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Professional secrecy in Europe

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1 Concepts

1. A person seeking legal advice should be assured, when discussing his or her rights or obligations with a lawyer, that the latter will not disclose to third parties the information provided, and that this information will never be used against him or her. Only if this confidentiality is respected will people feel free to consult lawyers, to provide the information required for the lawyer to prepare the client's defence or ascertain the client's legal position, and to seek advice and legal assistance. Regardless of the type of information disclosed, the client must be certain that it will not be used against him or her in a court of law, by the authorities or any other party. It is generally considered to be a condition of the good functioning of the legal system, and thus in the general interest. Professional secrecy consequently protects both the information held by the lawyer and the correspondence and advice of the lawyer addressed to the client.

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This confidentiality is more commonly referred to as professional secrecy or the attorney–client privilege, and is defined as the lawyer’s obligation to maintain the confidentiality of information disclosed by a client in the context of the attorney–client relationship and the right of the client to consider any advice to him confidential. The lawyer is prohibited from disclosing the information, and the client is entitled to request that the information provided be kept confidential. The lawyer must in general refuse to disclose the information when requested to do so by a court, a public authority or any other third party. It also applies to the correspondence and advice of the lawyer to the client; this information is also protected by professional secrecy and benefits from the attorney–client privilege.

Professional secrecy is the term generally used in Continental legal (i.e. civil law) systems to refer to the common law concept of legal professional privilege or the attorney–client privilege, i.e. the lawyer’s duty and right to refuse to disclose, and the client’s right to prevent any third party’s having access to the advice in relation to the client’s defence. In any case, regardless of the term used, the underlying goal is the same, namely to protect information exchanged between the client and his or her lawyer with respect to the client’s legal position in relation to a specific matter in order to permit an unrestricted exchange of information.

2. Privileged information cannot be used against the client. In order to qualify as such, however, the information must have been provided to the lawyer for the purpose of seeking legal advice.

If privileged information is nonetheless disclosed in violation of the applicable rules, it may not be used in court or otherwise against the client. However, if the information is disclosed pursuant to a derogation provided for by law, it can be used in court.

3. Professional secrecy is not unique to the legal profession. Other professionals, such as doctors and priests, benefit from a similar privilege.

The duty of medical secrecy, which covers information about a patient’s health, appears to date back to the Hippocratic Oath, which requires physicians and other health care professionals to swear, ‘All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal’.¹

Further, pursuant to the Code of Canon Law (1983), a confessor must keep secret any confessions made by a penitent. In other words, ‘The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason’ (Art. 983, §1). This obligation, known as the priest–penitent privilege or

1 Owsei Temkin and C. Lilian Temkin (eds.), *Ancient Medicine: Selected Papers of Ludwig Edelstein*, Baltimore: The Johns Hopkins University Press, 1987, 6.

confessional privilege, is thought to date back to the councils (or synods) of Carthage.

4. It is necessary to distinguish the confidential nature of correspondence exchanged between lawyers, which is recognised in a number of jurisdictions, from professional secrecy. The first is an obligation imposed by local law or a local ethics code, for the purpose of facilitating communication between lawyers. It is not related to, or based on, professional secrecy and concerns solely relations amongst lawyers. Of course, the information exchanged by lawyers may also be privileged and thus covered by professional secrecy.

2 Scope

A Definition and relevance

5. There is no general definition of professional secrecy or the attorney–client privilege in Community law. The concept thus differs from one Member State to another. However, it is generally accepted that professional secrecy is necessary in order to ensure that anyone can freely obtain advice and assistance in legal proceedings. The client must be secure in the knowledge that his or her lawyer will not disclose, and cannot be forced to disclose, information provided by the client for the purpose of allowing the lawyer to assist him or her, and that any advice to the client cannot be used against him or her. If no such guarantee can be provided, the client will, of course, be reluctant to seek legal advice and to speak to a lawyer. The latter will not be in a position to advise his or her client and ensure their defence.

The Council of Bars and Law Societies of Europe’s Code of Conduct for European Lawyers defines the attorney–client privilege as follows:

It is of the essence of a lawyer’s function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer’s obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State. (Art. 2(3)(1))

6. It follows from the foregoing that the attorney–client privilege extends to all communications and advice between a lawyer and his or her client in preparation for the client’s defence in legal proceedings, i.e. proceedings intended to define the client’s legal rights and/or obligations or legal position. The privilege is not limited to the proceedings themselves but also includes the preparatory stage (see no 12 below); it applies not only to criminal and civil proceedings

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but to any type of procedure, including disciplinary or administrative, for the purpose of defining the legal rights and/or obligations of a natural or legal person, which could affect such a person's legal position.

The attorney–client privilege is not limited in time.²

7. The lawyer is obliged to maintain the confidentiality of all information that falls under the attorney–client privilege. Any disclosure of privileged information without the client's consent will constitute a breach of this duty. In all EU Member States, such a breach constitutes a violation of the ethics code of the legal profession. In addition, in most EU Member States it constitutes also a breach of contract (see no 13 below).³

Both the lawyer and the client can rely on the attorney–client privilege when requested by the court, an authority or another party to disclose privileged information. The court cannot take into account privileged information which is unlawfully disclosed. Indeed, a decision based on such information will be deemed invalid or at least could be challenged in a court which will decide whether it affects the rights of defence.

B Legal basis

8. As mentioned above, professional secrecy is essential in order to allow clients to seek legal advice and assistance. In providing legal assistance, lawyers should act in the sole interest of their clients. Therefore they need to be independent of any other power or party. The purpose of professional secrecy is to ensure that lawyers do not disclose privileged information to which they are privy. It is furthermore intended to protect any advice given to define and safeguard the legal interests of the client, so that it cannot be used against them.

There is no clear legal basis for professional secrecy or the attorney–client privilege. It has been argued, however, that it is based on the nature of the legal profession and the right to legal assistance. From this perspective, it can be considered part of the legal foundation on which European democracies rest. Others argue that professional secrecy is inherent in the right to a fair trial; indeed, people can only adequately defend themselves if they have access to specialised assistance.

One problem with the first theory, namely that professional secrecy derives from the nature of the legal profession itself, is that, in general, fundamental rights and freedoms tend to be laid down in treaties or constitutions, the fundamental acts of European democratic states. Professional secrecy is not entitled to different treatment, as it is no more important than other fundamental rights. Furthermore, if there is no legal basis for professional secrecy, it falls outside the legal order and consequently no limitations are acceptable. Thus it would

² Art. 2(3)(3) CCBE Code of Conduct for European Lawyers.

³ Art. 2(3)(2) CCBE Code of Conduct for European Lawyers.

be an absolute right which, in today's society, is difficult to accept. The issue with the second theory, that professional secrecy falls under the concept of due process, namely the right to a fair trial, is that it appears to limit the attorney–client privilege to contentious situations in which it is necessary to guarantee the right to a fair trial (see below).

In order to arrive at a common legal basis it is necessary to find a legal principle or text which is accepted throughout Europe. The European Convention on Human Rights (ECHR) would appear to be the obvious choice in this regard, as it has been ratified by all Member States of the European Union and the European Economic Area and expressly guarantees the right to a fair trial. Furthermore, pursuant to Article 6(2) of the Treaty on European Union, the fundamental rights enshrined in the ECHR are considered general principles of EU law.

Both the European Court of Human Rights and the Court of Justice of the European Union have recognised professional secrecy with respect to information exchanged between a client and his or her lawyer.⁴ Further, the contracting parties to the ECHR recognised professional secrecy in a recommendation (no R(2000)21) of 25 October 2000,⁵ adopted by the Committee of Ministers. Finally, professional secrecy is also recognised in several Community directives, including Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (see below) and Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.

9. Professional secrecy, or the attorney–client privilege, is an essential aspect of due process, in particular the right to a fair trial.⁶ Indeed, a fair trial cannot be guaranteed if each party is not able to obtain all information necessary to defend his or her interests. In today's society, this includes specialised legal assistance. In order for this right to be effective, the client must be able to

4 See e.g. ECtHR, 16 October 2007, *Wieser and Bicos Beteiligungen v. Austria*, Rep. 2007-IV; 23 January 2007, *Kepeneklioglu v. Turkey*, Rep. 2007-IV; 20 June 2000, *Foxley v. UK*, www.echr.coe.int/hudoc; 25 March 1992, *Campbell v. United Kingdom*, series A, no 233; CJEU, case 550/7 (*Akzo*) of 14 September 2010, ECR 2010, I-08301.

5 The following countries have ratified the ECHR: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Macedonia, Turkey, Ukraine and the United Kingdom.

6 CJEU, 18 May 1982, case 155/79, *C-305/05, AM&S Limited v. Commission of the European Communities*, Rep. 1982, 1575; CJEU, 26 June 2007, case C-305/05, *Ordre des barreaux francophones et germanophones and Others v. Council of Ministers*, Rep. 2007-I, 05305.

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disclose to his or her lawyer all information necessary to obtain correct legal advice.

The right to a fair trial is enshrined in Article 6 ECHR. This right should be respected every time the rights and obligations of a person are determined or any criminal charge is filed against a person. According to the literature, a determination of rights and obligations implies a ‘contestation’ or dispute,⁷ namely a disagreement between two or more persons who have a certain relationship with the rights and obligations at issue. A dispute will be considered to ‘determine’ rights and obligations if the decision taken could affect the rights and obligations of one of the parties.⁸ The dispute should not relate only to the mere existence of a right but also to its scope and manner of exercise.⁹

The right to a fair trial implies a right of access to the courts which is both practical and effective,¹⁰ in both criminal and civil proceedings. It also implies a level playing field, i.e. each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage compared to his or her opponent.¹¹ A party is therefore entitled to legal assistance to prepare his or her arguments to the court, when necessary.¹²

Based on the decisions of the European Court of Human Rights, a party to civil or criminal proceedings should be entitled to the assistance of a lawyer, if such assistance is required to give that party ‘a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent’.¹³ The Court assumes therefore that the right to be assisted by a lawyer is limited to certain cases where an opinion on the law is required, especially when a legal opinion is required to prepare a defence or legal arguments. In that case, the party should be given an opportunity to be assisted by a lawyer. Effective representation

7 Based on the French text of Article 6, which refers to ‘contestations sur ses droits et obligations de caractère civil’.

8 ECtHR, 23 June 1981, *Le Compte, Van Leuven and De Meyere v. Belgium*, series A, no 58; 23 January 2003, *Kienast v. Austria*. In the latter case, the Court held that the dispute must be of a serious and genuine nature. See also P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerp and Oxford: Intersentia, 2006, 519–20.

9 ECtHR, 23 March 2010, *Cudak v. Lithuania*, Rep. 2010.

10 ECtHR, 9 October 1979, *Airey v. Ireland*, series A, no 32.

11 ECtHR, 27 October 1993, *Dombo Beheer v. The Netherlands*, series A, no 274; 18 February 2009, *Andrejeva v. Latvia*, Rep. 2009.

12 Implicitly approved by the ECtHR, 27 November 2008, *Salduz v. Turkey*, Rep. 2008.

13 ECtHR, 20 May 2010, *Larin v. Russia*; 3 March 2000, *Křmář et al. v. The Czech Republic*.

of a client's interests requires that the client be able to speak freely to his or her lawyer, which necessarily implies that the information exchanged will be kept secret and cannot be used against the client.¹⁴ In general, violation of professional secrecy could have repercussions for the proper administration of justice and consequently, as the European Court of Human Rights has stated, on the rights guaranteed by Article 6 ECHR.¹⁵

In criminal cases, the defendant is always entitled to be assisted by a lawyer. This follows from Article 6(3) ECHR, which provides that each person is entitled 'to defend himself through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. In civil cases, every person is entitled to the assistance of a lawyer when such assistance is required to guarantee a fair trial, which will be the case when information about the consequences of a dispute involving that person's rights and obligations is required in order to allow that person better to defend him- or herself.

In order for legal assistance to be effective, it must be possible to speak freely to one's legal adviser.¹⁶ If this is not possible, the lawyer cannot defend the client appropriately, and the right to a fair trial is vitiated.

Consequently, the attorney–client privilege is a necessary requirement for effective legal assistance and embedded in the right to a fair trial, in both civil and criminal proceedings.¹⁷

10. The attorney–client privilege is also applicable during the pre-trial stage.¹⁸

In fact, it can be argued that the right to a fair trial (or due process) is the basis of the attorney–client privilege even outside the context of legal proceedings, i.e. when a lawyer advises a client on the latter's legal position even though no litigation is pending. Indeed, the existence of litigation or the threat of litigation is not a prerequisite for the attorney–client privilege. When assessing the rights and obligations of a client in a transaction or other matter, the lawyer is helping the client define his or her rights and obligations in relation to other persons and, therefore, to avoid litigation or ensure the protection of his or her interests in the event of legal proceedings. Advice on a legal position is generally given in order to allow the client to determine his or her rights and obligations in the event of a future dispute. It would indeed violate the right

14 ECtHR, 10 May 2007, *Modarca v. Moldova*, www.echr.coe.int/hudoc.

15 ECtHR, 16 December 1992, *Niemitz v. Germany*, series A, no 251-B; 20 June 2000, *Foxley v. UK*, www.echr.coe.int/hudoc.

16 ECtHR, 25 March 1992, *Campbell v. United Kingdom*, series A, no 233; 10 May 2007, *Modarca v. Moldova*, www.echr.coe.int/hudoc.

17 In case C-305/05 of 26 June 2007 (Belgian Bar Associations), the CJEU held that this also applies to Community law, pursuant to Article 6(2) of the Treaty on European Union.

18 ECtHR, 27 November 2008, *Salduz v. Turkey*, Rep. 2008.

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to a fair trial if this information could subsequently be used against the client in court.

The foregoing has been confirmed by Directive 2005/60 of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The Member States may (but are not obliged to) exclude any information from being communicated to the authorities if it was provided to lawyers when their assistance was sought to ascertain a client's legal position or to defend or represent a client in judicial proceedings or concerning such proceedings, including advice to enable the client to take a decision as to whether to institute or avoid proceedings.¹⁹ The twentieth recital to the directive expressly confirms that legal advice is subject to professional secrecy. Consequently, even if the Member State in question does not provide for an exclusion, it must respect the attorney–client privilege.

It follows from this directive that assistance to ascertain the legal position of a client benefits from the attorney–client privilege, regardless of whether such assistance is provided in the context of litigation. Consequently, legal advice on the rights and obligations of a client in a transaction also benefits from the attorney–client privilege.

11. An additional basis for professional secrecy can be found in Article 8 ECHR, which guarantees the right to respect for private and family life, home and correspondence.²⁰ The European Court of Human Rights has confirmed that this is a sufficient basis for professional secrecy.²¹

The lawyer's office is protected under Article 8 ECHR.²²

Exceptions to Article 8 ECHR are permitted if they are 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 and are imposed by law (Art. 8(2) ECHR). Interference by a public authority is only justified if it is in accordance with the law (in the substantive sense), pursues one or more of the legitimate interests referred to above and, in addition, is necessary in a democratic society to achieve those aims.²³ 'Necessary' means that the interference is in answer to a pressing societal need and, in particular, is proportionate to the legitimate aim being

19 Art. 23(2) of Directive 2005/60 of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

20 Opinion of Advocate-General Maduro in Case C-305/5 of the CJEU, 14 December 2006, para. 42.

21 See e.g. ECtHR, 27 September 2005, *Petri Sallinen et al. v. Finland*, www.echr.coe.int/hudoc.

22 ECtHR, 16 December 1992, *Niemitz v. Germany*, series A, no 251-B; 25 February 2003, *Roemen and Schmit v. Luxembourg*, Rep. 2003-IV. In *Niemitz*, the Court referred to the broader concept of *domicile* in the French version of Article 8.

23 ECtHR, 20 June 2000, *Foxley v. UK*, www.echr.coe.int/hudoc.

pursued.²⁴ Exceptions to Article 8(2) must be interpreted narrowly, and the need for the exception must be convincingly established.²⁵

In the Court's opinion, correspondence with lawyers is privileged and interference must therefore be solidly justified.²⁶ This implies, for example, that correspondence between prisoners and their lawyers can only be opened if it is necessary to do so in order to prevent abuse and provided sufficient guarantees are available that the letters will not be read, i.e. that the attorney–client privilege will not be violated. One possibility could be to have the letters opened in the prisoner's presence. Reading such letters is only permissible if 'the authorities have sufficient cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature'. The Court further stated that 'the possibility of examining correspondence for reasonable cause provides sufficient safeguard against the possibility of abuse'.²⁷ The fact that a lawyer advises a client to refuse to make a statement cannot be considered a sufficient ground to justify opening the lawyer's letters.²⁸ Indeed, a lawyer is entitled to advise his or her clients on the legal implications of statements made in the context of an investigation and on how to act to safeguard his or her interests. Under these circumstances, the provision of advice cannot be considered an obstruction of justice.

In keeping with the above-mentioned case law, the European Court of Human Rights has held that the redirecting of a bankrupt person's correspondence to the trustee in bankruptcy, in order to identify assets, can be necessary in a democratic society, provided it is accompanied by adequate and effective safeguards to ensure minimum impairment of the right of respect for the bankrupt's correspondence, in particular correspondence with the bankrupt's lawyer. Such correspondence, whatever its purpose, concerns matters of a private and confidential nature. Opening such correspondence would constitute a violation of the attorney–client privilege and of Article 8 ECHR.²⁹

In the event of the search of the offices of a lawyer, professional secrecy must be guaranteed by the presence of an independent observer, who is bound

24 ECtHR, 20 June 2000, *Foxley v. UK*, www.echr.coe.int/hudoc; 25 March 1992, *Campbell v. United Kingdom*, series A, no 233; 5 July 2001, *Erdem v. Germany*, www.echr.coe.int/hudoc; 10 October 2006, *L.L. v. France*, www.echr.coe.int/hudoc.

25 ECtHR, 25 February 1993, *Crémieux v. France*, series A, no 256-B.

26 Van Dijk et al., *Theory and Practice of the European Convention*, 732; see also ECtHR, 25 March 1992, *Campbell v. UK*, series A, no 233.

27 ECtHR, 25 March 1992, *Campbell v. UK*, series A, no 233; 24 February 2005, *Jankauskas v. Lithuania*, www.echr.coe.int/hudoc.

28 ECtHR, 20 June 1988, *Schönenberger and Durmaz v. Switzerland*, series A, no 137.

29 ECtHR, 20 June 2000, *Foxley v. UK*, www.echr.coe.int/hudoc. The Court did not further examine the alleged breach of Article 6 ECHR as it was not necessary to do so in this case.

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by professional secrecy and has ‘the requisite legal qualification in order to effectively participate in the procedure’; furthermore, he or she ‘should be vested with requisite powers to be able to prevent, in the course of the sifting procedure, any possible interference with the lawyer’s professional secrecy’.³⁰ In the event of copying electronic data, the discs must be sealed for review by an independent authority. Moreover, the scope of the search warrant must be reasonably limited to enable legal consequences to be foreseen. If such is not the case, the review should be accompanied with ‘sufficient procedural safeguards, capable of protecting the applicant against any abuse or arbitrariness’.³¹

It follows from these decisions that the European Court of Human Rights is of the opinion that even in cases where interference is required in the interest of society, such interference must not violate the attorney–client privilege. If it does so, the right to a fair trial will be undermined.

12. In espionage and terrorist cases, the Court will take into consideration that special legislation authorising secret surveillance of the mail and telecommunications, including of subversive persons, is necessary in the interest of national security and the prevention of disorder or crime, given the need for states to take special measures to protect society against highly sophisticated forms of espionage and terrorism.³² Such legislation can also provide for the monitoring of a lawyer’s correspondence with clients, provided sufficient safeguards are available, such as monitoring by an independent judge who is under a duty to keep the information confidential.³³

In these cases, the Court noted that some degree of compromise between the requirements for defending a democratic society and individual rights is inherent in the system established by the European Convention on Human Rights.³⁴ It is, of course, important, as the Court accepts, to guarantee that the information exchanged between a lawyer and his or her client cannot be used against the client in proceedings, which implies monitoring by an impartial judge who is not involved in the case and is, moreover, subject to a duty of confidentiality. Of course, if it appears from the correspondence that the lawyer is participating in terrorist activities or acts of espionage, the judge should, in accordance with the procedures laid down in the law, be authorised to take the necessary actions, such as informing the police. However, such actions should only be permitted if it has been established through a separate procedure before an independent judge that the lawyer is in violation of the law.

30 ECtHR, 5 July 2012, *Golovan v. Ukraine*.

31 ECtHR, 3 July 2012, *Robathin v. Austria*.

32 ECtHR, 6 September 1978, *Klass et al. v. Germany*, series A, no 28.

33 ECtHR, 5 July 2001, *Erdem v. Germany*, Rep. 2011-VII.

34 ECtHR, 5 July 2001, *Erdem v. Germany*, Rep. 2011-VII.