which were disseminated and received global media coverage. This was a very significant data leak, which revealed the offshore tax arrangements of thousands of the world’s wealthiest companies and individuals, including the Queen of the United Kingdom and other Commonwealth realms.¹³

8. AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58, 5 November 2018, 2.

9. The Guardian, ‘Victoria calls royal commission into underworld lawyer scandal’, 3 December 2018.

10. AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58, 5 November 2018, 10.

11. AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58, 5 November 2018, 10.

12. ABC News, Mining giant Glencore loses High Court Paradise Papers fight to force ATO to return documents, Elizabeth Byrne, 14 August 2019. 2018, 2.

13. ABC News, ‘Mining giant Glencore loses High Court Paradise Papers fight to force ATO to return documents’, Elizabeth Byrne, 14 August 2019.

By late 2017, the Australian Taxation Office (ATO) obtained copies of the Paradise Papers, which included the relevant Glencore section. Glencore brought forward proceedings in the High Court of Australia, seeking injunctive relief, requesting the Commissioner of Taxation return the documents and provide an undertaking that they would not be referred to or relied upon. Glencore argued that the documents were created for the sole or dominant purpose of the provision of legal advice by Appleby. It is interesting to note that the only legal ground relied on by Glencore was legal professional privilege and not the equitable doctrine of breach of confidence.

The key legal question for the Court was to determine whether a regulator, like the ATO, could use privileged material that had been distributed into the public by a third party. The High Court ruled that legal professional privilege was not a legal right after the fact, but rather was a protection against compelling parties to reveal private lawyer client communications.¹⁴

High Court ruled unanimously against Glencore and held that legal professional privilege is not an actionable legal right capable of sounding in injunctive relief. The decision clarified that legal professional privilege operates like a shield, and not a sword. It is an “immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications” and not a “legal right which is capable of being enforced”¹⁵. The court remarked on the awkwardness of Glencore’s request that the materials be returned, because of the way they were exposed.

The Court observed that on the present state of the law, once privileged communications have been disclosed, resort must be had to the equitable doctrine of breach of confidence for protection with respect to the use of that material.

CASE STUDY THREE: AUSTRALIAN TAXATION OFFICE (ATO) AND THE LAW COUNCIL OF AUSTRALIA

In March 2019, Tax Commissioner Chris Jordan warned lawyers that the ATO was stepping up its crackdown on tax and legal professionals it suspected were misusing legal professional privilege. warning came before the High Court of Australia’s decision in favour of the ATO in the Glencore case, discussed above.

The Tax Commissioner said that while the ATO wasn’t opposed to legal professional privilege as a concept, he was concerned that some were not using the protection appropriately. During a speech at the Tax Institute Conference in Tasmania, he said:

...We want taxpayers to be able to get the right and proper legal advice.

But when lawyers are claiming privilege on thousands or tens of thousands of documents — and we have seen this — we start to wonder if it’s a genuine claim or an effort to conceal a contrived tax arrangement.¹⁶

Three months later the ATO Deputy Commissioner Mark Konza revealed that as many as one in five major audits by the Tax Office were being complicated by blanket claims of legal privilege. He said ATO officials were dealing with major legal professional privilege claims in at least 24 current audits of large multinational groups, including two cases with some 13,000 and 19,000 documents being withheld.¹⁷

14. ABC News, ‘Mining giant Glencore loses High Court Paradise Papers fight to force ATO to return documents’, Elizabeth Byrne, 14 August 2019.

15. ??????????????????????

16. Chris Jordan, Tax Commissioner, Speech at the Tax Institute conference in Hobart, 14 March 2019.

17. Tom McIlroy, Legal privilege claims in 20 per cent of ATO multinational cases, 26 June 2019.

In July the Law Council of Australia announced it was developing a new protocol dealing with legal professional privilege, in collaboration with the ATO. The announcement followed a sit-down meeting with Law Council President, Arthur Moses SC, representatives of the Law Council's Business Law Section, and the Tax Commissioner.¹⁸

During the meeting, the Law Council accepted the ATO's assurances that the recent public statements were not an attempt to undermine the sanctity of legal professional privilege or to impugn the motives of lawyers seeking to raise legitimate privilege claims.¹⁹

The Law Council also raised concerns that lawyers were not always given sufficient time to respond to information requests; which the protocol may help overcome. The protocol aims to provide a balanced framework for legal professional privilege claims that would satisfy both the regulator and legal profession.

In a statement to the media, Arthur Moses said:

*The Law Council supports the development of guidelines and "best practice" procedures to enable efficient and effective resolution of [legal professional privilege] claims raised in investigations by Commonwealth agencies. The confidence [legal professional privilege] gives clients is necessary to help them develop a full understanding of their rights and responsibilities under Australia's complex and ever-changing system of laws."*²⁰

CONCLUSION

In Australia, as in other common law jurisdictions, legal professional privilege is considered a fundamental protection and pillar of our legal system. However, to call it "fundamental" isn't to say it is uncontested – far from it. The three case studies above are all taken from the last 24 months and reveal underlying tensions around this issue.

Lawyer X shows the complexities of legal professional privilege, at both an individual and institutional level. The High Court decision in Glencore clarified the way in which legal professional privilege works, as opposed to how a corporation might want it to work. And the development of a new protocol concerning legal professional privilege highlights the sometimes-tense relationship between members of the legal profession and regulators. The eventual release of the protocol and the conclusion of the Royal Commission into Lawyer X will only further this important conversation already underway in Australia.

18. Law Council, Media Releases, Protocol to provide balanced framework for Legal Professional Privilege claims, 26 July 2019 .

19. Law Council, Media Releases, Protocol to provide balanced framework for Legal Professional Privilege claims, 26 July 2019.

20. Law Council President, Arthur Moses SC, Protocol to provide balanced framework for Legal Professional Privilege claims, 26 July 2019.

4

Statement on Professional Privilege

Because the attorney-client privilege and related concepts are not viewed uniformly around the world, as indicated by the positions set forth in this booklet, this statement is made on behalf of certain UIA collective members only, who took the following position at their meeting in Luxembourg in November 2019. The list of signatories features below. Additional collective members who would like to join the statement should send their name and logo to UIA at the following address: uiacentre@uianet.org.

Collective Members’ Statement on Professional Privilege

International Association of Lawyers

During the 63rd UIA Congress held in Luxembourg on 6-9 November 2019,

We, the UIA and the undersigned Bar Associations,

In performance of our obligation to ensure the protection of the fundamental human right of confidentiality of the client-attorney relationship (also known as “client privilege” or “legal professional privilege”),

Want to remind all individuals, governments and our fellow lawyers that:

- 1) client privilege is a fundamental human right and a lawyer’s obligation to maintain;
- 2) legal professional privilege belongs to and protects the client;
- 3) this right is pivotal to protect access to and proper administration of justice;
- 4) along with the independence of the lawyer, client privilege is integral to the preservation of the rule of law and the right to a fair trial.

We therefore call:

- on all Bars and Law Societies and all lawyers’ associations globally to promote awareness of the right of all citizens to legal professional privilege;
- on all national governments, European and international institutions to respect this fundamental human right, as any attack upon the integrity of this confidential and trusted client-lawyer relationship would undermine the rule of law.



The Law Society of England & Wales, United Kingdom



Colegio de Abogados del Departamento Judicial de Mercedes, Argentina



Ilustre Colegio de la Abogacía de Barcelona, Spain



Ordine degli Avvocati di Verona, Italy



Polish Bar Council, Poland



Kuwait Bar Association, Kuwait



The Law Society of Hong Kong, Hong Kong



Fédération des Barreaux d'Europe, France



Japan Federation of Bar Associations, Japan



Barreau de Kinshasa/Matete, Democratic Republic of Congo

Étant donné que le privilège avocat-client et les concepts liés au secret professionnel ne sont pas considérés de manière uniforme dans le monde, comme l'indiquent les positions exposées dans cette brochure, cette déclaration est faite au nom de certains membres collectifs de l'UIA uniquement, qui ont pris la position suivante lors de leur réunion à Luxembourg en novembre 2019. La liste des signataires figure ci-dessous. Les membres collectifs additionnels qui souhaitent se joindre à la déclaration doivent envoyer leur nom et leur logo à l'UIA à l'adresse suivante uiacentre@uianet.org.

Déclaration des membres collectifs sur le secret professionnel

Union Internationale des Avocats

À l'occasion du 63^e Congrès de l'UIA qui s'est tenu à Luxembourg du 6 au 9 novembre 2019,

Nous, les soussignées, organisations et associations d'avocats et Barreaux du monde,

Dans le cadre de notre obligation de garantir la protection du droit humain fondamental qu'est la confidentialité des rapports et échanges qui régit la relation client-avocat (aussi appelé « secret professionnel »),

Rappelons à tous les ressortissants des États, à leurs gouvernements et à la collectivité des avocats, que :

- 1) le droit au secret des rapports client/avocat est un droit fondamental de tout être humain et une obligation impérative qui s'impose à l'avocat ;
- 2) le secret professionnel appartient au client et le protège ;
- 3) ce droit est fondamental afin de permettre un libre accès à la justice et sa bonne administration ;
- 4) au même titre que l'indépendance de l'avocat, le secret professionnel fait partie intégrante du maintien de l'État de droit et du droit à un procès équitable.

Nous appelons donc :

- tous les barreaux et organisations et associations d'avocats du monde à promouvoir la sensibilisation au droit de tout être humain à bénéficier du secret professionnel ;
- il incombe à tous les gouvernements, institutions européennes et internationales de respecter ce droit humain fondamental, car, toute atteinte à l'inviolabilité de la relation confidentielle entre un client et un avocat constituerait une grave attaque contre l'État de droit.



The Law Society of England & Wales, Royaume-Uni



Colegio de Abogados del Departamento Judicial de Mercedes, Argentine



Ilustre Colegio de la Abogacía de Barcelona, Espagne



Ordine degli Avvocati di Verona, Italie



Polish Bar Council, Pologne



Kuwait Bar Association, Koweït



The Law Society of Hong Kong, Hong Kong



Fédération des Barreaux d'Europe, France



Japan Federation of Bar Associations, Japon



Barreau de Kinshasa/Matete, République Démocratique du Congo

Teniendo en cuenta que el privilegio abogado-cliente y los conceptos relacionados con el secreto profesional no se ven de manera uniforme por todo el mundo, como lo indican las posiciones establecidas en este folleto, esta declaración se hace en nombre de ciertos miembros colectivos de la UIA, quienes tomaron la siguiente posición en su reunión en Luxemburgo en noviembre de 2019. La lista de los firmantes se encuentra a continuación. Los miembros colectivos adicionales que deseen unirse a la declaración deben enviar su nombre y logotipo a UIA a la siguiente dirección: uiacentre@uianet.org.

Declaración de los miembros colectivos sobre el secreto profesional

Unión Internacional de Abogados

Durante el 63° Congreso de la UIA que se ha tenido lugar en Luxemburgo del 6 al 9 de noviembre de 2019, Nosotros, la UIA, las organizaciones de la Abogacía y los Colegios de Abogados abajo firmantes,

En cumplimiento de nuestra obligación de garantizar la protección de los derechos humanos fundamentales en general, y en particular del principio de confidencialidad y secreto profesional en la relación cliente-abogado,

Queremos recordar a todos los ciudadanos, gobiernos y nuestros compañeros abogados que:

- 1) el principio de confidencialidad y el secreto profesional en la relación entre cliente y su abogado, es un derecho humano fundamental para la ciudadanía y una obligación que se impone a los abogados de mantenerlo;
- 2) el principio de confidencialidad y el secreto profesional pertenece y protege exclusivamente a los clientes;
- 3) este derecho es esencial para proteger el libre acceso a la justicia y a su adecuada administración;
- 4) junto con la independencia del abogado, el principio de confidencialidad en la relación cliente-abogado así como el secreto profesional, es una regla básica del Estado de Derecho, del derecho de defensa y del debido proceso legal.

Por eso convocamos:

- a todas las organizaciones de la Abogacía del mundo a promover y divulgar el derecho de todos los ciudadanos a que se garantice el principio de confidencialidad y el secreto profesional en la relación cliente-abogado;
- a todos los gobiernos nacionales, las instituciones europeas e internacionales a respetar este derecho fundamental, ya que cualquier afectación al mismo constituye una grave vulneración a los principios esenciales del Estado de Derecho.



The Law Society of England & Wales, Reino Unido



Colegio de Abogados del Departamento Judicial de Mercedes, Argentina



Ilustre Colegio de la Abogacía de Barcelona, España



Ordine degli Avvocati di Verona



Polish Bar Council, Polonia



Kuwait Bar Association, Kuwait



The Law Society of Hong Kong, Hong Kong



Fédération des Barreaux d'Europe, Francia



Japan Federation of Bar Associations, JFBA



Barreau de Kinshasa/Matete, République Démocratique de Congo

